



**HOSTILE PUBLIC ACCOMMODATIONS
LAWS AND THE FIRST AMENDMENT**

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INTRODUCTION

In April 2000, bar owner Tom English paid a \$4,500 fine to the Massachusetts Commission Against Discrimination (MCAD).¹ His offense? Decorating his bar with an African jungle display, which included vines and stuffed monkeys. Relying on statements that one of English's bartenders allegedly made to an undercover reporter, MCAD asserted that English put up the jungle display to

¹ Terms and Conditions of Tom English Settlement (Apr. 2000) (on file with author).

mock Black History Month.² Although English claimed the display was intended only to liven up the bar during the dreary winter months, he ultimately settled with MCAD in order to avoid further negative publicity.³

What is striking about the Tom English case is that the MCAD did not even consider the possibility that the First Amendment protected English's speech. The MCAD did not allege that English had either refused to serve or had provided inferior service to any African American customers. MCAD's prosecution, and ultimately the \$4,500 English paid in settlement, was based entirely on English's speech.

What happened to Tom English is not an anomaly. Under the relatively new doctrine of "hostile public accommodations environment harassment," proprietors of public accommodations, such as Tom English, can face hefty sanctions if they aren't careful about what they say—or about what decorations they put up in their establishments. The hostile public accommodations doctrine has its genesis in the public accommodations provisions of the Civil Rights Act of 1964,⁴ enacted for the laudable purpose of preventing owners of hotels and restaurants from refusing service to blacks. But now states and cities across the nation have enacted similar provisions and are applying them to regulate the speech of owners, and in some cases patrons, of public accommodations. The theory is that if a restaurant owner—or even a restaurant patron—makes a comment that offends another patron on the basis of race, sex, religious affiliation, or another protected category,⁵ the offended patron has

² See Hillary Chabot, *Relative Defends Fired Bartender, Says He Was Scapegoat for Overblown Incident in South Boston*, BOSTON GLOBE, Apr. 22, 2000, at B2 (describing terms of English's settlement with the MCAD).

³ English released a statement announcing the terms of his settlement with the MCAD. The statement denied that the decorations were intended as a disparaging reference to Black History Month, but acknowledged that the allegations that the decorations were intended to disparage Black History Month had "insulted, hurt, and divided" the Boston community. The statement concluded by expressing English's "hope that now we can all pull together, put this incident behind us, and move on." Tom English Statement (Apr. 2000) (on file with author).

⁴ 42 U.S.C. § 2000a (2006).

⁵ For a discussion of the various protected categories, see *infra* notes 21-23 and accompanying text.

been discriminated against by being subjected to a "hostile environment" that denies him or her the "full and equal enjoyment" of the accommodation.

As the following examples demonstrate, human relations commissions have applied this theory in a wide variety of situations. Across the country, commissions have:

1. Ordered the Franklin Lodge of Elks to pay \$64,000 in compensatory damages for failing to prevent members from making insulting remarks about women who had applied for membership, even though most of the remarks were not made directly to the women (the women found out about the remarks from friends or relatives who overheard them).⁶

2. Ordered the removal of a painting of a nude woman from the club room of a country club, on the theory that the "painting forms a vestige of the past history of the Club Room as a single-sex environment," conveying to women "a not-so-subtle message that the room remains a male preserve" where they are not welcome.⁷

3. Held that organizers of a softball league could be liable for insulting comments that spectators made to gay players on one of the softball teams, if the organizers failed to stop the remarks.⁸

4. Fined a restaurant owner \$5,546 for telling a friend that a "god damn nigger"⁹ had just stolen a customer's tip (two other black customers who overheard the conversation successfully argued that, even though the epithet was not directed at them, merely overhearing it subjected them to a hostile environment on the basis of race).¹⁰

⁶ *Marcoux v. Franklin Lodge of Elks*, No. PAS 6079-97 (N.H. Human Rights Comm'n 1999), <http://www.nh.gov/hrc/decisions/Franklin.html>, *aff'd*, 825 A.2d 480 (N.H. 2003).

⁷ *Flaa v. Manor Country Club*, No. 98-28, at *25 (Md. Montgomery County Human Relations Comm'n 1999) (on file with author).

⁸ *Neldaughter v. Dickeyville Athletic Club*, Equal Rights Div. No. 9132522 (Wis. Labor & Indus. Review Comm'n 1994) (on file with author). The organizees escaped liability only because it was unclear whether they had authority to control the spectators, since they did not own the premises where the games took place.

⁹ *Bond v. Michael's Family Restaurant*, Equal Rights Div. No. 9150755 (Wis. Dep't Indus. Labor & Human Relations 1994) (on file with author).

¹⁰ *Id.* See also *Craig v. New Crystal Restaurant*, No. 92-PA-40, 1995 WL 907560 (Chi. Comm'n on Human Relations Oct. 18, 1995) (requiring restaurant owner to pay \$750 in compensatory damages and a \$100 fine because of one insulting comment made

5. Held that a scalper's allegation that a ticket agent spoke to him in a "derogatory manner" was sufficient to state a claim of discrimination based on "source of income."¹¹

6. Charged a newspaper with racial discrimination in public accommodations for printing an editorial cartoon entitled "The Plantation," which asserted that the University of Minnesota exploited its African-American student athletes.¹²

by a server to a customer); *Rodger v. Steve's Market, Inc.*, PA98-0058 (Vt. Human Rights Comm'n 1999) (on file with author) (finding market liable for discrimination against deaf customer based on derogatory remark made by employee, even though customer couldn't hear the remark); *In re Miller*, No. 97-PA-29, 1998 WL 307868, at *3 (Chi. Comm'n on Human Relations Apr. 15, 1998) (fining plumber \$2,750 for calling African American customer a "mother fucking cock sucking nigger" in the context of a dispute over the price of plumbing services); *Barbot v. Yellow Cab Co.*, No. 97-SPA-0973, 2001 WL 1805186 (Mass. Comm'n Against Discrimination Nov. 27, 2001) (finding sexual orientation discrimination by cab driver who yelled obscenities such as "faggot" and "motherfucker" at gay passenger); *Cote v. First Class Taxi*, No. 98-BPA-3213, 2002 WL 31318586 (Mass. Comm'n Against Discrimination Jul. 8, 2002) (holding that cab driver discriminated on the basis of disability, because cab driver told a visually challenged customer with a mobility guide dog that "cabs are for people, not dogs" and complained about customer's guide dog throughout the trip); *Lee v. Benway's Transp., Inc.* (Vt. Human Rights Comm'n June 18, 2002), available at http://www.hrc.state.vt.us/case_summaries.htm (finding racial discrimination by cab driver who spoke to customer abusively and called him racial epithets); *King v. Greyhound Lines, Inc.*, 656 P.2d 349 (Or. Ct. App. 1982) (concluding that ticket agent discriminated against black customer by calling him a "nigger" when the customer tried to exchange his ticket for a refund).

¹¹ *Ploch v. Chi. Nat'l League Ball Club*, No. 92-PA-46, at 4 (Chi. Comm'n on Human Relations Oct. 4, 1993) (on file with author). See also CONN. GEN. STAT. ANN. § 46a-64 (2007) (banning discrimination in public accommodations based on "lawful source of income"); D.C. CODE ANN. § 1-2519(a) (2007) (same); N.D. CENT. CODE § 14-02.4-14 (2007) (banning discrimination in public accommodations based on "status with respect to ... public assistance").

¹² St. Paul Dep't of Human Rights, Charge of Discrimination (June 7, 1999) (on file with author) ("I, W. H. Tyrone Terrill, Director of the City of Saint Paul Department of Human Rights, hereby file a Director's charge of discrimination against St. Paul Pioneer Press on the basis of race on behalf of African American student-athletes. The discriminatory practice includes, but is not limited to, publishing a racially charged cartoon depicting African American basketball players at the University of Minnesota as slaves and showing two white males saying, 'of course we don't let them learn to read or write.'"). The Department later dropped the charge after concluding that a newspaper wasn't a place of public accommodation. *Agency Drops Complaint Over Editorial Comic in Newspaper*, MINNEAPOLIS STAR TRIBUNE, June 23, 1999, at 2B.

7. Held that the restaurant name Sambo's created a hostile environment by "notifying black persons that their patronage was unwelcome."¹³

8. Concluded that e-mails a recent graduate had received via her university-supplied e-mail account caused her to view the university campus as "a hostile one," even though she was no longer a student there.¹⁴ The university settled the case on undisclosed terms.¹⁵

9. Stated in dicta that even private citizens could be liable under the public accommodations statute if they made remarks creating a hostile environment.¹⁶ (Under this reasoning, a spectator in the basketball arena—or for that matter, a patron of a restaurant, movie theater, public park, or any of the other myriad places which are public accommodations under Hawaii law—could be fined for making comments that created a hostile environment on the basis of "race, religion, sex, or ancestry." Moreover, the commission could not confine the statute's reach to spoken remarks—a person wearing, say, a white power t-shirt creates a hostile environment on the basis of race as surely as someone who shouts insulting racial epithets.)

¹³ Urban League of R.I., Inc. v. Sambo's of R. I., Inc., 79 PRA 074-06/06 (R.I. Comm'n for Human Rights 1981) (on file with author). See generally Note, *A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 HARV. L. REV. 904 (1999) (arguing that the American Indian names of professional sports franchises—such as the Atlanta Braves, Chicago Blackhawks, and Washington Redskins—create a hostile environment for Native Americans in violation of public accommodations law); State Div. of Human Rights *ex rel.* Gladwin v. McHarris Gift Ctr., 418 N.E.2d 393 (1980) (narrowly rejecting claim that gift shop created a hostile environment based on national origin by selling various novelty items, including a pencil with an electric cord marked "Polish Calculator" and a mug with the handle inside marked "Polish Mug").

¹⁴ Kavanagh v. Goddard College, No. PA99-0002, at 18 (Vt. Human Rights Comm'n Feb. 9. 1999) (on file with author).

¹⁵ Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 318-19 (2000) (discussing Kavanagh case).

¹⁶ Hawaii v. Hoshijo, 76 P.3d 550, 554 (Haw. 2003). The statute says only that "[i]t shall be unlawful for a person to discriminate unfairly in public accommodations" (emphasis added). HAW. REV. STAT. ANN. § 489-8 (2007).

10. Issued publications stating that it is illegal to display “racist or sexist statements . . . in a public accommodation,”¹⁷ and that “sexually explicit or offensive material that is displayed in a public place” or “sexual or smutty jokes” are forms of illegal sexual harassment.¹⁸

11. Required proprietors to take “immediate and corrective action” if they overhear patrons making “unwelcome comments” or “jokes” that could prevent disabled patrons from fully enjoying the accommodation.¹⁹

As these examples illustrate, and as I demonstrate in Part II, the First Amendment protects much of the speech that hostile public accommodations law restricts. Moreover, the broad reach of public accommodations statutes makes the implications of the cases listed above even more disturbing. In most jurisdictions, a “public accommodation” is defined as any place that offers services, entertainment, recreation, or transportation to the general public—both for-profit and not-for-profit. This includes restaurants, stores, hospitals, gymnasiums, hotels, concert halls, buses, libraries, bookstores, and sometimes even private clubs.²⁰ Given this breadth, the question “what is

¹⁷ South Dakota Dep’t of Labor, Div. of Human Rights, Sexual Harassment, <http://www.state.sd.us/dol/boards/hr/sexualharassment.pdf>.

¹⁸ New Jersey Dep’t of Law & Public Safety, Div. on Civil Rights, Factsheet Sexual Harassment—Your Rights, http://www.nj.gov/oag/dcr/downloads/fact_sexhar.pdf. See also MICH. COMP. LAWS ANN. § 37.2103(i) (2000) (prohibiting “communication of a sexual nature” that creates “an intimidating, hostile, or offensive . . . public accommodations environment”); N.D. CENT. CODE § 14-02.4-01 to -02 (2007) (prohibiting sexually harassing speech in places of public accommodation); E. LANSING, MICH., CITY CODE ORDER NO. 1120, § 1 (2006), <http://www.municode.com/resources/gateway.asp?sid=22&pid=13231> (prohibiting harassing speech based on race, religion, sex, and other attributes in places of public accommodation); MONT. ADMIN. R. 24.9.609(2)(c) (1999) (same); CAMBRIDGE, MASS., HUMAN RIGHTS ORDINANCE § 2.76.120(N) (prohibiting harassing speech based on race, color, sex, age, religion, disability, national origin, sexual orientation, marital status, family status, military status, and source of income in places of public accommodation); MINN. STAT. ANN. § 363A.01, subd. 43 (2000); COOK COUNTY, ILL., ORDINANCE NO. 93-9013 art. V(c).

¹⁹ ME. HUMAN RIGHTS COMM’N. REGS. 3.06 I. (3) (1999).

²⁰ See, e.g., ST. PAUL, MINN., HUMAN RIGHTS ORDINANCE § 183.07 (a public accommodation includes, but is not limited to, the follow facilities: “a barber shop, beauty shop, bathhouse, swimming pool, gymnasium, reducing salon . . . clinic, hospital, convalescent or nursing home . . . mortuary . . . hotel, motel, resort, restaurant or trailer park”); CHI., ILL., HUMAN RIGHTS ORDINANCE § 2-160-020(j) (2000). (“Public

a public accommodation?" might be more appropriately posed as "what *isn't* a public accommodation?"

