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ESSAY: Zero Tolerance for God?: Religious Expression in the
Workplace After Ellerth and Faragher

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SUMMARY:

... Wilson wore the button to her workplace, where there was no dress code. ... Cases of religious harassment reveal a chronic tension between competing interests, namely, the rights of employees to express their religious beliefs and yet be free from discrimination in the workplace. ... The Guidelines on Religious Exercise and Religious Expression in the Federal Workplace took a narrower approach to religious harassment. ... Refuting the claim that Title VII forbade only discrimination that resulted in tangible economic losses, the Court drew heavily from the EEOC's 1980 Guidelines on Discrimination Because of Sex, which stated that a hostile work environment constituted sexual harassment and was thus prohibited by Title VII. ... Among cases of racial and national-origin discrimination, the Court also cited *Rogers and Compston* - religious harassment cases - for the proposition that environmental discrimination undermined Title VII's anti-discrimination mission. ... In a decision "counseled by" Ellerth and Faragher, the court wrote, "we cannot say that a supervisor who pats a female employee on the back, brushes up against her, and tells her she smells good does not constitute sexual harassment as a matter of law." ... Several theories offer ways to consider the tension between Title VII's anti-harassment mandate and the First Amendment's protection of religious expression. ...

TEXT:

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Christine Wilson, a Roman Catholic, made a religious vow in 1990 that she would always wear a particular anti-abortion button. ⁿ¹ The six-and-one-half-inch button pictured a five-month-old fetus and the phrases, "Stop Abortion" and "They're Forgetting Someone." Wilson wore this button everywhere, except to the bath and bed, and believed that the fate of her soul depended upon fulfilling her vow to wear this button.

Wilson wore the button to her workplace, where there was no dress code. When a co-worker asked her not to wear the button, Wilson responded that her vow to God compelled her to wear it. Other co-workers were similarly offended, and a few threatened to walk off their jobs. Wilson's employer, fearing serious workplace disruptions, gave Wilson three options: wear the button only in her cubicle, cover the button while at work, or wear a different button (without the picture of the fetus). Wilson replied that her vow required her to wear this

particular button, and because the facility had no dress code, she should not be singled out for such restrictions.

What should an employer do, where one employee feels compelled to express her religious convictions in the workplace, and **[*328]** others feel harassed by that very expression? n2 The law offers no clear rule to resolve the conflict. n3 Cases of religious harassment reveal a chronic tension between competing interests, namely, the rights of employees to express their religious beliefs and yet be free from discrimination in the workplace. Courts shaping harassment law over the years have largely ignored this uniquely significant tension in religious harassment, treating all types of harassment identically. Thus, two recent Supreme Court decisions expanding the scope of employer liability for sexual harassment bear significant implications for cases of religious harassment. In part because these implications may be significant, these decisions offer an opportunity to reconsider the tension specific to religious harassment cases. As a result of the increased vulnerability to harassment suits created by these cases, employers may well resort to zero-tolerance policies toward expression in the workplace. In order to forestall the outright exclusion of religion from the workplace, courts should recognize the special position occupied by religion in the constellation of First Amendment values and presume religious expression to be protected unless such expression may be demonstrated to be truly "hostile or abusive."

THE TENSION: HARASSMENT PREVENTION AND ACCOMMODATION OF RELIGION

Title VII of the Civil Rights Act of 1964 forbids discrimination in the workplace that is based upon race, color, sex, religion, or national origin. n4 Courts - including the Supreme Court - have routinely construed Title VII broadly, understanding this provision to be a general expression of Congress' intention to eradicate all forms of invidious **[*329]** discrimination in the employment context. n5 Applying this construction of Title VII, courts have recognized claims alleging that employers discriminated against employees by creating hostile working environments. n6 Title VII also states, however, that employers must accommodate employees' religious beliefs, n7 a rule that the courts have applied narrowly. n8 In short, employers are both forbidden to subject their employees to religiously hostile environments and required to make some accommodation to religious employees.

Professor Douglas Laycock of the University of Texas Law School summarized well this conundrum of religious harassment cases: "Claims of religious harassment present a conflict between every employee's right to religious expression and every employee's countervailing right not to be harassed because of his religion or lack thereof." n9 This tension arises because both of these countervailing interests derive from a single understanding of religious liberty. First, Title VII's accommodation requirement expresses the First Amendment's explicit intention to protect the rights of conscience and expression of religious beliefs. Second, Title VII's anti-discrimination rule expresses the underlying principle of the First Amendment, that religion is a matter so personal and so consequential to the individual that it ought not be manipulated by people with power. Even if this tension is understandable, it presents a serious dilemma: how can courts and employers simultaneously foster both religious liberty and freedom from harassment? n10

[*330] Lower courts have wrestled with this problem in cases where employees complain that their co-workers' proselytizing created a hostile work environment. n11 Some courts have resolved the issue by advancing a broad interpretation of harassment, concluding that any conduct, no matter how well intended, may constitute harassment. n12 While such an approach recognizes the diversity of contexts in which employees may face discrimination, its broad sweep effectively silences innocent expression. n13 And when innocent religious expression is at issue, the cost of silence is too great.