The list of protected categories under the statutes is likewise exceptionally broad. For example, a Cambridge, Massachusetts statute prohibits discrimination on the grounds of "race, color, sex, age, religious creed, disability, national origin or ancestry, sexual orientation, gender, marital status, family status, military status or source of income."²¹ San Francisco goes further, adding place of birth, weight, and height to the list of protected categories.²² Chicago prohibits discrimination based on "lawful source of income."²³

The broad definition of "public accommodation," the lengthy list of protected categories, and the tendency of human rights commissions to construe the statutes broadly subjects a large body of speech to regulation. The proprietors whose speech is suppressed are often small business owners who cannot afford the costs of protracted litigation. As a result, many proprietors facing prosecution agree to pay a small fine and stop engaging in the speech. Even those proprietors who contest charges of discrimination typically do not appeal to a higher court after a human rights commission has ruled against them. Thus, most cases do not reach federal courts, which would be more likely to seriously consider the First Amendment ramifications of imposing liability on a proprietor based on something he or she said to a customer.²⁴ The end result is

accommodation' means a place, business establishment or agency that sells, leases, provides or offers any product, facility or service to the general public"); MASS. GEN. LAWS ch. 272, § 92A (1998) (public accommodation includes "any place . . . which is open to and accepts or solicits the patronage of the general public"); OR. REV. STAT. ANN. § 659A.400 (2007) (same); VT. STAT. ANN. tit. 9, § 4501(1) (2007) (same); N.H. REV. STAT. ANN. § 155:39(a) (2007) (listing restaurants, theaters, stadiums, and hotels, among other things, as public accommodations); CAMBRIDGE, MASS., HUMAN RIGHTS ORDINANCE § 2.76.030(10)(a) (nonexhaustive list of over fifty examples of public accommodations, including billiard parlors, shooting galleries, garages, and bath-houses).

²¹ CAMBRIDGE, MASS., HUMAN RIGHTS ORDINANCE § 2.76.120(O).

²² S.F., CAL., POLICE CODE art. 33, § 3305(a), available at <http://www.municode.com/content/4201/14140/HTML/ch033.html>.

²³ See *Ploch v. Chi. Nat'l League Baseball Club*, No. 92-PA-46 (Chi. Comm'n Human Relations Oct. 4, 1993).

²⁴ The relatively low profile of hostile public accommodations prosecutions does not minimize the ability of these laws to deter speech. Many of the public accommodations sanctions imposed by local human relations commissions would likely be in-

that to a significant extent, the actions of human relations commissions are not constrained by meaningful judicial review.

The First Amendment should not protect all proprietor speech. If no speech was out of bounds, a bigoted proprietor could too easily circumvent the Civil Rights Act of 1964, simply by using, for example, the most offensive racial epithets he could think of whenever a black patron entered. Even if the proprietor provided prompt service to the black patrons, most would choose to leave the accommodation and never come back.

In addition to harming patrons, this kind of hostile speech would not add much value to the public discourse. Protecting an individual's freedom to communicate ideas and to persuade others is one of the primary purposes of the First Amendment. But a proprietor who verbally abuses patrons usually is not trying to persuade those patrons of anything; instead, such a proprietor is trying to inflict emotional injury. The verbally abused patrons certainly will not be persuaded by the ideas communicated via the proprietor's hostile speech. Because the marketplace of ideas is unlikely to benefit from speech whose only purpose is to inflict harm on listeners, such

validated because of obvious First Amendment problems if they were ever considered by a federal court. For example, the Rhode Island Commission for Human Rights found Sambo's restaurants liable for creating a hostile environment, on the theory that the name "Sambo's" was offensive to black customers. The decision was overturned by the Sixth Circuit on First Amendment grounds. *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981). In a similar instance, *Flaa v. Manor Country Club* did not reach the federal court level, but followed the same pattern of a higher-level panel overturning a local human rights commission's finding of hostile environment harassment. The Hearing Examiner's Report and Recommendation would have required the club to take down a nude painting on the theory that it created a hostile environment for women. The full panel of the Montgomery County Human Relations Commission rejected this recommendation, apparently realizing its First Amendment flaws. *Flaa v. Manor Country Club*, No. 98-28, at *2-*3 (Md. Montgomery County Human Relations Comm'n 2000) (on file with author). Other proprietors are deterred by the threat of liability. For example, after learning that he was being investigated by the San Francisco Human Rights Commission, the owner of Eddie Rickenbacker's bar removed a display containing the teeth of a Native American woman who had been assaulted by General Custer. Matt Smith, *The Storm of the Teeth*, S.F. WEEKLY, May 18, 2005, available at http://www.sfweekly.com/issues/2005-05-18/news/smith_full.html.

speech should be subject to regulation.²⁵ Part III proposes a narrowly-defined First Amendment exception that would permit regulation of the most egregious instances of hostile proprietor speech, and Part IV presents doctrinal justifications for the proposed exception.

By contrast, proprietor speech that is directed to the public at large—as opposed to speech directed to individual patrons—may contribute to the marketplace of ideas, even if it simultaneously offends some patrons. While the offended patrons won't be persuaded by the proprietor's ideas, other patrons might be. Therefore, hostile public accommodations law should not restrict speech intended for the public at large.

Human relations commissions have also interpreted public accommodations laws to require that proprietors take corrective action to prevent patrons from continuing to make comments creating a hostile environment. Part V examines these situations, and explains why the proposed First Amendment exception permits regulation of hostile proprietor speech but does not permit regulations requiring proprietors to monitor and control the speech of their patrons.

I. OVERVIEW OF PUBLIC ACCOMMODATIONS LAWS

The public accommodations provisions of the Civil Rights Act of 1964²⁶ serve as a template for similar laws enacted by many different states, counties, and cities across the nation. The state and municipal public accommodations provisions all follow the same basic structure, containing three elements:

1. a prohibition on discrimination in
2. a place of public accommodation²⁷

²⁵ As the Court said in *Rowan v. Post Office Dep't*, “no one has a right to press even ‘good’ ideas on an unwilling recipient.” 397 U.S. 728, 738 (1970). For further discussion of this argument, see *infra* Part IV(A)–(B).

²⁶ “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination . . . on the ground of race, color, religion, or national origin.” 42 U.S.C. § 2000a (2006).

²⁷ A “public accommodation” is generally defined as any place “which is open to and accepts or solicits the patronage of the general public.” MASS. GEN. LAWS ch. 272, § 92A (1998). Many of the statutes provided extensive lists of places which are classified as places of public accommodation, although the statutes generally specify that

3. on the basis of various protected categories such as race, sex, national origin, and religion.²⁸

The statutes are generally enforced by state or municipal commissions.²⁹ Most commissions are state-level administrative agencies, although some larger cities—such as Chicago, New York City, San Francisco, and Minneapolis/St. Paul—have their own commissions.³⁰ Commissions enforce all provisions of applicable civil rights laws, which, in addition to public accommodations laws, include laws prohibiting housing and employment discrimination.

The First Amendment problems arise because of the way the commissions apply the public accommodations laws, not because of the laws themselves. In fact, none of the laws say anything about regulating speech. However, commissioners have interpreted the laws to apply to the speech of public accommodations proprietors, if the speech creates a “hostile environment” that deprives patrons of the “full and fair enjoyment” of the public accommodation.³¹ Under this “hostile environment” theory, which has been developed by analogy to workplace harassment law,³² proprietors

the lists are for illustrative purposes and are nonexhaustive (for examples, *see supra* note 20 and accompanying text).

²⁸ *See supra* notes 21- 23 and accompanying text for examples of various protected categories.

²⁹ Some representative state commissions include the Massachusetts Commission Against Discrimination, <http://www.mass.gov/mcad/>; the Vermont Human Rights Commission, <http://www.hrc.state.vt.us/>; the New Hampshire Commission for Human Rights, <http://www.nh.gov/hrc/>; the Wisconsin Labor and Industry Review Commission, <http://www.dwd.state.wi.us/lirc/>; and the Minnesota Department of Human Rights, <http://departmentresults.state.mn.us/humanrights/index.html>. Prominent municipal commissions include Chicago Commission on Human Relations, <http://egov.cityofchicago.org/> (follow “City Departments” hyperlink; then follow “Human Relations” hyperlink); the San Francisco Human Rights Commission, http://www.sfgov.org/site/sfhumanrights_index.asp; and the New York City Commission on Human Rights, <http://www.nyc.gov/html/cchr/html/housing.html>.

³⁰ *See supra* note 29 for a listing of various human rights commissions.

³¹ *See, e.g.,* *Bond v. Michael’s Family Restaurant*, Equal Rights Div. No. 9150755 (Wis. Labor and Indus. Review Comm’n 1994).

³² One case relies explicitly on an analogy to workplace harassment law to justify its holding: “It is well established in the context of employment discrimination law that an employer may be liable for discriminatory harassment committed by its employees [sic] if this harassment creates a hostile environment . . . An argument may be made by analogy [that similar liability should be imposed in the context of public accom-

can be found liable for public accommodations discrimination based solely on their speech.³³

While human relations commissions have analogized to workplace harassment law to develop some aspects of hostile public accommodations laws, important differences between the two bodies of law remain. The most significant difference is that liability may be imposed far more easily in the public accommodations context than in the workplace. Whereas a proprietor of a public accommodation may be found liable for discrimination based on a single insult,³⁴ workplace speech must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'" in order for employers to be found liable.³⁵ Isolated insults are generally not sufficient to meet this standard.³⁶

Proprietor liability can stem from the proprietor's own speech, or from speech of the proprietor's employees.³⁷ In addition,

modations]." *Neldaughter v. Dickeyville Athletic Club Equal Rights Div.* No. 9132522, at 2 (Wis. Labor And Indus. Review Comm'n May 24, 1994).

³³ See, e.g., *Bond*, No. 9150755 (Though not directed personally at plaintiffs, proprietor's repeated use of the word "nigger" throughout a loud conversation with other restaurant patrons subjected plaintiffs "to a racially hostile environment, thereby depriving them of the 'full and fair enjoyment' of a place of public accommodation."); *Rodger v. Steve's Market*, Investigative Report #PA98-0057, at 7 (Vt. Human Rights Comm'n 1999) ("There is no doubt that [proprietor] Mr. Longhi treated [patron] Mr. Rodger differently than he and [his] staff treated hearing customers, because Mr. Longhi made the remark ['Bring your fucking scumbag bottles somewhere else'] while Mr. Rodger was still in the store. He felt safe doing so, because he knew that Mr. Rodger would not hear him."); *In re Craig*, No. 92-PA-40, 1995 WL 907560 (Chi. Comm'n Human Relations Oct. 18, 1995) (finding that restaurant discriminated against gay patron because a server called the patron a "faggot" when he complained about the service); *King v. Greyhound Lines, Inc.*, 656 P.2d 349 (Or. Ct. App. 1982) (concluding that ticket agent discriminated against black customer by calling him a "nigger" when the customer tried to exchange his ticket for a refund).

³⁴ See *In re Craig*, 1995 WL 907560, at *1.

³⁵ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

³⁶ *Id.* at 67.

³⁷ See, e.g., *In re Craig*, 1995 WL 907560, at *5 (holding New Crystal Restaurant responsible for insulting comment made by employee Gloria Matteson); *Kavanagh, v. Goddard College*, Charge No. PA99-0002 (Vt. Human Rights Comm'n Mar. 10, 1999) (final determination) (holding Goddard College responsible for speech of employee Alex Johnson); *Franklin Lodge of Elks v. Marcoux*, 825 A.2d 480 (N.H. 2003) (holding Franklin Lodge of Elks responsible for speech of its members).

proprietors can be liable for failing to take corrective action against patrons who create a hostile environment by making hostile comments.³⁸

Because the constitutional analysis differs depending upon the precise context in which the hostile speech takes place, I divide hostile proprietor speech³⁹ into four categories. *Targeted proprietor speech* occurs when the proprietor speaks directly and specifically to a member of a protected category, as opposed to the public at large. For example, a server in a restaurant who calls a gay patron a “faggot”⁴⁰ engages in targeted proprietor speech. *Non-targeted proprietor speech* occurs when the speech is addressed to the public at large, rather than to an individual patron. The jungle display intended as a mocking reference to Black History Month in Tom English’s bar is an example of non-targeted proprietor speech because the display was seen by all patrons who entered the bar. People who wear T-shirts containing swastikas or other racist slogans also engage in non-targeted speech. *Targeted patron speech* is similar to targeted proprietor speech, except the speaker is a patron of the public accommodation rather than the proprietor. *Non-targeted patron speech* occurs when two patrons are speaking to each other and a member of a protected category overhears something offensive. The chart below illustrates the four categories of hostile speech and provides examples of each.

³⁸ See *Neldaughter*, Equal Rights Div. No. 9132522 at 2 (“An argument may be made by analogy [to workplace harassment law] that an operator of a public place of accommodation . . . may be held liable for the harassment of patrons by other patrons, where the harassment creates a hostile environment and has the effect of denying the full and fair enjoyment of the facilities if the operator knew or should have known of the harassment yet fails to take steps to stop it.”).

³⁹ “Hostile proprietor speech” refers to speech by either a proprietor or the proprietor’s employees that creates a hostile environment based on sex, race, religion, or any other protected category.

⁴⁰ In re Craig, 1995 WL 907560, at *1. (Server Gloria Matteson made the remark to other employees, but spoke loudly while patron Daniel Craig was still within earshot so that Craig would overhear the remark).

Types of Hostile Speech

	<i>Targeted at a specific patron</i>	<i>Not targeted at a specific patron</i>
<i>Proprietor speaks to patron</i>	<p>I. Targeted proprietor speech:</p> <p>(a) Restaurant server called gay patron a “faggot”;⁴¹ (b) Ticket agent called African-American a “nigger”;⁴² and (c) Ticket agent spoke to scalper in a “derogatory manner.”⁴³</p>	<p>II. Non-targeted proprietor speech:</p> <p>(a) African jungle display at Tom English’s pub mocked Dr. Martin Luther King, Jr.;⁴⁴ (b) Large painting of naked woman was displayed in the Manor Country Club;⁴⁵ and (c) Gift shop sold novelty items making fun of people from Poland.⁴⁶</p>

⁴¹ See *In re Craig*, 1995 WL 907560.

⁴² *King v. Greyhound Lines, Inc.*, 656 P.2d 349 (Or. Ct. App. 1982).

⁴³ See *supra* text accompanying note 11.

⁴⁴ See *Complaint, Massachusetts Commission Against Discrimination v. Tom English’s Cottage, Inc.*, No. 00140427 (Mass. Comm’n Against Discrimination 2000).

⁴⁵ See *supra* text accompanying note 7.

⁴⁶ See *State Div. of Human Rights ex rel. Gladwin v. McHarris Gift Ctr.*, 418 N.E.2d 393, 393 (N.Y. 1980).

<p><i>Patron speaks to another patron</i></p>	<p>III. Targeted patron speech: (a) Spectators at an informal community softball league repeatedly yelled insults at members of one particular team;⁴⁷ and (b) Male members of the Franklin Lodge of Elks called prospective female members derogatory names.⁴⁸</p>	<p>IV. Non-targeted patron speech: On an airplane, a drunken passenger uttered a number of racial slurs, including “nigger,” which were overheard by an African-American woman.⁴⁹</p>
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II. PUBLIC ACCOMMODATIONS LAWS ARE NOT DEFENSIBLE UNDER EXISTING FIRST AMENDMENT EXCEPTIONS

A. PUBLIC ACCOMMODATIONS LAWS ARE VIEWPOINT-BASED REGULATIONS

Public accommodations laws restrict the speech of proprietors based on the viewpoint expressed by the speech. That is, a cab driver who yells insults such as “faggot” at a gay passenger is liable for discrimination because the insults deny the passenger full enjoyment of the accommodation based on sexual orientation.⁵⁰ But a cab driver who yells insults not referring to the passenger’s sexual orientation—for instance, “you stupid dumbass” — cannot be held liable.

Viewpoint-based regulations are presumptively unconstitutional, even if the speech they regulate is not otherwise subject to constitutional protection (in the example above, the insult “faggot” could be regulated as a fighting word). In *R.A.V. v. St. Paul*, the Supreme Court invalidated a Minneapolis regulation prohibiting the

⁴⁷ See Introduction, Example 3.

⁴⁸ See Introduction, Example 1.

⁴⁹ *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995).

⁵⁰ See *Barbot v. Yellow Cab Co.*, No. 97-SPA-0973, 2001 WL 1805186 (Mass. Comm’n Against Discrimination 2001) (awarding cab passenger \$5,500 for the emotional distress he suffered as a result of the cab driver’s discriminatory insults).

display of symbols or objects which arouse “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”⁵¹ As construed by the Minnesota Supreme Court, the regulation affected only those fighting words not subject to constitutional protection under *Chaplinsky v. New Hampshire*.⁵² Nonetheless, the ordinance was invalid because it engaged in “actual viewpoint discrimination,” since it prohibited displays containing “odious racial epithets” but not “‘fighting words’ that do not themselves invoke race, color, creed, religion, or gender.”⁵³ Although St. Paul could ban all fighting words, it could not “impose special prohibitions on those speakers who express views on disfavored subjects” by banning only fighting words related to race, color, and other categories.⁵⁴

However, dicta in *R.A.V.* suggested that viewpoint-based speech restrictions are occasionally permissible. Because “words can in some circumstances violate laws directed not against speech but against conduct . . . , a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.”⁵⁵ For instance, “sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices.”⁵⁶ Title VII’s viewpoint-based regulation of fighting words—sexually derogatory fighting words are prohibited but other fighting words are not—is constitutional for two reasons: (1) fighting words are not protected speech; and (2) the regulation results from a generally-applicable law aimed against the conduct of employment discrimination (rather than a law aimed solely at restricting certain words). Since Title VII’s purpose is punishing the conduct of discrimination—rather than punishing the use of certain words—the fact that Title VII incidentally imposes some viewpoint-based restrictions on

⁵¹ 505 U.S. 377, 391 (1992).

⁵² 315 U.S. 568, 571-72 (1942).

⁵³ *R.A.V.*, 505 U.S. at 391.

⁵⁴ *Id.*

⁵⁵ *Id.* at 389.

⁵⁶ *Id.*

speech does not raise “the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”⁵⁷

The *R.A.V.* dicta thus provides a potential avenue for regulating some hostile proprietor speech. A law prohibiting discrimination in public accommodations could be constitutionally applied to prohibit hostile proprietor speech directed towards members of a protected category, but only to the extent that the proprietor speech rose to the level of fighting words. In regulating fighting words, the law clearly engages in a form of viewpoint-based regulation, but this is permissible because the law is directed “not against speech but against conduct” and only incidentally sweeps within its scope some otherwise unprotected speech.⁵⁸

But *R.A.V.*'s dicta is insufficient to vindicate the aforementioned broad application of public accommodations laws, since much of the speech restricted by this application does not rise to the level of fighting words. The African jungle display in Tom English's bar,⁵⁹ the nude painting in the Manor Country Club,⁶⁰ and the restaurant name “Sambo's”⁶¹ may have been offensive to various individuals, but not offensive enough to “incite an immediate breach of the peace,”⁶² the threshold required for speech to be classified as fighting words.

B. THE “SPEECH AS CONDUCT” ARGUMENT

Another unsatisfying justification for regulating hostile proprietor speech is the argument that the speech is not really speech at all, but instead is an act of discrimination. Under this view, regulating hostile proprietor speech poses no First Amendment problems, since what is being regulated is conduct, not speech. One commentator argues that, although “sexual harassment on the job may be effectuated by ‘speech,’” such speech can be constitutionally prohibited since what is being regulated is really the

⁵⁷ *Id.* at 387 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

⁵⁸ *See id.*

⁵⁹ *See* Introduction, *supra* pp.2-6.

⁶⁰ *See* Introduction, example 2, *supra* p.3.

⁶¹ *See* Introduction, example 7, *supra* p.3.

⁶² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

“underlying nonspeech conduct” of “anti-social behavior in the workplace.”⁶³ The court in *Robinson v. Jacksonville Shipyards* invoked the same argument, holding that pornographic pictures and sexist comments in the workplace “are not protected speech because they act as discriminatory conduct in the form of a hostile work environment.”⁶⁴

The “conduct rather than speech” argument is based in part on the premise that speech becomes conduct when it results in the same kind of harm to recipients that could otherwise be facilitated through illegal conduct. Under this reasoning, an employer’s sexist comments to a female employee can become the conduct of sex discrimination because the sexist remarks may cause the coworker to become so upset that she quits her job. The outcome is the same as if the employer had engaged in the illegal conduct of firing the female worker because of her sex. To take another example, a proprietor’s anti-Semitic slurs toward a Jewish customer become the conduct of public accommodations discrimination, since the remarks may encourage the customer to leave the accommodation. Once again, the same result could be achieved through illegal conduct—barring the Jewish customer from entering the accommodation. In both situations, speech becomes a substitute for conduct that is illegal, by indirectly accomplishing what cannot legally be accomplished directly.

The argument that speech can be regulated as conduct if it ultimately achieves the same results as conduct is inconsistent with the Supreme Court’s First Amendment jurisprudence. The Court has held in several instances that speech cannot be regulated simply because the speech may harm listeners: “Where the designed benefit of a content-based restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities ‘simply by averting [our] eyes.’”⁶⁵ The government’s ability to outlaw conduct that imposes harm similar to the harm flowing from protected speech is not reason to disregard

⁶³ Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 187 (1990).

⁶⁴ *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).

⁶⁵ *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

these decisions. If the government could regulate harm-causing speech every time it could point to a valid conduct-regulating law aimed at forestalling similar harm, the amount of speech subject to regulation would be breathtaking. To give just a few examples: Because the government can regulate the sale of cigarettes to promote public health, the government could bar film and television actors from playing characters that smoke onscreen, since this speech might encourage some people to start smoking. Similarly, because the government can prohibit people from driving above the speed limit, it could make it illegal to talk about the thrills of speeding down the highway in a high-performance sports car.

Recognizing this problem, the Supreme Court has frequently rejected attempts to apply valid conduct-regulating laws in a way that restricts speech.⁶⁶ For example, in *NAACP v. Claiborne Hardware Co.*,⁶⁷ the Court concluded that civil rights leaders had a First Amendment right to speak in favor of a boycott of white-owned businesses. Constitutional protection applied even though the speech violated a valid conduct-regulating law prohibiting “malicious interference” with business relationships.⁶⁸ Although the state could criminalize conduct which interfered with business relationships, it could not constitutionally regulate speech that had the same effect—even though the harm caused by the speech was as great as, or greater than, the harm that could be achieved through illegal conduct.⁶⁹ And in *Claiborne Hardware*, the harm to the businesses caused by the constitutionally protected speech—lost earnings of \$944,699—very possibly was greater than any harm that could have been achieved through illegal conduct.⁷⁰

Similarly, the government cannot rely on laws prohibiting the restraint of trade as justification for banning speech that accomplishes the same thing. Organizations are free to lobby in favor of

⁶⁶ See generally Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1288–93 (discussing cases in which the Court concluded that valid conduct-regulating laws could not be applied to restrict speech, even if the speech caused the same type of harm as the illegal conduct).

⁶⁷ 458 U.S. 886 (1982).

⁶⁸ *Id.* at 891, 911, 926.

⁶⁹ *Id.* at 909–10.

⁷⁰ *Id.* at 893.

anticompetitive regulations, even though such regulations, if passed, would restrain trade.⁷¹ Another example: the government can impose liability for conduct that inflicts emotional distress, but cannot impose liability for speech that inflicts similar or even greater emotional distress. For instance, the Reverend Jerry Falwell could recover damages against a funeral home that dishonored his deceased mother by mishandling her remains.⁷² However, Falwell could not recover damages against *Hustler Magazine*, which dishonored his deceased mother by publishing a vicious satire depicting Falwell and his mother engaging in a “drunken incestuous rendezvous . . . in an outhouse.”⁷³ The First Amendment protected *Hustler Magazine’s* speech, even though the emotional distress Falwell experienced from the satire was probably far greater than the emotional distress he would have experienced from a funeral home mishandling his mother’s remains.

C. THE “SPEECH DEVOID OF INTELLECTUAL CONTENT” ARGUMENT

Another unsatisfactory rationale for why hostile proprietor speech can be regulated is the claim that hostile speech is devoid of intellectual content. Professor Smolla argues that racial epithets are statements of pure emotion which have “no cognitive message at all,” but rather convey “raw, unvarnished feeling.”⁷⁴ According to Smolla, a racial insult such as “nigger” communicates “only the uncut emotions of hate and insult.”⁷⁵ Such racial epithets approach “a ratio of emotional to cognitive” of “nearly ninety-nine to one.”⁷⁶ Smolla defines the “language of emotion” as “language that requires no more thought than the ability to spell . . . language that embodies emotion with no elaborative gloss other than [the] feeble minimum intellectual current necessary to power the use of

⁷¹ See, e.g., *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961).

⁷² See, e.g., *In re Tri-State Crematory Litigation*, 215 F.R.D. 660, 684–85 (N.D. Ga. 2003) (holding that if plaintiffs could prove that Tri-State Crematory mishandled their family members’ remains, plaintiffs were entitled to recover damages against Tri-State for intentional infliction of emotional distress).

⁷³ *Hustler Magazine v. Falwell*, 485 U.S. 46, 48 (1988).

⁷⁴ Smolla, *supra* note 63, at 182.

⁷⁵ *Id.* at 184.

⁷⁶ *Id.*

words.”⁷⁷ Essentially, Smolla’s argument boils down to the following: (1) Hateful racial epithets are not ideas; (2) A primary purpose of the First Amendment is to foster the discussion and cultivation of ideas; (3) Because they are not ideas, racial epithets do not foster this primary First Amendment purpose and therefore can be regulated.

Smolla’s analysis fundamentally mischaracterizes the nature of hate speech. It would be a mistake to claim that hate speech does not express ideas. It is, in fact, precisely because hate speech contains so many disturbing ideas that it is correctly perceived as dangerous. For example, Hitler’s ideas about creating an Aryan nation resulted in the death and suffering of millions. One of the reasons an anti-Semitic slur is so disturbing is because it implicitly recalls the heinous ideas that were used to facilitate the murders of so many people. To take another example, the epithet “nigger” derives much of its potency from America’s practice of slavery during the nineteenth century. To ignore the historical subtext present in anti-Semitic or racial slurs and to contend that the speech is devoid of ideas is to deny the power of language, which acquires much of its force and meaning through historical context.

Smolla’s claim that hate speech is devoid of intellectual content is similar to Chief Justice Rehnquist’s argument that flag burning “is the equivalent of an inarticulate grunt or roar”⁷⁸ and is “no essential part of any exposition of ideas.”⁷⁹ Rehnquist’s arguments were rejected by a majority of the Court in *Texas v. Johnson*.⁸⁰ In *Johnson*, the Court clearly viewed burning the flag as the expression of an idea, albeit a “provocative” and “disagreeable” one.⁸¹

D. COMMERCIAL SPEECH

Although hostile proprietor speech takes place in a commercial setting, it does not fall within the category of commercial speech. Therefore, hostile proprietor speech cannot be restricted by relying upon the Court’s less-stringent protection of commercial speech.

⁷⁷ *Id.* at 183.

⁷⁸ *Texas v. Johnson*, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting).

⁷⁹ *Id.* at 430.

⁸⁰ 491 U.S. 397 (1989).

⁸¹ *Id.* at 409.

To impose content-based restrictions on commercial speech, the government must assert a “substantial interest,” and the restrictions “must be in proportion to that interest.”⁸² This standard is considerably easier to satisfy than the normal requirement that content-based regulations “must be narrowly tailored to promote a compelling government interest.”⁸³ If hostile proprietor speech did constitute commercial speech, public accommodations regulations would likely withstand constitutional scrutiny.