The EEOC adopted this broad approach in 1993 in its proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability. n14 These Guidelines defined "harassment" to include a wide variety of conduct and advanced a subjective standard for determining whether the environment created by such conduct was indeed hostile or abusive. n15 Following criticism concerning the protection of religious expression in the workplace, the EEOC withdrew the Guidelines in 1994. n16 Opponents successfully argued that the EEOC failed to recognize the differences between religious expression and other forms of expression that constitute harassment. n17 Of course, the EEOC articulated only the operative [*331] legal standards, which never distinguished religious harassment from racial or sexual harassment.

In 1997, three years after the EEOC withdrew its proposed Guidelines, President Clinton issued his own directive on workplace harassment. n18 The Guidelines on Religious Exercise and Religious Expression in the Federal Workplace took a narrower approach to religious harassment. In fact, these Guidelines specifically affirm the rights of federal employees to wear religious jewelry, to keep religious texts or pictures in their personal work spaces, and to engage in Bible studies with co-workers in rooms that are otherwise available to employees for meetings. n19 Sounding a call for reasonableness, the Guidelines state, "In a country where freedom of speech and religion are guaranteed, citizens should expect to be exposed to ideas with which they disagree." n20

Still, these Guidelines suffer from the endemic vagueness of harassment law. In one example, the Guidelines state that one employee's derogatory comment about a co-worker's religion is not harassment "unless the words are sufficiently severe or pervasive to alter the conditions of the insulted employee's employment or create an abusive working environment." n21 Even these Guidelines, more modest in scope and more deferential toward religious expression than the EEOC's proposal, may not offer much help to private employers who seek to avoid lawsuits altogether. Whether harassment is understood broadly or more narrowly, the tension between religious accommodation and religious-harassment prevention remains troublesome.

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HARASSMENT DOCTRINE: IGNORING THE TENSION

This unique tension has gone largely ignored by contemporary harassment doctrine. The law of harassment is a one-size-fits-all doctrine, drawing from precedents in cases of racial, sexual, and religious harassment all at once and attempting to identify general principles that define environmental discrimination. n22 The drive to articulate a coherent theory of environmental discrimination found expression in the lower courts, beginning in 1971 with the Fifth Circuit's decision in *Rogers v. EEOC*. The court in that case held that a Hispanic employee complaining of severe racial and national-origin harassment could state a cognizable claim under Title VII. n23 According to the court, the severity of the harassment was key to the validity of the suit. n24 An Ohio federal district court extended the theory of "hostile work environment" to a case involving religious harassment. n25 The Supreme Court formally recognized this "hostile work environment" doctrine in *Meritor Savings Bank v. Vinson*, a 1986 sexual harassment case. n26

In *Meritor*, an unanimous Court held that Title VII's broad mandate to eradicate all forms of discrimination in the workplace compelled recognition of environmental discrimination claims. n27 Refuting the claim that Title VII forbade only discrimination that resulted in tangible economic losses, the Court drew heavily from the EEOC's 1980 Guidelines on Discrimination Because of Sex, which stated that a hostile work environment constituted sexual harassment and was thus prohibited by Title VII. n28 Those Guidelines, according to the Court, accurately

reflected the body of law emanating from other harassment cases. n29 Among cases of racial and national-origin discrimination, the [*333] Court also cited Rogers and Compston - religious harassment cases - for the proposition that environmental discrimination undermined Title VII's anti-discrimination mission. n30 By approving the holdings of these cases, "the Supreme Court explicitly endorsed the uniformity - and the interdependency - of harassment doctrine under Title VII." n31

A subsequent sexual harassment case confirmed that point. In *Harris v. Forklift Systems, Inc.*, the Court considered the question whether Title VII plaintiffs were required to allege serious psychological injury in order to prevail in a "hostile work environment" claim. n32 The Court answered that the unlawfully hostile environment was one that the reasonable person would find abusive, and that the plaintiff did, in fact, find abusive. n33 According to the Court, conduct that is "so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality." Justice Ginsburg echoed that sentiment in her concurring opinion: "except in the rare case<elip> Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful." n34 As it did in *Meritor*, the Court again noted the unity and breadth of anti-harassment doctrine.

The Seventh Circuit recently considered the case of Jennifer Venters, a police dispatcher who claimed that her supervisor, the chief of police, created a religiously hostile work environment by expressing various religious judgments that she deemed offensive. n35 According to Venters, the chief made it known to her that he was a born-again Christian who was sent by God to save the citizens of Delphi, Indiana from eternal damnation. n36 He chastised Venters repeatedly for living an allegedly immoral lifestyle, which included living with a single female roommate and receiving visits from married male police officers. n37 He told Venters that she was possessed by "negative spirits" and that if she could not play by God's rules, then she might be "traded" from the office. n38 After analogizing Venters' case to a sexual [*334] harassment case, n39 the court analyzed her claim according to the principles set down in *Meritor* and *Harris*. n40

This history of harassment doctrine reveals an important lesson: decisions in sexual harassment cases bear serious implications for every other kind of harassment case. Thus, as courts expand the scope of liability in sexual harassment cases, they (perhaps unwittingly) do the same for religious harassment cases. And in those cases - where the tension between accommodation and harassment-prevention is so significant - the consequences of expanded liability could be severe. Late last term, the Supreme Court decided several important sexual harassment cases, n41 two of which tipped the scales of harassment law toward employer liability. n42 Indeed, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* will change the face of harassment law.

TIPPING THE SCALES TOWARD LIABILITY: ELLERTH AND FARAGHER

Kimberly Ellerth, a salesperson employed by Burlington, alleged that her supervisor, Ted Slowik, sexually harassed her by making offensive comments and gestures and threatening to make her job more difficult unless she yielded to his sexual demands. n43 Specifically, Ellerth alleged that Slowik told her that she was not "loose enough," and that she needed to "loosen up." n44 Ellerth also claimed that Slowik threatened her with comments such as "You know, Kim, I could make your life very hard or very easy at Burlington" and "Are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." n45 Ellerth's claim was complicated by the fact that, despite her repeated refusals, the supervisor never did make [*335] good on his threats. n46 Furthermore, she never filed a complaint with management. n47

Nevertheless, Ellerth claimed that the environment Slowik created on the job was so hostile and degrading that she could not continue her employment with Burlington. n48 She brought suit against the company under Title VII, claiming that the hostile environment created by her supervisor altered the terms and conditions of her employment on the basis of her sex. n49 The Court heard the case in to decide whether Title VII imposes liability upon an employer for creating a hostile work environment where a supervisor threatens, but does not effectuate, tangible job detriments if the employee refuses his sexual advances. n50

The Court first confronted the labeling problem created by prior harassment doctrine. n51 Earlier cases made much of the distinction between "quid pro quo" harassment (where a harasser punishes an employee for refusing to satisfy his demands) and "hostile work environment" harassment (where the employee suffers no tangible job detriment). n52 In order to invoke the doctrine of vicarious liability and hold the company accountable for the misconduct of its supervisors, Ellerth argued her case under the "quid pro quo" label. n53 Of course, the fact that Ellerth never suffered any tangible job detriment impaired her "quid pro quo" argument.

In deciding Ellerth's case, the Court significantly undermined the rigidity of the harassment labels, holding that the terms "quid pro quo" and "hostile work environment" merely describe specific factual situations and ought not prescribe substantive results. n54 Indeed, the Court wrote, "When we assume discrimination can be proved<elip> the factors we discuss below [agency principles], and not the categories quid pro quo and hostile work environment, will be controlling on the issue of vicarious liability." n55

[*336] The Court then analyzed Ellerth's claim under the law of agency to determine whether Burlington should answer for the misdeeds of its supervisors. Justice Kennedy's majority opinion concluded that "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." n56 The Court went on to establish an affirmative defense for employers in cases where no tangible employment action was taken: "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." n57 These twin considerations would promote proactive policies designed to deter harassment as well as attempts to resolve problems on-site rather than in court. n58

In the second case, Beth Ann Faragher complained that her supervisors, Bill Terry and David Silverman, subjected her to repeated lewd comments and unwanted touching while she was a lifeguard employed by the City of Boca Raton, Florida. n59 According to Faragher, Terry once told her that he would never promote a woman to lieutenant; Silverman once threatened, "Date me or clean the toilets for a year." n60 Like Ellerth, Faragher did not formally complain about these incidents. n61 Since Courts of Appeals had adopted different approaches to employer liability for "hostile work environment" harassment, the Court heard Faragher's case in order to consider a uniform standard. n62 In short, the Court faced this question: How far must an employer go to prevent or redress sexual harassment on the job?

The Court applied to Faragher's case the rule announced in Ellerth: in the absence of any tangible job detriment (such action would invite liability), an employer could be held liable for the misconduct of its supervisors unless it succeeded in proving that it took reasonable steps to prevent such misconduct and that the employee failed to avail **[*337]** herself of those steps. n63 The City could not prove that defense. While the City had a recorded policy against sexual harassment, it had "entirely failed to disseminate its policy<elip> among the beach employees and its employees made no attempt to keep track of the conduct of supervisors like Terry and Silverman." n64 Moreover, that policy was lacking in substance: it

"did not include any assurance that the harassing supervisors could be bypassed in registering complaints." n65 Thus, the Court held that the City was vicariously liable for the hostile environment created by Terry and Silverman. n66

In essence, Ellerth and Faragher mean that employers may be held vicariously liable for their supervisors' misbehavior whether or not they had knowledge of such harassment. Employers must write anti-harassment policies that provide supervisor-bypass options, and they must take affirmative steps to enforce those policies. Merely having a policy in an employee manual will not insulate an employer from liability; rather, the employer must rid its workplace of harassment.

Some courts have already applied the rule of Ellerth and Faragher. A federal district court in Illinois recently allowed an employee to pursue a Title VII claim against Sam's Warehouse Club, Inc., even though the company was never aware of alleged altercations between the employee and her supervisor. n67 While the employer argued that it could not be held strictly liable for an allegedly hostile environment about which it was never informed, the court held that Ellerth and Faragher required imposition of vicarious liability unless the company could demonstrate that it exercised reasonable care in preventing and correcting the misconduct and that the employee failed to avail herself of corrective procedures. n68 This case illustrates a narrow reading of Ellerth and Faragher.

The Eighth Circuit recently applied a broader reading of these cases, denying an employer's motion for summary judgment where an employee complained that her supervisor created a hostile work environment. n69 In a decision "counseled by" Ellerth and Faragher, the court wrote, "we cannot say that a supervisor who pats a female em [*338] ployee on the back, brushes up against her, and tells her she smells good does not constitute sexual harassment as a matter of law." n70 The Eighth Circuit thus remanded to a jury facts it characterized as "on the borderline of those sufficient to support a claim of sexual harassment." n71 In this way, Ellerth and Faragher have affected substantive judgments concerning the character of a hostile environment.