Commercial speech is “speech which does ‘no more than propose a commercial transaction’”⁸⁴ or “expression related solely to the economic interests of the speaker and its audience.”⁸⁵ Hostile proprietor speech targeted towards individual patrons does not fall within this definition. When a proprietor makes racist or sexist comments to a customer, those comments do not “propose a commercial transaction.”⁸⁶ Such comments certainly do not serve “the economic interest of the speaker”⁸⁷ — on the contrary, hostile remarks harm the economic interest of the proprietor by alienating potential customers.

Most instances of proprietor speech to the public at large (non-targeted speech) likewise do not fall within the definition of commercial speech. For example, the African jungle display in Tom English’s bar was not commercial speech. Unlike an advertisement for beer, this display did not propose a commercial transaction. The display decorated the bar and expressed English’s dislike of Dr. Martin Luther King, Jr. and Black History Month.

E. TIME, PLACE, AND MANNER RESTRICTIONS

Although hostile public accommodations laws restrict only speech that occurs in public accommodations, the laws cannot be justified as time, place, or manner restrictions. A valid time, place,

⁸² *Central Hudson Gas & Elec. Co. v. Publ. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

⁸³ *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000).

⁸⁴ *Virginia State Bd. of Pharmacy v. Virginia Consumers Counsel*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

⁸⁵ *Central Hudson*, 477 U.S. at 561.

⁸⁶ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973).

⁸⁷ *Central Hudson*, 477 U.S. at 562.

or manner restriction must be “applicable to all speech irrespective of content.”⁸⁸ Hostile public accommodations laws clearly run afoul of this requirement, since they regulate some speech (insults based on race, sex, or another protected category) but not other speech.

Some facially content-based statutes may be treated as content-neutral, if the justification for the statutes arises from the secondary effects of the regulated speech, rather than the content of the speech itself.⁸⁹ However, “the direct impact of speech on its audience” does not count as a secondary effect.⁹⁰ For example, a time, place, or manner restriction on the showing of adult films would not be appropriately analyzed as content neutral, if the restriction was justified by a “desire to prevent the psychological damage [the restricting entity] felt was associated with viewing adult movies.”⁹¹ Similarly, hostile public accommodations laws restrict speech in order to prevent psychological injury and emotional harm to members of protected categories, and therefore do not meet the standard of content-neutrality.

F. CAPTIVE AUDIENCE

Some commentators embrace an expansive reading of the captive audience doctrine that would justify restricting speech in public accommodations. For example, Professor Balkin argues that “people are captive audiences for First Amendment purposes when they are unavoidably and unfairly coerced into listening” to speech that they do not want to hear.⁹² Although Balkin does not discuss

⁸⁸ *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975).

⁸⁹ *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (a speech restriction is content-neutral if it is “justified without reference to the content of the regulated speech” (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (emphasis omitted)); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976) (upholding zoning restrictions prohibiting a concentration of adult movie theaters in any one area, because the restrictions were aimed at the undesirable “secondary effect” of increased crime associated with adult theater concentration, not at suppressing the theater’s offensive speech).

⁹⁰ *Boos v. Barry*, 485 U.S. 312, 321 (1988). *See also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”).

⁹¹ *Boos*, 485 U.S. at 321.

⁹² Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2310–11 (1999).

the application of his captive audience ideas to public accommodations, the logical implications of his argument support such an application:

[L]imiting captive audience situations to the home misses the point of the metaphor of *captivity*—that a person must listen to speech because he or she is practically unable to leave. . . . Captivity in this sense is a matter of practicality rather than necessity. It is about the right not to have to flee rather than the inability to flee.⁹³

The Supreme Court has never invoked the captive audience doctrine to sustain content-based speech restrictions operating outside the context of the home.⁹⁴ To uphold hostile public accommodations laws under a captive audience theory would require a drastic expansion of the doctrine that would seriously undermine free speech. If, as Balkin contends, the captive audience doctrine is really “about the right not to have to flee rather than the inability to flee,”⁹⁵ the government could, for example, regulate anti-veteran speech at a local park so that soldiers returning from Iraq could enjoy a picnic in peace. And what about the office worker who objects to the message on a billboard that he or she must walk past every night on the way home? As Laurence Tribe aptly describes the problem, the idea of a captive audience “is dangerously encompassing,”

⁹³ *Id.* at 2312 (emphasis added).

⁹⁴ Some commentators cite Justice Douglas’ concurrence in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) for the proposition that content-based restrictions can protect a captive audience outside the home. *See, e.g.*, Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 13 n.47 (Winter 1990); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 502 n.87 (1990). However, *Lehman* cannot accurately be read this way. Douglas voted to uphold the city’s ban on political ads on its buses because he believed the city could not constitutionally display any ads on its buses, not because he believed the city could implement a content-based regulation to protect captive bus passengers from certain ads but not others. A majority of the *Lehman* court (Justice Douglas plus the four-member dissent) did not believe that content-based regulations could be justified by a captive audience. *See* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. REV. 1791, 1837 (1992) [hereinafter Volokh, *Freedom of Speech and Workplace Harassment*].

⁹⁵ Balkin, *supra* note 92, at 2312.

and “the Court has properly been reluctant to [find a captive audience] whenever a regulation is not content neutral.”⁹⁶

In situations where the Court has used the captive audience doctrine to uphold content-based speech restrictions, the Court has relied heavily upon the fact that the restrictions are aimed at protecting the sanctity of the home. In *Rowan v. U.S. Post Office Dep’t*, the Court rested its decision on the “ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter.’”⁹⁷ However, even venerated notions such as a “man’s home is his castle” are not always sufficient to sustain content-based restrictions aimed at protecting householders from potentially unwanted speech. The ability of government “to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”⁹⁸ If householders can avoid the unwanted speech with minimal effort, the captive doctrine does not apply.⁹⁹

⁹⁶ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 950 n.24 (2d ed. 1988).

⁹⁷ *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737 (1970) (upholding law allowing householders to require a mailer to remove their names from mailing lists and stop all future mailings to those householders). See also *Carey v. Brown*, 447 U.S. 455, 471 (1980) (“The State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (upholding content-based restriction on patently offensive radio broadcast, because the “indecent material presented over the airwaves confronts the citizen . . . in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendments rights of an intruder”); *Gregory v. Chicago*, 394 U.S. 111, 125–26 (1969) (Black, J., concurring) (“I believe that the homes of men, sometimes the last citadel of the tired, the weary and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown.”).

⁹⁸ *Cohen v. California*, 403 U.S. 15, 21 (1971).

⁹⁹ For example, the Court invalidated a regulation prohibiting Consolidated Edison from including material stressing the advantages of nuclear power in its electricity billing inserts. *Consolidated Edison Co. v. Public Service Comm’n of N.Y.*, 447 U.S. 530 (1980). Although the inserts might “offend the sensibilities of some consumers,” offended consumers could “escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.” *Id.* at 541–42. The Court invoked similar reasoning to invalidate a prohibition on mailing advertisements for contraceptives. *Bolger v. Youngs Drug Products*, 463 U.S. 60, 72 (1983). The Court concluded that for householders offended by the mailings, the “short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.” *Id.* (quoting *Lamont v. Commissioner of Motor Ve-*

In the rare instances in which the Supreme Court has relied on the captive audience doctrine to restrict speech outside the home, the speech restrictions were content-neutral. For example, in *Hill v. Colorado*,¹⁰⁰ the Court upheld a Colorado statute which regulated speech taking place within one hundred feet of the entrance to any health care facility. The statute prohibited any person from knowingly approaching any other person, without that person's consent, "for the purpose of . . . engaging in oral protest, education, or counseling with such other person."¹⁰¹ The Court concluded that the statute was constitutional because its purpose was to "protect listeners from unwanted communication."¹⁰² However, the Court took pains to emphasize that the statute was content neutral, because its "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech."¹⁰³

hicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 449 (2d. Cir. 1967). *See also* FCC v. Pacifica Found., 438 U.S. 726, 766 (1978) (Brennan, J., dissenting) ("Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds.").

¹⁰⁰ 530 U.S. 703 (2000).

¹⁰¹ *Id.* at 707 (quoting COLO. REV. ST. §18-9-122(3) (1999)).

¹⁰² *Id.* at 716.

¹⁰³ *Id.* at 719. The Court acknowledged that the regulation might sometimes require some examination of "the content of the statements made by a person approaching within eight feet of an unwilling listener," because the statute prohibited "oral protest, education, or counseling," but not other forms of speech (such as saying "good morning"). *Id.* at 721. However, these types of content distinctions were insufficient to invalidate the statute "for failure to maintain 'content neutrality,'" because a statute that restricts certain categories of speech only lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve [here, invading the privacy of unwilling listeners], that fall outside the statute's scope, while others fall inside.

Id. at 723-24. The Colorado statute did not suffer from this problem, because it prohibited all forms of oral protest that were likely to invade the privacy of unwilling listeners:

Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so.

Id. at 723.

In *Madsen v. Women's Health Center, Inc.*,¹⁰⁴ the Court upheld, on captive audience grounds, an injunction restraining the speech of anti-abortion protestors. Once again, the Court emphasized that the injunction was content neutral. The Court pointed out that the injunction's regulation of only the speech of anti-abortion protestors, and not the speech of other protestors, did not render it content-based. This targeted regulation was instead an inherent characteristic of an injunction:

An injunction, by its very nature, applies only to a particular group and regulates the activities, and perhaps the speech, of that group. . . . The fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion. . . . There is no suggestion . . . that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioner's message.¹⁰⁵

Aside from the content-neutral speech restrictions involved in *Hill v. Colorado* and *Madsen v. Women's Health Center*, the Supreme Court has never relied upon the captive audience doctrine to restrict speech outside the home—even when the expression at issue may be deeply offensive to individuals who are in all practicality unable to avoid it. For example, in *Cohen v. California*,¹⁰⁶ the Court refused to hold that women and children in a Los Angeles courthouse were captive to the words “Fuck the Draft” emblazoned on a man's jacket. Individuals wishing to avoid Cohen's speech would either have to leave the courthouse, foregoing access to the justice system, or continuously concentrate on not looking in Cohen's direction—not an easy task.¹⁰⁷ In *Rosenfeld v. New Jersey*, the

¹⁰⁴ 512 U.S. 753 (1994).

¹⁰⁵ *Id.* at 762–63.

¹⁰⁶ 403 U.S. 15 (1971).

¹⁰⁷ Several commentators have noted the practical difficulties associated with the Court's statement that those offended by Cohen's jacket “could effectively avoid further bombardment of their sensibilities simply by averting their eyes.” *Id.* at 21.

court vacated the conviction of a man speaking in a school board meeting who used the word “mother-fucking” to describe the teachers, the school board, the town, and the United States.¹⁰⁸ The individuals attending the school board meeting—including forty children and twenty-five women—could have avoided this speech only with great difficulty.¹⁰⁹ Either they would have to leave the meeting, forfeiting their opportunity to participate in school board functions, or tightly plug their ears throughout the man’s entire address. And either of these remedies would be at best incomplete, since individuals would hear the word “mother-fucking” at least once before they could take further measures to avoid the unwanted speech.

Patrons of public accommodations are no more captive than the individuals in *Cohen* or *Rosenfeld*; in fact, in many instances, patrons may be far less captive. It’s much easier to walk out of a restaurant containing an offensive painting¹¹⁰ or display¹¹¹ than it is to walk out of a courthouse or school board meeting. The person who walks out of a restaurant can, without too much difficulty, find a similar restaurant to dine at. By contrast, the person who walks out of a school-board meeting loses the opportunity to express his or her opinions to the school-board, and the person who walks out of a courthouse forfeits access to the justice system.

Professor Volokh points out that “the very process of keeping one’s eyes averted reminds one of the offensive message—thinking ‘I shouldn’t look over there because there is a man wearing a “Fuck the Draft” jacket’—keeps the offensive message in one’s mind just as surely as staring at the jacket would.” Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 94, at 1840. Arguing that the audience in *Cohen v. California* was more captive than the radio listeners in *FCC v. Pacifica*, Professor Schauer observes that “[t]urning off a radio is much easier than averting your eyes from someone who is in the same room. Just try it sometime.” Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 294 (1981).

¹⁰⁸ *Rosenfeld v. New Jersey*, 408 U.S. 901, 904-05 (1972) (Powell, J., dissenting).

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., *Flaa v. Manor Country Club, Inc.* (Montgomery County Human Relations Comm’n 1999) (on file with author) (large painting of naked woman hanging in dining room).

¹¹¹ See, e.g., *Complaint, Mass. Comm’n Against Discrimination v. Tom English’s Cottage, Inc.*, No. 00140427 (Mass. Comm’n Against Discrimination 2000) (African jungle display depicting Martin Luther King, Jr., as a gorilla).

Of course, a restaurant is only one example of a public accommodation and leaving other types of public accommodations may be more difficult than leaving a restaurant. For example, getting off a bus that contains racially offensive advertising¹¹² could be a costly decision for someone who doesn't own a car, especially if no other public transportation options are available. Yet the degree of captivity in even this extreme example still seems less than that of the people exposed to Cohen's "Fuck the Draft" jacket in the Los Angeles courthouse. A defendant appearing at the courthouse for an arraignment would risk fines and jail time if she left in order to avoid seeing Cohen's jacket.

III. PROPOSED FIRST AMENDMENT EXCEPTION

A. CREATING A NEW FIRST AMENDMENT EXCEPTION IS PREFERABLE TO UPHOLDING THE REGULATIONS USING STRICT SCRUTINY

Human Rights Commissions should be free to regulate targeted hostile proprietor speech, since proprietor insults directed solely at unwilling listeners are unlikely to benefit the marketplace of ideas by convincing the insulted listeners to alter their opinions. However, as demonstrated in Part II, laws regulating targeted hostile proprietor speech do not fit within any of the existing First Amendment exceptions.