If the broader reading of Ellerth and Faragher prevails, and courts feel obliged to allow more harassment cases to go to juries, it is reasonable to expect an increase in the volume of claims brought against employers. Indeed, in deciding the Ellerth case, the Court cast aside the few remaining formal categories ("quid pro quo" and "hostile work environment") that limited and channeled workplace harassment claims. Liberated from these substantive fetters, plaintiffs undoubtedly will attempt to cast every discomfort as harassment warranting employer liability. n72 In order to stave off such claims, employers will seek ways to prevent any incidents that could possibly be construed as offensive. In order to keep our nation's workplaces from becoming religion-free zones, courts should determine to resolve the tension we describe, rather than to continue ignoring it.

STILL IGNORING THE TENSION: ZERO TOLERANCE FOR GOD?

Courts could continue to import wholesale the holdings of sexual harassment cases into other contexts. n73 Indeed, a federal district court [*339] in New York recently did just that. n74 Granting an employer's bid for summary judgment, this court applied the standards of "The Faragher/Burlington Affirmative Defense" to a claim alleging national-origin harassment. n75 The employer in that case satisfied both prongs of the test announced in Ellerth: it implemented a clear grievance policy, and the plaintiff failed to avail himself of the procedures specified in that policy. n76 Another federal district court has applied this test to a case involving racial harassment. n77

By now, the problem with such wholesale importation is clear: in cases of religious harassment, this approach only exacerbates the problem caused by the inherent tension

between harassment-prevention and religious accommodation. Employers already are called upon to balance the interests of religious employees who wish to express their beliefs and their co-workers who feel harassed by such expression. Now that the Supreme Court has tipped that balance in favor of employer liability, it would behoove employers to prevent even the possibility that a hostile environment could be created in their workplaces. Some commentators worry that, in response to Ellerth and Faragher, employers will impose stifling restrictions upon all manner of expression in their workplaces. n78 After all, "an employer can't just tell its employees 'You can generally make these statements, but not when they in the aggregate are so severe or pervasive as to create a hostile environment.' To be safe, it has to prohibit any individual statement that might contribute to a hostile environment." n79

In their haste to sanitize workplace environments and insulate themselves from liability, employers may neglect to spare religious ex [*340] pression. Indeed, some employers will simply forbid any religious expression, creating a zero-tolerance policy for religion in their workplaces. n80 Such a response would not be wholly groundless: Ellerth and Faragher have raised the stakes so high that any supervisor's stray comment or misplaced compliment could conceivably land the company in court. To be sure, other employers will accept the more difficult task of revising their existing harassment policies in order to balance accommodation of religious exercise and anti-discrimination rules. n81 In any event, absent some clearer guidance as to the constitution of harassment, employers after Ellerth and Faragher face some very difficult decisions.

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RESOLVING THE TENSION: A NEW UNDERSTANDING OF RELIGIOUS HARASSMENT

Several theories offer ways to consider the tension between Title VII's anti-harassment mandate and the First Amendment's protection of religious expression. It may be argued that Section 701(j) of Title VII - the accommodation requirement - need not apply to religious expression. That Section requires employers to accommodate "religious observance or practice"; n82 it could be contended that mere speech does not constitute "observance or practice" and thus does not warrant accommodation. This argument fails to note that religious believers often consider proselytizing to be an "observance or practice" of their religious convictions. The line between mere speech and "observance or practice" is simply too faint and uncertain to support so grave a contention that Title VII does not protect religious expression.

Perhaps refining the general harassment doctrine will ameliorate the problems resulting from the tension. Professor Volokh has argued that the tension should be resolved by limiting the scope of harassment law such that only speech that is targeted toward individual co-workers would be actionable. n83 Speech directed at a group rather than a specific individual - no matter how offensive - would not invite liability under Title VII. n84 "Thus, personal face-to-face insults<elip> would be regulable<elip>. But bigoted or pornographic posters or cartoons posted in the workplace, or overheard conversations between willing listeners<elip> would be undirected and therefore protected." n85 Professor Volokh's theory rightly seeks to mitigate the encroachment of anti-discrimination law into otherwise protected speech, and it identifies the specific kind of speech that most directly affects individual employees' working conditions. The flaw in this approach is that it relies upon a difficult formal distinction: drawing lines between targeted speech and general speech is often difficult, and perhaps functionally unsatisfying. Is there any functional difference be [*342] tween posters that denigrate others' religious beliefs and words actually spoken to an individual that do the same thing?