To sustain such laws, the Supreme Court could take two approaches. First, the Court could conduct the strict-scrutiny review it traditionally employs when evaluating laws restricting speech.¹¹³ A determination that public accommodations laws satisfied strict scrutiny would require the Court to find that eliminating hostile environments in public accommodations is a compelling government interest and that public accommodations laws are the least restrictive means of effectuating that interest. Second, the Court could conclude that targeted hostile proprietor speech is of such minimal value that it is unprotected by First Amendment. The

¹¹² Complaint at 3, *EEOC v. Hyster Co.*, No. 88-930-DA (D. Or. filed Aug. 15, 1988), the EEOC alleged that an advertising campaign using images of samurai, kabuki, and sumo wrestling to refer to Japanese competitors created a hostile work environment. Presumably, then, similar advertising appearing on a city bus would create a hostile public accommodations environment.

¹¹³ *See, e.g., United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000).

Court took a similar approach in *New York v. Ferber*,¹¹⁴ which held that child-pornography was outside the protection of the First Amendment. For the following reasons, a narrowly-defined, categorical exception (defined in Part III(B) below) placing the most egregious instances of targeted hostile proprietor speech outside the protection of the First Amendment is preferable to upholding public accommodations laws under strict-scrutiny review.

First, hostile public accommodations laws would not likely survive strict scrutiny. To survive strict scrutiny, a content-based speech restriction such as a hostile public accommodations law must be “narrowly tailored to serve a compelling state interest.”¹¹⁵ The government interest justifying public accommodations laws is insuring that members of protected categories do not suffer psychological harm from exposure to hostile speech.

The court has never determined whether shielding the sensibilities of members of protected categories from hostile proprietor speech is a compelling state interest. However, various other Court decisions strongly suggest that this interest would not qualify as compelling. Consider, for example, *Roberts v. United States Jaycees*, where the Court held that “Minnesota’s compelling interest in eradicating discrimination against its female citizens” justified the Minnesota Human Rights Act’s requirement that the Jaycees extend full membership privileges to women.¹¹⁶ The Minnesota Human Rights Act is representative of the public accommodations laws discussed throughout this Comment: it forbids any public accommodation from denying “the full and equal enjoyment of the . . . facilities” to any person on the basis of “race, color, creed, religion, disability, national origin or sex.”¹¹⁷ The Jaycees, the Court held, could not deny full and equal enjoyment to female members by denying them the rights to vote or hold national office.

But the Court took pains to make clear that its holding relied on the fact that requiring the Jaycees to extend voting privileges to female members would not interfere with the Jaycees’ ability to

¹¹⁴ 458 U.S. 747 (1982).

¹¹⁵ See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Boos v. Barry*, 485 U.S. 312, 334 (1988).

¹¹⁶ 468 U.S. 609, 623 (1984).

¹¹⁷ *Id.* at 615 (citing MINN. ST. § 363.03(3) (1982)).

disseminate its preferred views: “The [Minnesota Human Rights] Act requires no change in the Jaycees’ creed of promoting the interests of young men.”¹¹⁸ The constitutionality of the Minnesota Human Rights Act, the Court said, was predicated on the fact that the Act’s “infringements on [the Jaycees’ associational] right[s]” were “unrelated to the suppression of ideas.”¹¹⁹

So while the Jaycees could constitutionally be required to admit females, they could not constitutionally be required to alter their views so that female members would not be offended. Yet public accommodations laws require proprietors to alter their speech in order to avoid offending members of protected categories. For example, the MCAD charged Tom English’s Pub with denying African-Americans the “full and equal enjoyment” of the accommodation solely on the basis of a display mocking Dr. Martin Luther King, Jr., which most African-Americans would find offensive.

Applying MCAD’s reasoning, the Jaycees could be held in violation of the statute if, taking a cue from former Harvard University president Lawrence H. Summers, they adopted the position that women did not have the same innate or natural ability in science and math as men.¹²⁰ Such a position—essentially, that at least with respect to scientific cognitive ability, women are genetically inferior to men—would undoubtedly deeply offend many of the Jaycees’ female members.¹²¹ But to hold that adopting a position deeply offensive to women thereby denies them “full and equal enjoyment” ignores the Court’s repeated statements in *United States Jaycees* that government infringement on associational rights is only acceptable when that infringement is “unrelated to the suppression of ideas.”¹²²

¹¹⁸ *Id.* at 627.

¹¹⁹ *Id.* at 623.

¹²⁰ See Marcella Bombardieri, *Summers’ Remarks on Women Draw Fire*, BOSTON GLOBE, Jan. 17, 2005, at A1 (recounting Summers’ remarks at an academic conference that one possible explanation for the small number of women in high-level science and engineering positions at universities is that women do not have the same innate ability as men in these fields). However, Summers did not express a definitive opinion on the issue, noting that further research needed to be conducted.

¹²¹ See, e.g., *id.* (quoting biologist Nancy Hopkins, who said that she would have either “blacked out or thrown up” if she had not walked out in the middle of Summers’ presentation).

¹²² *United States Jaycees*, 468 U.S. at 623. See also *id.* (“On its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited

The Court has also stated explicitly that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹²³ This statement suggests that hostile public accommodations laws cannot prevent proprietors from saying things that members of protected categories find “offensive or disagreeable”—although, as Professor Volokh points out, “the word ‘simply’ here ... leaves a good deal uncertain.”¹²⁴ For example, would the result be the same “if society finds an idea offensive and the resulting offense leads to a particular bad result, such as employees of a particular religion, race or sex becoming so offended by workplace speech”—or so offended by hostile speech in a public accommodation—“that they reasonably conclude that their workplaces [or the public accommodation] have become hostile environments?”¹²⁵ The answer to this question, Professor Volokh concludes, is “far from settled.”¹²⁶

Even if the Court were to decide that eliminating hostile speech in public accommodations was a compelling state interest, upholding public accommodations laws under a strict scrutiny rationale would require the restriction of an unacceptably large body of speech. To satisfy the “narrow tailoring” component of the strict scrutiny test, a law cannot be underinclusive. Laws are underinclusive if they “fail to restrict a significant amount of speech that harms the government interest to about the same degree as does the restricted speech.”¹²⁷

In the context of public accommodations, the underinclusiveness requirement forces the government to adopt an “all or nothing” approach to speech regulation. The compelling interest marshaled in support of public accommodations laws is the need to

and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria.”).

¹²³ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

¹²⁴ Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PENN. L. REV. 2417, 2419 (1996) [hereinafter Volokh, *Transcending Strict Scrutiny*].

¹²⁵ *Id.*

¹²⁶ *Id.* at 2420.

¹²⁷ *Id.* at 2423. For cases establishing the principle of underinclusiveness, see *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *Carey v. Brown*, 447 U.S. 455, 465 (1980); and *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 793 (1978).

protect members of protected categories from being subjected to offensive, hostile speech as they attempt to enjoy the accommodations. To borrow a term from Henry Louis Gates, “gutter epithets”¹²⁸ are the words that first come to mind when debating the desirability of regulating hostile speech. Indeed, most of the cases discussed in this Comment involve “gutter epithets” — extremely offensive slurs such as “nigger,” “faggot,” “bitch,” and “cunt.”

While such gutter epithets are certainly deeply wounding and offensive, they may not constitute the most offensive speech for certain members of protected categories. To illustrate this point, consider a hypothetical posed by Professor Gates:

Contrast the following two statements addressed to a black freshman at Stanford: (A) LeVon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well intentioned, but given the fact that aptitude tests place African Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide. (B) Out of my face, jungle bunny.¹²⁹

Gates concludes that “[s]urely there is no doubt” that Statement A “is likely to be more ‘wounding’ and alienating to its intended audience” than Statement B.¹³⁰ If Gates is right that Statement A is more offensive than Statement B, a hostile public accommodations law restricting “gutter epithets” would have to restrict

¹²⁸ Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, THE NEW REPUBLIC, Sept. 20-27, 1993, at 37, 45.

¹²⁹ *Id.*

¹³⁰ *Id.*

speech about the harmfulness of affirmative action as well, in order to avoid being underinclusive.

Needless to say, a public accommodations law prohibiting speech opposing affirmative action would unacceptably hamper political discourse. Such a law would require public accommodations such as the Stanford Law Library to remove copies of Volume 57 of the *Stanford Law Review* from its shelves. Volume 57 contains Richard Sander's article *A Systemic Analysis of Affirmative Action in American Law Schools*, which reaches a conclusion strikingly similar to Gates' hypothetical Statement A:

What I find and describe ... is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries. The admission preferences extended to blacks are very large and do not successfully identify students who will perform better than one would predict based on their academic indices. Consequently, most black law applicants end up at schools where they will struggle academically and fail at higher rates than they would in the absence of preferences. The net trade-off of higher prestige but weaker academic performance substantially harms black performance on bar exams and harms most new black lawyers on the job market.¹³¹

While many people would vehemently disagree with Professor Sander's conclusions, few would contend that Professor Sander should not be free to discuss his findings in a law school classroom because the discussion would create a hostile environment for black students. But to avoid the problem of underinclusiveness, this result would follow from the Court's decision to uphold public accommodations laws using a strict-scrutiny framework.

A better approach is to create a categorical exception which excludes the most virulent instances of hostile proprietor speech from First Amendment protection. The Court has already concluded that

¹³¹ Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371-72 (2004).

the First Amendment does not protect some speech – defamation,¹³² obscenity,¹³³ and child pornography.¹³⁴ I propose a similar categorical exception, which would exclude hostile proprietor speech targeted at specific individual patrons. Hostile targeted proprietor speech has minimal constitutional value, since the ideas it communicates aren't likely to persuade individual recipients. Under my proposal, proprietor speech to the public at large remains subject to full First Amendment protection.

B. EXPLANATION OF PROPOSED EXCEPTION

Under the new First Amendment exception that I propose, public accommodations statutes can constitutionally regulate speech if the following three-pronged test is satisfied:

1. The proprietor or employee of the public accommodation speaks directly and specifically to a member of a protected class, as opposed to the public at large;
2. The speech would cause a reasonable member of the protected category to believe that the proprietor did not want to extend to him or her full and equal enjoyment of the accommodation as a result of his or her membership in that protected category; and
3. The totality of the circumstances indicates that the proprietor's offensive statements are motivated by a desire to exclude the patron because of the patron's membership in a protected category.

1. Prong One

The proprietor or employee of the public accommodation speaks directly and specifically to a member of a protected class, as opposed to the public at large.

Prong one prevents proprietors from functionally excluding members of protected categories from their establishments by using targeted hostile speech. As a practical matter, for instance, it would be easy for an anti-Semitic proprietor to exclude Jews from his store by using anti-Semitic slurs, even if the proprietor otherwise

¹³² *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹³³ *Miller v. California*, 413 U.S. 15 (1973).

¹³⁴ *New York v. Ferber*, 458 U.S. 747 (1982).

extended full service to Jewish customers. The reason is that in addition to whatever specific product or service they are purchasing, patrons of public accommodations often have a broad objective. Patrons going to restaurants, movie theaters, or other places of recreation want to have a good time; patrons going to grocery stores or pharmacies want to be treated respectfully. A Jewish customer at a restaurant is not likely to have an enjoyable experience if his or her server makes anti-Semitic remarks—even if the food is delicious and the service is prompt. Instead, a Jewish customer subjected to anti-Semitic slurs would likely leave the restaurant.

Speech not specifically addressed to members of a protected category is not targeted speech, even if members of the protected group cannot avoid overhearing it. For example, in *Bond v. Michael's Family Restaurant*, owner Marge Christodoulakis became upset when two black men stole a tip that had been left on a table by an elderly patron.¹³⁵ Speaking with another customer, Christodoulakis said that “two niggers” had just stolen the tip.¹³⁶ Mischeral Bond, an African-American woman, overheard the remarks and was offended. Although Bond could not avoid overhearing the offensive speech (Christodoulakis was speaking loudly), the speech was not intended specifically for her. Subjecting Christodoulakis to liability merely because Bond overheard what she said and was offended would lead to troubling consequences. Proprietors of public accommodations would constantly have to monitor their speech to insure that no one within ear shot could possibly be offended.

When *Bond* is read in conjunction with *Neldaughter*, the restrictions on speech in public accommodations are even greater. *Neldaughter* held that proprietors have a duty to suppress speech by patrons if that speech creates a hostile environment.¹³⁷ Together with *Bond's* holding that members of a protected category are subjected to a hostile environment simply by overhearing hostile speech, *Neldaughter* requires proprietors to monitor the speech of patrons to make sure the patrons do not say anything that creates a

¹³⁵ Equal Rights Div. No. 9150755, at *3 (Wis. Labor & Indus. Review Comm'n 1994).

¹³⁶ *Id.* Christodoulakis repeated the phrase “those god damn niggers” several times. A friend of Christodoulakis said “those niggers wonder why we hate them so much.”

¹³⁷ *Neldaughter v. Dickeyville Athletic Club*, Equal Rights Div. No. 9132522 (Wis. Labor & Indus. Review Comm'n 1994).

hostile environment for members of protected categories who overhear. Suppose a Vietnamese-American customer sitting in a restaurant overheard two customers expressing their support for Senator McCain's statement that the North Vietnamese soldiers who tortured him were "gooks."¹³⁸ Or suppose that the restaurant's television was tuned to a CNN broadcast of McCain's statement that his torturers were "gooks." In both situations, the proprietor would have to suppress the speech—by telling the customers to talk about something else or by turning off the television—in order to avoid liability. If Christodoulakis cannot use an epithet such as "nigger" to express her anger at members of another race who had harmed her by stealing money, then surely McCain cannot use an epithet such as "gook" to express his anger at members of another race who tortured him.¹³⁹ As these examples demonstrate, *Bond* and *Neldaughter* restrict an unacceptably large amount of protected speech.