The critical factor in harassment cases may not be the direction of the expression but rather its purpose. Indeed, the EEOC noted that "it is one thing to express one's own beliefs; another to disparage the religion or beliefs of others." n86 Concern for purpose could move

courts to adopt the following rule: promoting one's own religious beliefs - even if it offends others' sensibilities - should be wholly protected, but expressions of a religious nature that serve only to denigrate or intimidate another person should not enjoy such protection. Such a regime would simplify harassment analysis and focus courts' attention on the discriminatory aspect of offensive speech, but it would also raise difficult descriptive problems. For instance, the police chief in Jennifer Venters's caseⁿ⁸⁷ likely believed that he was saving Ms. Venters from Hell - even by threatening to fire her. When a proselyte expresses his conviction that a particular co-worker will be eternally damned unless she accepts Christ, at what point do her feelings of intimidation become legally cognizable?ⁿ⁸⁸

These approaches offer valuable insights into the nature of the conduct that anti-discrimination laws seek to address. It is the personal derogatory comment that most certainly alters the conditions of employment for an individual employee. But undirected expressions - if pervasive enough - may also effect an atmosphere pulsing with discriminatory animus. And it is often difficult to determine the intent of the offender, such that reliance on his or her state of mind may yield incorrect results. Because it is so difficult to ascertain subjective intent, it seems imprudent to allow that determination to determine liability. These problems are salient in religious harassment cases, but courts have another alternative in such cases. Courts could finally recognize that the tension exposed in the religious harassment [*343] context is uniquely significant and calls for wholly different treatment in the law.

At least theoretically, religion occupies a preferred position in the law. The first two clauses of the Bill of Rights articulate this nation's commitment to a system of law that preserves individuals' religious liberty.ⁿ⁸⁹ Even if the Court's construction of those clauses has not done much to bolster religious liberty,ⁿ⁹⁰ its interpretation of the Free Speech Clause, at least, has protected religious expression.ⁿ⁹¹ Article VI, section 3 outlaws the use of a religious test as a requirement for national office-holding.ⁿ⁹² The Constitution thus explicitly affirms the unique consequence of religious belief and expression. There is a clear constitutional imperative to tread carefully where religion is concerned.

Congress has recognized this common-sense imperative. Indeed, Title VII itself reflects a conviction that religion is different. The accommodation requirement in Section 701(j) was intended to accord religious employees more protection than merely equal treatment.ⁿ⁹³ Moreover, certain religious organizations and educational institutions are exempt from Title VII's broad coverage.ⁿ⁹⁴

The Religious Freedom Restoration Act ("RFRA") of 1993 also reflects Congress' understanding of the importance of religious ex [*344] pression.ⁿ⁹⁵ Responding to the Supreme Court's decision in *Employment Division v. Smith* (analyzing free-exercise claims under minimal-level scrutiny), Congress declared that "governments should not substantially burden religious exercise without compelling justification."ⁿ⁹⁶ Congress further expressed its purpose to "restore the compelling interest test as set forth in *Sherbert v. Verner*^{<elip>} and *Wisconsin v. Yoder*^{<elip>} and to guarantee its application in all cases where free exercise of religion is substantially burdened."ⁿ⁹⁷ While the Supreme Court invalidated RFRA as it applied to state law,ⁿ⁹⁸ the law still applies to other federal statutes.ⁿ⁹⁹ Congress' understanding of the unique importance of religious exercise thus remains codified in RFRA.

Religious expression warrants protection higher even than other kinds of protected expression. The power of religion derives, in large part, from a sense in the believer that a higher power requires certain conduct. Further, there is an eternal consequence attendant to the believer's obedience or disobedience. Praying or proselytizing may not be matters of discretion. Thus, the price of silencing religion seems to be far greater than the price of silencing other kinds of expression. Souls suffer no eternal harm (indeed, they may benefit) where non-religious expression is limited. Other concerns counsel against general censorship, but religion is something different. "I'll pray for you" is qualitatively different from "I don't

have time for you - unless you tell me what you're wearing." While it would be perfectly reasonable for employers to foster something close to a zero-tolerance policy regarding sexual expression, it is highly objectionable - both to many employees and to our tradition of religious liberty - to do so with respect to religious expression.

Courts deciding religious harassment cases face a difficult problem, having to balance the right of the employee to be free from discriminatory treatment and the right of other employees or employers to exercise their religious convictions. The unitary nature of contemporary harassment doctrine only exacerbates this problem. The first step in resolving the tension between anti-harassment and accommodation imperatives is to recognize that religion is unique. Courts should presume religious expression to be protected, unlike sexist or [*345] racist expression. Such a presumption could be overcome by demonstrating that the religious expression was targeted at a specific individual and intended to harass or intimidate rather than merely to promote or express a religious belief. In short, courts should be slower to characterize religious expression as hostile than they would sexist or racist expression. Complaining employees should satisfy a higher standard to prove hostility and offense where religious speech is involved.

CONCLUSION

In *Ellerth* and *Faragher*, the Court affirmed that individuals are entitled to work in environments free from degrading and abusive behavior. And they are surely entitled to the terms and conditions of their employment contracts, unaltered by such hostility. Through Title VII, Congress expressed the will of the nation that people not be discriminated against on account of race, sex, or religion. *Ellerth* and *Faragher* amplify that sentiment. Employers are on notice now that they are responsible for the acts of incivility and discrimination that infect their workplaces. At least seven Justices have had enough of workplace harassment, and they have taken bold steps to end it.

We hope these steps will help to foster equality in our nation's workplaces. But by raising the stakes for employers faced with harassment suits, these decisions also highlight the problem inherent in a unitary harassment doctrine: religion is different. Indeed, the potential implications of *Ellerth* and *Faragher* upon religious expression in the workplace are so serious that courts should take this opportunity to reconsider the practice of treating all kinds of harassment identically. The law of harassment should take into account the special protection intended for religious expression. "God loves you" is not the same as "Are you wearing shorter skirts yet?"

FOOTNOTES:

n1. The facts of this case are reported in *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1339 (8th Cir. 1995).

n2. U.S. West fired Ms. Wilson. See *id.*

n3. Some commentators do find easy solutions. Compare Suzanne Sangree, Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight, 47 *Rutgers L. Rev.* 461 (1995) (arguing that hostile-environment harassment doctrine poses no threat to the First Amendment because speech that promotes discrimination is unworthy of constitutional protection) with Kingsley R. Browne, Title VII As Censorship: Hostile-Environment Harassment and the First Amendment, *Ohio St. L.J.* 481 (1991) (arguing that hostile-environment harassment law imposes unconstitutional restrictions on free speech).

n4. Section 703 of Title VII reads, in pertinent part:

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(a) (1996).

n5. See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (sex); *Compston v. Borden*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (religion); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (race).

n6. See *Meritor*, 477 U.S. at 66.

n7. Section 701(j) of Title VII mandates accommodation. This provision states that an employer violates Title VII unless it "demonstrates that [it] is unable to reasonably accommodate to an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j) (1996).

n8. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1987) (holding that employers are not required to choose any particular accommodations offered by the employee); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding that an employer is not required to undertake accommodations that would impose more than a de minimis cost upon its business).

n9. The Effect of the EEOC's Proposed Guidelines on Religion in the Workplace: Hearing Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 103d Cong., 2d Sess. 39 (1994) [hereinafter Hearing] (prepared statement of Professor Douglas Laycock).

n10. Hans Bader put the problem well: "Harassment law is on a collision course with the First Amendment." Free Speech Trumps Title VII Suits, Nat'l L.J., Nov. 24, 1997, at A19. Eugene Volokh has examined this general conflict between harassment law and free speech. See Eugene Volokh, Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment, 17 *Berkeley J. Emp. & Lab. L.* 304 (1996) [hereinafter Volokh, Thinking Ahead] ; Eugene Volokh, Freedom of Speech and Appellate Review in Workplace Harassment Cases, 90 *Nw. U.L. Rev.* 1009 (1996); Eugene Volokh, How Harassment Law Restricts Free Speech, 47 *Rutgers L. Rev.* 563 (1995); Eugene Volokh, Comment, Freedom of Speech and Workplace Harassment, 39 *UCLA L. Rev.* 1791 (1992) [hereinafter Volokh, Comment].

n11. See Josh Schopf, Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment, 31 *Colum. J.L. & Soc. Probs.* 39 (1997).

n12. See, e.g., *Wilson*, 58 F.3d at 1339 (employer forced employee to cover or not wear anti-abortion button at work because other employees complained of harassment).

n13. See Schopf, *supra* note 11, at 56.

n14. See 58 *Fed. Reg.* 51,266 (1993).

n15. The proposed Guidelines defined "harassment" broadly, including within that definition "written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion ... and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace." In order to determine whether such materials contributed to a hostile work environment, the Guidelines would ask "whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive." *Id.* (emphasis added).

n16. See *59 Fed. Reg. 51,396 (1994)*.

n17. In a prepared statement submitted to a Senate subcommittee considering the EEOC's Proposed Guidelines, Atlanta employment attorney Dudley C. Rochelle noted the following:

The Commission fails to distinguish between religious expression, slurs, and derogatory comments, and hostile work environment. The Commission uses the same legal framework to analyze the statement, 'I believe all blacks are inferior to whites,' ... as it uses to analyze the statement, 'I believe salvation can only be obtained by accepting Jesus,' or 'The Jews are God's chosen people,' statements which are expressions of religious belief which may be offensive to those who disagree, but are not aimed at them with derogatory intent.

Hearing, *supra* note 9, at 31 (prepared statement of Dudley C. Rochelle).

Professor Laycock made a similar observation:

The difference [between sexual and religious harassment] is not in the claims of harassment. The two claims are totally parallel. The difference is in the constitutional value of the pornographic expression in the one case and the religious expression in the other, and that difference is not taken into account anywhere in the text of these guidelines.

Id. at 37 (statement of Douglas Laycock).

Michael K. Whitehead, General Counsel to the Southern Baptist Convention's Christian Life Commission, concluded that "Religion should not be relegated to generic coverage in a consolidated, 'one-size-fits-all' guideline, with sexual harassment, racial harassment and all the other protected groups." *Id.* at 60 (prepared statement of Michael K. Whitehead).

n18. See Guidelines on Religious Exercise and Religious Expression in the *Federal Workplace*, 1997 WL 475412 (White House, Aug. 14, 1997).

n19. See *id.* at 7-8.

n20. *Id.* at 7.

n21. *Id.*

n22. See Russell S. Post, Note, The Serpentine Wall and the Serpent's Tongue: Rethinking the Religious Harassment Debate, *83 Va. L. Rev. 177, 198 (1997)*.

n23. See *Rogers*, 454 F.2d at 237-38.

n24. See *id.* at 238. Judge Greenberg was careful to note that Title VII should not forbid every impolite or misunderstood comment:

I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of [Title VII].... One can readily envision working environments so heavily polluted with

discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think ... Title VII was aimed at the eradication of such noxious practices.