Prong one does not apply to non-targeted proprietor speech, even when such speech may reasonably be perceived as hostile by members of protected categories. Non-targeted speech—even hostile non-targeted speech—has much greater constitutional value than targeted speech. Hostile speech targeted to unwilling listeners is unlikely to convince the listeners of anything.

¹³⁸ For an account of McCain's use of the word "gook" and his subsequent apology, see Maureen Fan & Jessie Mangaliman, *McCain Apologizes for Using Slur GOP Candidate Renounces 'Bigoted' Language*, SAN JOSE MERCURY NEWS, Feb. 24, 2000, at 1A. McCain's racial slur is by no means a political anomaly; the same hypothetical could be constructed substituting the names of a number of other prominent politicians. For example, Virginia Senator George Allen called an Indian American supporter of his opponent "macaca," a derogatory term commonly in use in western Africa. Robert Barnes & Michael D. Shear, *Allen and Webb in Virtual Tie, Post Poll Says; Northern Virginia Voters' Views Differ from Rest of Commonwealth*, WASHINGTON POST, Oct. 15, 2006, at A01. The Reverend Jesse Jackson referred to Jews as "Hymie" and New York as "Hymietown." Rick Atkinson, *Conciliation; Jackson Expects Party Unity*, WASHINGTON POST, Aug. 27, 1984, at A1.

¹³⁹ The *Bond* court justified its decision in part by noting that it was the restaurant manager who said the word "nigger." The court said it would be hesitant to impose liability if the racial epithet had been used by another customer, as opposed to the owner Christodoulakis. However, *Neldaughter* held that a proprietor could be liable for creating a hostile environment if the proprietor failed to prevent patrons from using harrassing speech. *Neldaughter*, Equal Rights Div. No. 9132522 (Wis. Labor & Indus. Rev. Comm'n May 24, 1994).

By contrast, non-targeted speech directed to the public at large may find willing listeners.¹⁴⁰

Non-targeted speech should also be protected because it expresses ideas about political, religious, social, and moral matters—speech which lies at the heart of the First Amendment.¹⁴¹ For example, consider the non-targeted proprietor speech restricted by public accommodations laws in the Tom English case. Using an African jungle display, English compared Dr. Martin Luther King, Jr. to a gorilla. An opinion about an important public figure such as Dr. King surely is within the scope of the First Amendment's protection for matters of public concern. It's important to note that the viciousness of English's attack on Dr. King does not remove the speech from First Amendment protection. The Court has recognized that debate concerning public figures "may well include vehement, caustic, and sometimes unpleasantly sharp attacks."¹⁴²

The murals on the outer walls of Brahim Ayad's deli in Cleveland, Ohio, are another example of non-targeted proprietor speech that should receive constitutional protection, even though the speech creates a hostile environment. Ayad intends the murals as a protest against "evil-doing Zionists," whom he claims "took away his Palestinian father's land to make way for the state of Israel."¹⁴³ The murals include a picture of the Star of David superimposed over a swastika, a slogan stating "Jew World Order!," an image depicting "skullcap wearing Jews counting money . . . while Jesus hangs on a cross above them," and a picture of Hitler with the star of David on his upraised hand.¹⁴⁴ This kind of hostile speech is deeply troubling, but, once again, that is not grounds for denying it First Amendment protection. In fact, free speech "may indeed best

¹⁴⁰ See *infra* Part IV(B) for a more developed discussion of this idea.

¹⁴¹ See *Abouod v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (In addition to protecting political speech, the First Amendment protects "expression about philosophical, social, artistic, economic, literary, or ethical matters.").

¹⁴² *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁴³ Douglas J. Guth, *Controversial Cleveland Murals Are Protected*, CLEV. JEWISH NEWS, Nov. 18, 2003, available at <http://www.clevelandjewishnews.com/articles/2003/09/18/news/local/dadeli0919.txt>.

¹⁴⁴ *Id.*

serve its high purpose when it induces a condition of unrest, creates dissatisfaction, . . . or even stirs people to anger.”¹⁴⁵

Allowing regulation of non-targeted speech could also prevent museums from displaying historical artifacts that allow the public to more fully come to terms with racism and its destructive past. David Pilgrim, founder and proprietor of the Jim Crow Museum of Racist Memorabilia, believes in using “items of intolerance to teach tolerance.”¹⁴⁶ Only through confronting the full ugliness of racism, he contends, can Americans overcome it: “These images force a person to take a stand for or against the equality of all human beings.”¹⁴⁷

Even though the museum’s goal is to deconstruct and expose racism, some black patrons perceive it as a hostile environment.¹⁴⁸ After all, the museum contains items that are far more offensive than Tom English’s primitive jungle display. A 1916 magazine advertisement shows a young black boy drinking from a bottle of ink; the caption reads “Nigger Milk.”¹⁴⁹ A sculpture shows a caricatured young black child about to be eaten by an alligator.¹⁵⁰ It’s very possible that a well-intentioned but misguided Human Relations Commission might conclude that despite its noble purpose, the Jim Crow Museum of Racist Memorabilia does more harm than good. And under current public accommodations jurisprudence,

¹⁴⁵ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). See also *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972) (“Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Street v. New York*, 394 U.S. 576, 592 (1969) (“[It is] firmly settled [that] the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).

¹⁴⁶ David Pilgrim, *The Garbage Man: Why I Collect Racist Objects*, <http://www.ferris.edu/jimcrow/collect/>.

¹⁴⁷ Jim Crow Museum of Racist Memorabilia, <http://www.ferris.edu/jimcrow/menu.htm> (last visited Mar. 5, 2008).

¹⁴⁸ According to Pilgrim, “some visitors find the artifacts upsetting,” and claim “that the museum actually promotes racism.” Jim Crow Museum of Racist Memorabilia, *Frequently Asked Questions*, <http://www.ferris.edu/jimcrow/FAQ.htm> (last visited Mar. 5, 2008).

¹⁴⁹ Pilgrim, *supra* note 146.

¹⁵⁰ Jim Crow Museum of Racist Memorabilia, *The Picaninny Caricature*, <http://www.ferris.edu/jimcrow/picaninny/> (last visited Mar. 5, 2008).

such a Commission would have ample power to shut down the museum using a hostile environment theory.¹⁵¹

Consider, as well, a bookstore stocking materials advocating race-based violence or praising Nazism and Adolf Hitler. Certainly a bookstore prominently displaying works such as *The Turner Diaries*—a fictional account of white supremacists who overthrow the federal government, brutally murder blacks and other minorities, and establish an all white society—would be a hostile environment for blacks, Jews, and many other people. It is well established that the First Amendment protects such books, and thus it seems incongruous that a bookstore distributing them could be penalized. Yet public accommodations laws' restrictions on non-targeted proprietor speech allow precisely such penalties to be imposed. The fact that the speech creating the hostile environment occurs in a bookstore, university, or other setting dedicated to the exploration of ideas would not necessarily deter a human relations commission from imposing liability. For example, Penn State University removed a reproduction of Goya's 200-year old painting "Naked Maja" from a classroom, citing the possibility that a teacher objecting to the painting could demonstrate that it created a hostile work environment.¹⁵² Given that public accommodations patrons have a much easier time establishing hostile environment liability than workers,¹⁵³ a human relations commission applying public

¹⁵¹ A hostile environment theory could also be used to force the closing of a pro-Hitler museum located in Sugar Creek, Wisconsin. Ted Junker, a former SS officer, built the museum because he believes that Hitler is widely misunderstood. The museum isn't open to the public because Junker neglected to obtain the proper land-use permits from the city. But if the museum were ever to open, it would undoubtedly create a hostile environment for Jewish survivors of World War II. See Jennie Tunkiewicz, *Shrine to Hitler Unnerves Community*, MILWAUKEE JOURNAL SENTINEL, June 13, 2006, available at <http://www.jsonline.com/story/index.aspx?id=435393>.

¹⁵² See Nat Hentoff, *Trivializing Sexual Harassment*, WASH. POST, Jan. 11, 1992, at A19. University administrators cited *Robinson v. Jacksonville Shipyards*, a case where workplace hostile environment liability had been imposed in light of nude pinups in the workplace.

¹⁵³ As discussed in Part I, a public accommodations proprietor may face hostile environment liability based on a single insult; whereas, hostile environment liability cannot be established in the workplace unless the speech is sufficiently severe or pervasive to alter the conditions of the victim's employment. See *supra* notes 34–36 and accompanying text.

accommodations law would have even more reason to order the painting's removal than the university did.

A second reason for the distinction between targeted and non-targeted speech is to limit the scope of the proposed exception. Because of "the inherent dangers of undertaking to regulate any form of expression,"¹⁵⁴ a rule which denies First Amendment protection for a class of speech should be narrow in scope. The decision to deny protection to a given classification of speech rests upon the judgment that "the evil to be restricted . . . overwhelmingly outweighs the expressive interests . . . at stake."¹⁵⁵ This conclusion should not be arrived at lightly, for so long as the First Amendment is viewed "as no more than a set of 'values' to be balanced against other 'values,' that Amendment will remain in grave jeopardy."¹⁵⁶

The limited scope of the exception is especially appropriate given that public accommodations laws operate as viewpoint-based restrictions on speech—the most constitutionally suspect speech restrictions in existence. Through a viewpoint-based regulation, the government openly declares that certain opinions are unacceptable, and backs up the declaration by bringing the full force of law to bear against those who dare to utter such opinions.¹⁵⁷ Viewpoint-based regulations strike at the heart of the First Amendment: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."¹⁵⁸

As a result of its limited scope, the proposed exception allows proprietors freedom to communicate ideas through non-targeted speech. While a proprietor cannot direct racial slurs at

¹⁵⁴ *Miller v. California*, 413 U.S. 15, 23 (1973).

¹⁵⁵ *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

¹⁵⁶ *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 402 (1973) (Stewart, J., dissenting).

¹⁵⁷ By contrast, other types of speech restrictions are far less severe. Content-based regulations prohibit the discussion of certain topics in certain places—for example, an ordinance might allow advertising on city buses but prohibit political ads. Here, the government has confined speech to non-political advertising, but it has not expressed a preference for one political viewpoint over another (a viewpoint-based regulation would allow ads for Candidate X but not for Candidate Y). Time, place, and manner restrictions may limit opportunities for speech to certain locations, but, once again, the government does not take sides in the debate.

¹⁵⁸ *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943).

individual African-American patrons, the proprietor can put racial slurs on the establishment wall, or communicate his low regard for African-Americans to patrons of other races.¹⁵⁹

Failing to regulate non-targeted proprietor speech is not likely to result in a wave of hostile speech. Proprietors have an economic interest in encouraging the goodwill of the community. Even racist proprietors will likely keep their sentiments to themselves, because they know that a dramatic loss of business could result if they openly expressed their racist viewpoints to the community at large. A proprietor's economic self-interest thus serves as a check on non-targeted proprietor speech. However, this check is not nearly as effective in the context of targeted proprietor speech, since in many cases a proprietor could utter racial slurs to an individual patron and not have to worry that his racist sentiments would be overheard and become widely known.¹⁶⁰

The economic self-interest of proprietors perhaps explains why a large number of cases brought before the Massachusetts Commission Against Discrimination involve cab companies.¹⁶¹

¹⁵⁹ This kind of non-targeted proprietor speech may also be somewhat less harmful to members of protected categories than targeted speech. For most people, being called hateful names face-to-face, often in front of a crowd of strangers, is more humiliating than seeing their race, sex, or religion disparaged by a sign, billboard, or mural.

¹⁶⁰ While it's true that patrons subjected to racist insults can attempt to generate community opposition to the proprietor, any resulting negative publicity will likely be much less than if the proprietor were to openly proclaim racist sentiments to the community at large. The insulted patron may have difficulty attracting media attention, since providing incontestable evidence that the insult took place is difficult, and in most cases likely to be impossible. Not all insulted patrons will be willing to devote the time and effort necessary to mount an organized campaign in an attempt to expose proprietors, especially when the prospects for success are minimal.

¹⁶¹ See, e.g., *Barbot v. Yellow Cab Co.*, Docket No. 97-SPA-0973, 2001 WL 1805186 (Mass. Comm'n Against Discrimination 2001) (cab driver yelled obscenities such as "faggot" and "motherfucker" at gay passenger); *Wilder v. Diamond Cab Co.*, No. 97-SPA-0789, 2001 WL 1602757 (Mass. Comm'n Against Discrimination Feb. 23, 2001) (cab driver required black customer to pay fare up front, explaining "[y]ou people don't like to pay—if you don't like it, you can get out."); *Cote v. First Class Taxi*, No. 98-BPA-3213, 2002 WL 31318586 (Mass. Comm'n Against Discrimination July 8, 2002) (cab driver told visually challenged customer with a mobility guide dog that "cabs are for people, not dogs" and complained about customer's guide dog throughout the trip); *John Lee v. Benway's Trans., Inc.* (Vt. Human Rights Comm'n, 2002), available at http://www.hrc.state.vt.us/case_summaries.htm (cab driver spoke to customer abusively and called him racial epithets).

Within the confined environment of a cab, it's easy for a cab driver to use racial insults without anyone overhearing. In crowded public accommodations which simultaneously host large numbers of people—such as restaurants or theaters—the risk of being overheard is much greater. Social norms against racism are often sufficient to restrain racist proprietors from expressing their feelings in public, especially considering that proprietors have an economic incentive not to tarnish their reputation.