Id.

n25. See *Compston*, 424 F. Supp. at 160-61.

n26. See *Meritor*, 477 U.S. at 73.

n27. See *id.* at 63-66.

n28. See *id.* at 65.

n29. See *id.*

n30. See *Meritor*, 477 U.S. at 65-66.

n31. Post, *supra* note 22, at 187.

n32. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993).

n33. *Id.* at 21-22.

n34. *Id.* at 26 (Ginsburg, J., concurring).

n35. See *Venters v. City of Delphi*, 123 F.3d 956, 961-65 (7th Cir. 1997).

n36. See *id.* at 962.

n37. See *id.* at 963.

n38. *Id.*

n39. See *Venters*, 123 F.3d at 972.

n40. See *id.* at 974-76.

n41. See *Burlington Indus., Inc. v. Ellerth*, 118 S.Ct. 2257 (1998) (holding private employer vicariously liable for hostile environment created by supervisor); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998) (holding municipal employer liable for supervisor's offensive conduct); *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998) (rejecting Title IX claim by students who alleged sexual abuse by teachers); *Oncale v. Sundowner Offshore Serv's, Inc.*, 118 S.Ct. 998 (1998) (applying Title VII sexual harassment law to same-sex harassment claim).

n42. See *Ellerth*, 118 S.Ct. at 22; *Faragher*, 118 S.Ct. 2282.

n43. See *Ellerth*, 118 S.Ct. at 2259-61.

n44. *Id.* at 2262.

n45. *Id.* at 2259-61.

n46. See *id.* at 2264.

n47. See *id.*

n48. See *id.* at 2263.

n49. See *id.*

n50. See *Ellerth*, 118 S.Ct. at 2262.

n51. See *id.* at 2264-65.

n52. See *id.* at 2265.

n53. See *id.*

n54. See *id.* at 2264 ("The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.").

n55. *Id.* at 2264.

n56. *Id.* at 2271.

n57. *Id.*

n58. See *id.* (Court adopted holding "in order to accommodate ... Title VII's equally basic policies of encouraging forethought by employers and saving action by employees.").

n59. See *Faragher*, 118 S.Ct., at 2259.

n60. *Id.*

n61. See *id.* at 2262.

n62. See *id.* at 2282.

n63. See *id.*

n64. *Id.*

n65. *Id.*

n66. See *Faragher*, 118 S.Ct. at 2275.

n67. See *Alverio v. Sam's Warehouse Club*, 9 F. Supp.2d 955, 961 (N.D. Ill. 1998).

n68. See *id.* at 960-61.

n69. See *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 760-62 (8th Cir. 1998).

n70. *Id.* at 762.

n71. *Id.*

n72. See David G. Savage, High Court Holds Employers to Strict Harassment Rules, L.A. Times, June 27, 1998, at A1 ("In the short term, the rulings [Ellerth and Faragher]... are likely to increase the number of sexual harassment lawsuits, already one of the fastest-growing areas of law.").

Claims of religious harassment are as diverse as claims of other kinds of harassment; some claims seem fragile at best. Consider, for instance, the case of Glenda Beasley, who complained that her employer, Blue Cross / Blue Shield, created a hostile work environment when it urged her and other supervisors to "make Blue Cross their number one priority." God, not Blue Cross, was Beasley's number one priority, and she brought suit, alleging that management's suggestion to the contrary constituted workplace harassment. See *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1086-88 (7th Cir. 1991).

n73. Justice Thomas, joined by Justice Scalia, insisted in his Ellerth dissent that the majority's decision applies only to cases involving sexual harassment. He argues that employers in racial harassment cases are not subject to such a strict standard of liability. See *Ellerth*, 118 S.Ct. at 2272. In light of the historic unity of harassment doctrine, we see no reason to limit the holding in Ellerth to sexual harassment cases. Indeed, lower courts have already begun applying Ellerth to Title VII "hostile work environment" cases that do not involve sexual harassment. See *supra* notes 66-71 and accompanying text.

n74. See *Fierro v. Saks Fifth Ave.*, 13 F. Supp.2d 481, 490-93 (S.D.N.Y. 1998).

n75. *Id.* at 490.

n76. See *id.* at 490-93.

n77. See *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp.2d 735 (M.D. Tenn. 1998).

n78. See, e.g., David G. Savage, Changing Rules on the Job, A.B.A. J., Aug. 1998, at 42 ("Corporate lawyers and women's rights advocates predicted that over time, zero-tolerance policies in the workplace may replace lawsuits."); Editorial, More Harassment, The Wash. Post, June 28, 1998, at C6 ("The bad news is that the decisions [Ellerth and Faragher] ... could encourage [employers] to regulate obtrusively their workplaces."); Editorial, Policing Harassment, Sacramento Bee, July 7, 1998, at B6 ("The greater the potential liability, the more large organizations will seek to control their members."). Even prior to Ellerth and Faragher, commentators expressed the same concern. See Dean J. Schaner and Melissa M. Erelemeier, When Faith and Work Collide: Defining Standards for Religious Harassment in the Workplace, 21 *Employee Rel. L.J.* 7, 10 (1995) ("To avoid liability, the prudent employer will proscribe all speech and conduct that may constitute 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.").

n79. Volokh, Thinking Ahead, *supra* note 10, at 310.

n80. One observer writes that Ellerth and Faragher "suggest that companies will have to prove they had an effective, zero-tolerance policy on employee harassment, not just words in a manual." Savage, *supra* note 78, at 42.

Some companies have already implemented such policies toward religious expression. In *Tucker v. California*, 97 F.3d 1204 (9th Cir. 1996), for instance, the state Department of Education imposed such a zero-tolerance policy. Tucker placed the phrase, "Servant of the Lord Jesus Christ" on the label of a computer program that he distributed at the office. His supervisors quickly ordered him (and the other employees in his division) to cease using any religious symbols or phrases with religious connotations on any job-related document. Further, these employees were forbidden to discuss religious matters at the workplace or to display religious materials outside the workplace. The Ninth Circuit held that the Department violated Tucker's First Amendment rights by implementing such restrictive policies.

In a similar case, the Eighth Circuit vindicated the claim of a plaintiff who alleged that his employer's imposition of a religion-free workplace violated his First Amendment right to religious expression. In *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995), the county's director of information services (and a Christian) permitted co-workers to pray in his office during departmental meetings and once invoked Scripture to discourage sloth on the job. In response, the county administrator ordered Brown to cease engaging in any activity that could be construed as "religious proselytizing, witnessing, or counseling." Brown was ordered to remove all religious paraphernalia from his office, including his desk Bible. The Eighth Circuit corrected such excess.

Both of these cases involved public employers. While the First Amendment limits the measures that public employers may take to remedy harassment, it does not apply directly to the actions of private employers. As Professor Volokh explains, however, the First Amendment is implicated when (1) the law penalizes employers who express their religious beliefs in their business operations so as to create a hostile environment, or (2) the law requires private employers to take actions that infringe employees' rights to exercise their religion and express their religious beliefs freely. See Volokh, Comment, *supra* note 10, at 1804-05, 1816-18. According to Professor Volokh, "The government simply cannot avoid First Amendment scrutiny by using the threat of legal liability to coerce a private party into implementing the speech restriction on its behalf." *Id.* at 1818.

n81. For example, attorney Steven D. Brown advises employers to take three basic steps to help prevent religious harassment lawsuits: revise sexual harassment policies to include broader anti-discrimination rules; document carefully the job performance of employees who spend a lot of time expressing their religious opinions and take affirmative steps to remedy any problems; and, accommodate employees' religious interests as much as possible. See *Private Employers Beware Next Big Battleground - Religion in the Workplace*, 10 Va. Employment L. Letter (July 1998). See also Steptoe & Johnson, *Religion in the Workplace: A Balancing Act for the Employer*, 1 W. Va. Employment L. Letter (May 1996) ("An employer cannot and should not announce a 'religion-free' environment.").

n82. 42 U.S.C. 2000e(j) (1995).

n83. See Eugene Volokh, *What Speech Does "Hostile Environment" Harassment Law Restrict?*, 85 *Geo. L.J.* 627 (1997). See also Volokh, Comment, *supra* note 10, at 1871-72.

n84. See Volokh, Comment, *supra* note 10, at 1846 ("This Comment proposes to draw the line between directed speech - speech that is aimed at a particular employee because of her race, sex, religion, or national origin - and undirected speech, speech between other employees that is overheard by the offended employee, or printed material, intended to communicate to the other employees in general, that is seen by the offended employee.").

n85. *Id.*

n86. Hearings, *supra* note 9, at 63 (quoted in prepared statement of Michael K. Whitehead). In her statement criticizing the EEOC's Proposed Guidelines, employment attorney Dudley Rochelle argued that the EEOC had failed to distinguish general expressions of belief from derogatory comments. See *id.* at 31 (prepared statement of Dudley C. Rochelle).

n87. See *supra* notes 35-40 and accompanying text.

n88. *Consider Meltebeke v. Bureau of Labor and Industries*, 903 P.2d 351 (Or. 1995), where an evangelical Christian employer was accused of creating a hostile environment by repeatedly inviting an employee to attend church, calling him a sinner who would go to hell, and telling his family the same. The employee never voiced his discomfort with these invitations, and he never asked his employer to stop proselytizing. Was the employer's conduct more aptly described as promotion or intimidation?

n89. The First Amendment to the U.S. Constitution begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. Const. amend. I.

n90. See John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 *Temple Pol. & Civ. Rights L. Rev.* 1 (1997). The Court's interpretation of the Establishment Clause has increasingly edged religious expression out of the public domain. See *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that clergy-led graduation prayers violate the Establishment Clause). Similarly, the Court has gradually eroded the protection afforded by the Free Exercise Clause. See *Employment Div., Or. Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (holding that governments must satisfy only minimal-level scrutiny where a neutral law of general applicability burdens religious exercise). Indeed, if courts choose not to reconsider the place of religious expression in the overall harassment doctrine, Title VII's anti-discrimination rule could swallow up the principle of religious liberty expressed by the First Amendment.

n91. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that a public university's refusal to fund a religious student organization violated the First Amendment's guarantee of free speech).

n92. U.S. Const. art. VI, sec. 3 reads:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a Qualification to any Office or public Trust under the United States.

n93. See supra note 7 and accompanying text.

n94. See 42 U.S.C. 2000e-1, 2000e-2(e)(2) (1995).

n95. 42 U.S.C. 2000bb (1995).

n96. 42 U.S.C. 2000bb(a)(3) (1995).

n97. 42 U.S.C. 2000bb(b)(1) (1995).

n98. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

n99. See *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854, 863 (8th Cir. 1998).