Recent events lend support to the theory that public sentiment, combined with a proprietor's economic incentive, is extremely effective at curtailing hostile non-targeted proprietor speech. For example, the Los Angeles comedy club "Laugh Factory" quickly denounced comedian Michael Richard's racist tirade,¹⁶² and banned him from the club. The effectiveness of hostile speech suppression through economic and social pressure counsels against meddling with the First Amendment to suppress hostile speech using the law. Why "run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy"¹⁶³ when market conditions and social norms are, for the most part, successfully resolving the problem?

2. *Prong Two*

The speech would cause a reasonable member of the protected category to believe that the proprietor did not want to extend to him or her full and equal enjoyment of the accommodation as a result of his or her membership in that protected category.

Prong two is designed to limit the reach of the proposed exception, to insure that it prohibits only proprietors' genuine attempts

¹⁶² Michael Richard's racist tirade doesn't fit neatly into the targeted/non-targeted categories. Richards screamed racial insults at two African-American hecklers. The remarks were targeted in the sense that they were directed to the hecklers, but non-targeted in the sense that they were overheard by the entire club and broadcast on the Internet. Owners of the Laugh Factory apologized to the entire African American community, which suggests that they would have been just as quick to denounce Richards even if his racist remarks hadn't referred specifically to anyone in the audience. Regan Morris, *Laugh Factory Owner Apologizes for Michael Richards Rant*, CITY NEWS SERVICE, Nov. 20, 2006.

¹⁶³ *New York v. Ferber*, 458 U.S. 747, 756 (1982).

to exclude customers from their establishments based on a protected category. The reason prong two is limited to speech designed to exclude members of protected categories—as opposed to speech that a reasonable member of a protected category would find offensive—is that some speech that members of protected categories find offensive has constitutional value. Consider, for example, Senator McCain’s use of the word “gook” to describe his Vietnamese captors, discussed above. A reasonable Vietnamese-American might be offended by a proprietor who adamantly defended McCain’s word-choice. However, a proprietor who defends McCain engages in political speech clearly entitled to First Amendment protection. In addition, it seems unlikely that this type of political speech is motivated by a desire to drive away Vietnamese-American customers.

3. Prong Three

The totality of the circumstances indicates that the proprietor’s offensive statements are motivated by a desire to exclude the patron because of the patron’s membership in a protected category.

Prong three places further limits on the speech that public accommodations regulations can constitutionally curtail. Sometimes proprietors who use hostile speech are not necessarily trying to drive members of protected categories away from the establishment. Often the proprietor’s hostile speech occurs in the context of a heated argument with a patron, in which both the proprietor and patron use offensive language.

Many cases follow a similar pattern. First, a member of a protected category enters a public accommodation and purchases goods or services. Second, some dispute over the quality of the goods or services develops between the patron and the proprietor. For example, the patron may feel that he was overcharged for repairs made to a vacuum cleaner,¹⁶⁴ or that a server was not sufficiently prompt in taking his order.¹⁶⁵ Third, an angry argument between the proprietor

¹⁶⁴ See *Etienne v. Chaet’s Vic-Video-TV*, No. 98-BPA-0347, 2003 WL 22056881 (Mass. Comm’n Against Discrimination July 31, 2003). See *supra* Part III(B) for a more in depth discussion.

¹⁶⁵ See *In re Craig*, No. 92-PA-40, 1995 WL 907560 at *2 (Chi. Comm’n Human Relations 1995). See *supra* Part III(A) for a more in depth discussion.

and patron ensues. In such arguments it is common for both the proprietor and patron to resort to hostile speech.

In such situations, proprietors may use racial insults, not because they hate all members of a particular race and want to drive them away from the accommodation, but instead because they are angry at a particular customer, want to offend the customer as deeply as possible, and know that a racial insult is one of the most offensive things they can say.¹⁶⁶ Because race, sex, religion, sexual orientation, and other protected categories are fundamental aspects of a person's identity, an insult based on any one of these characteristics is especially stinging. In addition, an individual's membership in a protected category is often obvious, based on externally visible characteristics—race and sex are readily observable, and sometimes an individual's religion can be easily determined if the religion requires the wearing of ceremonial clothing. So just by looking at a customer, an angry proprietor engaged in an argument is able to come up with an especially hurtful insult.

But why should the proprietor's motive for using the offensive speech matter? Consider comedian Michael Richards's angry outburst at the Laugh Factory comedy club.¹⁶⁷ The African-American man whom Richards called a "nigger" likely does not care much about Richards's motives for the outburst. It probably does not matter to this man whether Richards is secretly a racist at heart, or whether Richards simply lost his temper and said the most hurtful thing that he could think of.

Taking proprietor intent into account serves important constitutional values.¹⁶⁸ A blanket prohibition on all targeted hostile proprietor speech would unnecessarily restrict too much speech.

¹⁶⁶ For a good example of this phenomenon see *Hoshijo v. Hawaii*, No. 97-001-PA-R (Haw. Civil Rights Comm'n Final Decision and Order). Wallace became angry at the remarks of a fellow spectator at a basketball game and called the spectator a "nigger." The Civil Rights Commissions' Findings of Fact state that Wallace "used the term 'nigger' because it was the 'ugliest thing he could say to hurt [White] at the time.'" Fact 21. The Findings also stated that "Wallace knew that the word 'nigger' was a racist and derogatory term for black people. Respondent Wallace was taught to respect people of all races and did not believe that African Americans were 'niggers' or inferior." Fact 21.

¹⁶⁷ Lynn Smith, 'Seinfeld' Costar Apologizes for Racial Slurs at Comedy Club, L.A. TIMES, Nov. 21, 2006, at B3.

¹⁶⁸ See *infra* Part IV(C).

Prohibiting insults that stem from arguments between proprietors and patrons does not serve the government's interest in promoting equal access to public accommodations, since those insults are motivated by anger rather than a desire to drive patrons away. If their customers refuse to pay for services rendered or begin shouting insults at them, proprietors should be free to respond with insults of their own. The First Amendment does not permit the patron "to fight freestyle, while requiring the [proprietor] to follow Marquis of Queensberry rules."¹⁶⁹ There is "[n]o pressing social need" to criminalize "every abusive outburst . . . ; upon the contrary, it would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam."¹⁷⁰

Considering proprietor intent also avoids punishing eccentric proprietors who treat all customers with hostility. Proprietors similar to Seinfeld's famous Soup Nazi often run thriving businesses patronized by customers who enjoy the wacky, unusual atmosphere. Marx's Hot Bagels, located in the Cincinnati metropolitan area, is a prime example. Signs on the front door announce "This is an experience, not a restaurant! Owner not politically correct. Enter at your own risk. Why be normal?"¹⁷¹ John Marx, the proprietor, describes himself as "'a yeller and a screamer.'"¹⁷² He sometimes "zings his customers with loud, half-serious critiques,"¹⁷³ or "rant[s] to . . . customer[s] about the right way to order."¹⁷⁴ Marx expresses his opinion that certain people are "losers" by placing pictures of them upside-down on the store's wall of photographs.¹⁷⁵ Despite—or perhaps because of—Marx's bizarre antics, Marx's Hot Bagels is a highly successful restaurant. Penalizing Marx under a public accommodations

¹⁶⁹ *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

¹⁷⁰ Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1053 (1936).

¹⁷¹ Marx Hot Bagels, <http://community.iexplore.com/planning/journalEntryDining.asp?journalID=39089&EntryID=27267&n=Marx+Hot+Bagels> (reviewing restaurant).

¹⁷² Stan Sulkes, *Going Kosher "Bagelman" Plans 4th Shop*, CINCINNATI POST, Aug. 29, 1995, at 6B, available at 1995 WLNR 851193.

¹⁷³ Greg Paeth, *Bagel Bust*, CINCINNATI POST, May 29, 2003, at 60, available at 2003 WLNR 6709730.

¹⁷⁴ *Marx's Bagels*, EARL WORLD, <http://earlworld.blogspot.com/2006/04/marxs-bagels.html>.

¹⁷⁵ *Meyers v. Hot Bagels Factory*, 721 N.E.2d 1068, 1083 (Ohio Ct. App. 1999).

law because some customers might be offended would deprive the public of a memorable dining experience.

An Ohio court correctly dismissed claims of public accommodations discrimination brought by a female patron of Marx's Hot Bagels who was offended by Marx's colorful language.¹⁷⁶ Marx became angry when patron Kathleen Meyers said she preferred a competitor's menu. Marx approached Meyers and her friend Steven Clark and said "'You look like a classy lady, what are you doing with him? You must be a really good fuck. Are you a good fuck?'"¹⁷⁷ The court concluded that Meyers had failed to prove that Marx had intended to discriminate against her based on gender, since Marx treated all "his customers and employees with disrespect regardless of gender."¹⁷⁸

Several examples illustrate the operation of the totality of the circumstances prong. In *Craig v. New Crystal Restaurant*, Daniel Craig, a gay patron of New Crystal Restaurant, was displeased with the slow service he received.¹⁷⁹ Craig confronted a group of servers and told them that if he owned the restaurant, he would probably fire all of them.¹⁸⁰ In response, server Gloria Matteson, who was aware of Craig's sexual orientation, called Craig a "'holier than thou damn faggot.'"¹⁸¹ Concluding that Craig had been subjected to a hostile environment, the Chicago Human Rights Commission awarded \$750 for emotional distress plus attorney's fees.¹⁸²

The totality of the circumstances indicates that Matteson's insult was motivated by the angry confrontation, rather than a desire to discourage Craig from patronizing the restaurant because of his sexual orientation. First, Craig received slow service because his server got into an argument with the restaurant's cook after she had taken Craig's order, not because Craig was gay.¹⁸³ Second, Craig continued patronizing the restaurant after the incident, and was not

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1072-73.

¹⁷⁸ *Id.* at 1083.

¹⁷⁹ *In re Craig*, No. 92-PA-40, at *2 (Chi. Comm'n Human Relations 1995), 1995 WL 907560.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at *13.

¹⁸³ *Id.* at *2.

insulted or treated differently from other customers.¹⁸⁴ Finally, the restaurant served a large number of gay customers, and there is no evidence that servers discriminated against those customers based on sexual orientation.¹⁸⁵

Similarly, in *Etienne v. Chaet's Vac-Video TV*, the proprietor angrily insulted customer Francklin Etienne, a black male from the Caribbean Islands, after Etienne refused to pay for the cost of repairs to his vacuum cleaner.¹⁸⁶ The Massachusetts Commission Against Discrimination (MCAD) correctly concluded that Etienne had not been subjected to discriminatory harassment, because the proprietor's insults were "precipitated by a heated exchange between [Chaet] and Complainant [Etienne] that was initiated by Complainant [Etienne] when he complained about the job and refused to pay for [Chaet's] services. Complainant [Etienne] was not denied service or provided with inferior service."¹⁸⁷

Finally, in *King v. Greyhound Lines*, the court correctly concluded that Alfred King had been subjected to a hostile public accommodations environment.¹⁸⁸ When King attempted to exchange a bus ticket he had purchased for a refund, the attendant asked him "Nigger, where did you get this ticket?" and said "Now, boy, you get the person who purchased the ticket, and I'll be glad to refund it."¹⁸⁹ The totality of the circumstances indicates that the sole purpose of the racial slurs was to discourage King from patronizing the terminal. To prevent people from exchanging lost or stolen tickets for a refund, the terminal's policy required that employees processing refunds must "be satisfied that the person returning the ticket is the original purchaser."¹⁹⁰ Against the backdrop of this policy, the attendant's statements implied that King was trying to fraudulently exchange a lost or stolen ticket.

¹⁸⁴ *Id.* at *4.

¹⁸⁵ *Id.* at *1.

¹⁸⁶ *Etienne v. Chaet's Vac-Video-TV*, 2003 WL 22056881 (Mass. Comm'n Against Discrimination 2003).

¹⁸⁷ *Id.* at *4.

¹⁸⁸ *King v. Greyhound Lines, Inc.*, 656 P.2d 349 (Or. Ct. App. 1982).

¹⁸⁹ *Id.* at 350.

¹⁹⁰ *Id.*

IV. DOCTRINAL JUSTIFICATIONS FOR PROPOSED EXCEPTION

In this section, I weave together doctrinal strands from various Supreme Court decisions in support of the proposed exception. No single case, standing alone, is directly on point; rather, each case is one strand that, taken with all the other cases, forms the doctrinal tapestry justifying the proposed exception.

A. PROPOSED STANDARD AFFECTS ONLY TARGETED SPEECH

The exception I propose subjects speech to regulation only when it is targeted at a specific person.¹⁹¹ In several situations, the Supreme Court has recognized that speech regulations can be more easily justified if the speech is targeted at a specific individual. In *Frisby v. Schultz*, the Court upheld a Wisconsin city's ordinance that prohibited picketing targeted at a specific residence. The picketing, the Court explained, was "narrowly directed at the household, not the public."¹⁹² The activities of the picketers were designed to "intrude upon the targeted resident, and to do so in an especially offensive way."¹⁹³

Frisby's reasoning is applicable to a public accommodations environment. A proprietor's hostile speech that is targeted to a specific patron is, like the speech at issue in *Frisby*, obviously not intended for the public, and does in fact intrude upon the targeted patron in an especially offensive way.¹⁹⁴ Moreover, hostile proprietor speech is not likely to be valuable, because it is targeted at an individual who is highly unlikely to be persuaded or informed by it.¹⁹⁵ Using similar reasoning, the Court in *Frisby* upheld a ban on

¹⁹¹ See Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 94, at 1863 (proposing a similar distinction between targeted and non-targeted speech for purposes of workplace hostile environment harassment law, and noting that *Frisby* provided support for the distinction).

¹⁹² *Frisby v. Schultz*, 487 U.S. 474, 486 (1988).

¹⁹³ *Id.*

¹⁹⁴ *Frisby* is only one thread in the doctrinal tapestry; standing alone, it fails to provide adequate justification for my proposed standard. The regulation at issue in *Frisby* was not viewpoint-based (the ordinance prohibited all targeted picketing, whatever the subject matter), and the picketing invaded the privacy of the home (a context in which the court has been more willing to uphold speech restrictions, on the theory that people should not be subjected to unwanted speech within their own homes).

¹⁹⁵ See Part IV(B).

targeted picketing because the picketing was “directed primarily at those who are presumptively unwilling to receive it.”¹⁹⁶

In *Ohralik v. Ohio State Bar Association*,¹⁹⁷ the Court upheld an Ohio state bar regulation prohibiting lawyers from soliciting clients in person. The Court noted that there were compelling reasons to subject in-person lawyer solicitation to greater regulation than advertising to the public at large.¹⁹⁸ In-person solicitation could pressure recipients to make uninformed decisions that they might later regret.¹⁹⁹ While not mentioned explicitly, the court’s decision seems to turn in part on the personal invasiveness often associated with in-person solicitation. The soliciting lawyer in *Ohralik* visited one prospective client, Carol, while she was lying in traction in a hospital room after having been involved in a serious car accident.²⁰⁰

The hospital patient in *Ohralik* and the customer subjected to hostile proprietor speech are in conceptually similar situations. Both face unwanted speech in circumstances in which they are potentially vulnerable—the injured, emotionally traumatized hospital patient is exposed to the potentially unwelcome solicitations of a fast-talking lawyer; and the patron in the public accommodation faces the unpleasant surprise and potential embarrassment of encountering hostile speech when she expected to receive polite customer service.²⁰¹

¹⁹⁶ *Frisby*, 487 U.S. at 488.

¹⁹⁷ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 467 (1978). I realize that *Ohralik* involved commercial speech which is subject to a lesser degree of constitutional protection, whereas the speech I propose regulating is not commercial since it does not propose a business transaction. However, even though the holding in *Ohralik* is not literally applicable to my proposed standard, I still believe the decision provides valuable support for the suggestion that targeted speech may be more easily regulated than speech that is not targeted.

¹⁹⁸ *Id.* at 460–61.

¹⁹⁹ *Id.* at 465.

²⁰⁰ *Id.* at 450.

²⁰¹ In *In re Primus*, the Court held that a public interest lawyer had a constitutional right to solicit a client by mail. *In re Primus*, 436 U.S. 412, 439 (1978). But the solicitation via mail that occurred in *In re Primus* was far less invasive than the direct, face-to-face solicitation involved in *Ohralik*.

B. PROPOSED STANDARD WILL NOT INHIBIT ROBUST EXCHANGE OF IDEAS

As stated most eloquently by Justice Holmes, one of the principle functions of the First Amendment is to allow truth to prevail through a free exchange of ideas:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.²⁰²

Professor Nimmer refers to this justification for the First Amendment as the “enlightenment function.”²⁰³ The Court has emphasized the First Amendment’s enlightenment function in numerous cases.²⁰⁴

Central to the enlightenment function is the freedom to attempt to persuade others of the validity of one’s ideas. However, it is highly unlikely that listeners subjected to the kind of hostile speech prohibited by the proposed standard will alter their opinions in response to that speech. Professor Volokh makes this same point while arguing for regulation of targeted hostile speech in the

²⁰² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁰³ MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* §1.02 (Release No. 7, Nov. 1992).

²⁰⁴ See, e.g., *Eisenstaedt v. Baird*, 405 U.S. 438, 457 (1972) (Douglas, J., concurring) (“However noxious Baird’s ideas might have been to the authorities, the freedom to learn about them, fully to comprehend their scope and portent, and to weigh them against the tenets of the ‘conventional wisdom,’ may not be abridged. Our system of government requires that we have faith in the ability of the individual to decide wisely, if only he is fully apprised of the merits of a controversy.”); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”); *United States v. A.P.*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Learned Hand, J.) (“[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many that is, and always will be, folly; but we have staked upon it our all.”).

workplace: "A black employee who is told that he is a 'nigger' is unlikely to become convinced of anything."²⁰⁵

In many (if not most) instances, the purpose of hateful proprietor speech is not principally to communicate ideas, but rather to drive unwanted patrons from the premises.²⁰⁶ My proposed standard permits the government to regulate hostile proprietor speech if the government can prove that the proprietor's hostile speech is intended to drive away patrons, rather than to communicate ideas. In determining proprietor intent, courts should look to the totality of the circumstances, relying upon common-sense norms of human interaction to assess the true character of the situation.

For example, if the proprietor yells hateful remarks in a loud voice at a patron the moment the patron enters the accommodation, that suggests that the proprietor's motive is to drive the patron away from the store. Alternatively, returning to Professor Gates' hypothetical, suppose the proprietor tells a black college freshman that he is the "beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one."²⁰⁷ When the deeply offended black customer gets up to leave, the proprietor encourages him to remain, saying "I know that this idea probably hurts your feelings, but if you stay and listen to me, I think I can persuade you why I have your best interests at heart." Examining the totality of these circumstances, the proprietor's motive is to gain a convert for his ideas about the harmfulness of affirmative action, not to drive the black customer out of the accommodation.

C. PROPOSED STANDARD RELIES ON THE SPEAKER'S INTENT

Some speech is constitutionally protected in some circumstances but not others. Under *Brandenburg v. Ohio*, for example, the

²⁰⁵ Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 94, at 1863.

²⁰⁶ The analysis becomes difficult because proprietors may have multiple motives for engaging in hateful speech. In uttering hateful remarks, a proprietor may seek both to (1) communicate his feelings of hatred towards members of a particular race or gender because he enjoys inflicting pain upon others and (2) cause the patrons to become so uncomfortable that they will depart from the premises. It is, of course, very difficult to determine which motive predominates in any given case.

²⁰⁷ See Gates, *supra* note 128, at 45.

state can proscribe “advocacy . . . of law violation” if the “advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁰⁸ Whether speech is protected depends on the speaker’s intent, which means that the identical statement could be protected when said by Speaker A but unprotected when said by Speaker B. Speech of this kind can be classified as “dual-use material,”²⁰⁹ because the speech has constitutional value in some instances but not in others. For example, speech advocating the necessity of assassinating certain political figures might be constitutionally protected advocacy if spoken at a conference on political theory. But the identical speech spoken to an angry mob standing in front of the political figure’s house is unprotected incitement.

An ideal standard would protect all the speech that has constitutional value while suppressing all the speech that does not. But crafting a rule that successfully suppresses all instances of speech lacking constitutional value, which at the same time does not suppress some constitutionally valuable speech, proves very difficult in practice. Regulations of dual-use speech always risk exerting a “chilling effect” upon constitutionally valuable speech, because some speakers might be deterred from speaking out of fear of punishment.

Examining the speaker’s intent allows courts to distinguish between the circumstances in which speech has constitutional value and those in which it does not. For example, in *Virginia v. Black*, the Court relied upon an intent standard to determine the circumstances in which Virginia’s ban on cross-burning could constitutionally be enforced. The speech at issue in *Virginia v. Black* is another example of dual-use speech: “The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech.”²¹⁰ Burning a cross to intimidate a black person is speech without constitutional value, since the speech’s sole purpose is intimidation rather than communicating ideas. By contrast, burning a cross to express solidarity among

²⁰⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²⁰⁹ I adapt this term from Eugene Volokh, *Crime-Facilitating Speech*, 57 *STAN. L. REV.* 1095, 1105 (2005).

²¹⁰ *Virginia v. Black*, 538 U.S. 343, 365 (2003).

members of the Ku Klux Klan is speech that, while deeply repugnant, nonetheless has constitutional value.

Hostile proprietor speech is well-suited to an intent standard.²¹¹ Like the cross-burning at issue in *Virginia v. Black*, this speech is dual-use. A proprietor who lectures a black college student on the evils of affirmative action may be intending to drive the student away, by implying that as a beneficiary of affirmative action the student isn't qualified to attend the university. But it's equally possible that the proprietor may be intending to communicate ideas. And if the black college student is an admirer of Justice Clarence Thomas²¹² and believes that affirmative action does its recipients more harm than good,²¹³ he or she would perceive the proprietor's speech as affirming, not hostile.

Of course, determining the speaker's intent and distinguishing between protected and unprotected speech may not always be easy. The difficulty becomes particularly apparent when the ideas a speaker seeks to communicate are offensive to nearly all members of a protected category. Recall Cleveland restaurant owner Brahim Ayad, who claims that his Palestinian father's land was stolen by "evil-doing Zionists."²¹⁴ Ayad's restaurant contains a large mural of Hitler with "the star of David branded into his up-raised hand."²¹⁵ Suppose that Ayad makes a point of telling every Jewish customer he sees that the state of Israel should be eliminated so that the land can be given back to the Palestinians. Is Ayad trying to communicate an offensive but deeply-felt idea? Or is he trying to

²¹¹ For a proposal applying an intent standard to distinguish between protected and unprotected speech in the similar context of hostile work environments, see Robert Austin Ruescher, *Saving Title VII: Using Intent to Distinguish Harassment from Expression*, 23 REV. LITIG. 349 (2004).

²¹² See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) ("But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence These programs stamp minorities with a badge of inferiority . . .").

²¹³ See, e.g., Sander, *supra* note 131, at 371 (arguing that affirmative action "produces more harms than benefits for its putative beneficiaries").

²¹⁴ See Guth, *supra* note 143.

²¹⁵ *Id.*

make the Jewish customer angry in order to drive him or her out of the restaurant?

The difficulty of determining Ayad's motive is not reason to conclude that the intent standard is unworkable. In any given case, it may also be difficult to determine if the KKK's cross-burning is intended to intimidate blacks or is intended as an expression of KKK solidarity—particularly given that the KKK's solidarity as a group derives from its members' shared goal of violently exterminating blacks. Despite these difficulties, the Supreme Court correctly concluded in *Virginia v. Black* that an intent standard was a workable method of distinguishing between protected and unprotected speech.

The intent standard successfully distinguishes between protected and unprotected speech in the public accommodations context as well. Examination of the totality of the circumstances, required by the proposed test, usually sheds light on the speaker's intent. For example, if Ayad communicated his ideas about exterminating Israel only to customers dressed in orthodox Hasidic clothing, that would suggest that his intent was to anger the customer and drive him out of the restaurant. Alternatively, if Ayad communicated his ideas to all customers, that would suggest his intent was to persuade others of the validity of his beliefs.

D. COMPARISON TO THE WORKPLACE DEMONSTRATES BASIS FOR SOME PUBLIC ACCOMMODATIONS REGULATION

If the characteristics which allow speech to be regulated in the workplace are also present in public accommodations, the case for hostile environment regulation is compelling. On the other hand, to the extent that public accommodations differ from the workplace, the workplace hostile environment regulations cannot justify similar regulations in the public accommodations context.

Some features of public accommodations suggest that there is a stronger case for hostile environment regulation in the public accommodations sphere than in the workplace. In the workplace, employees see each other every day, and therefore have the opportunity to engage in long-running discussions in which one employee may persuade another to alter his or her opinions. The chances of similar persuasion taking place between a public accommodations proprietor and patron are much lower, since encounters between patrons and proprietors are brief and usually

limited to completing commercial transactions. Since the likelihood of robust debate and meaningful conversation is greatly reduced in the public accommodations context, public accommodations regulations would suppress far less speech than comparable regulations in the workplace. Because a great deal of speech can be justifiably regulated in the workplace context, it stands to reason that regulations affecting far less speech in a public accommodations context would also be valid.

However, the workplace possesses other features suggesting that the need for workplace hostile environment regulation is far greater than the need for similar public accommodations regulation. Employees in the workplace are more captive than patrons of public accommodations. An employee cannot leave a job without suffering serious economic and psychological consequences. In contrast, a patron can leave a public accommodation such as a restaurant, park, or library relatively easily. This fact suggests that there is a more pressing need for protecting workers from hostile speech, since there is no way they can avoid the speech without severely disrupting their lives.

One commonality between the workplace and a public accommodation is that both exist primarily to facilitate economic transactions. People go to work to make money; they go to bars, restaurants, and concert halls to spend money. As commentators have pointed out, speech regulations in transactional settings are constitutionally permissible.²¹⁶ But the fact that transactional speech—speech employed to facilitate a commercial transaction²¹⁷—can be regulated does not explain why hostile proprietor speech which doesn't relate to the transaction can be regulated as well.²¹⁸ For example, consider a proprietor who asks a Jewish pa-

²¹⁶ Smolla, *supra* note 63, at 187. Smolla argues that in the course of regulating a commercial transaction, the government can regulate speech used to effectuate the transaction. Examples include the government's regulation of the language that may be used on promissory notes or in investment prospectuses. *Id.*

²¹⁷ *Virginia State Bd. of Pharmacy v. Virginia Consumers Counsel*, 425 U.S. 748, 762 (1976).

²¹⁸ Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 94, at 1824.

tron "What can I get you to drink, you Christ killer?"²¹⁹ The first part of the sentence ("what can I get you to drink") is speech facilitating a commercial transaction, but the second part ("you Christ killer") is hostile environment speech completely unrelated to the transaction. The fact that the government can regulate the speech relating to the commercial transaction should not justify regulation of the non-transactional elements of the speech.

The proposed standard provides a solution to this problem. As mentioned previously, the proposal regulates hostile proprietor speech only when it is clear, based on the totality of the circumstances, that the proprietor's speech is intended to drive away the patron. In situations where the totality of the circumstances indicates that the proprietor's intent is to drive the patron away, the hostile speech is the functional equivalent of saying "Go away; I don't want to do business with you." Thus, where proprietor intent is established, hostile speech is transactional, in the sense that the speech is the proprietor's refusal to do business with a particular customer.

The intent prong is necessary because it is not fair to assume that all hostile proprietor speech is shorthand for "get out of my store." Perhaps a tactless proprietor who asks a black customer why she doesn't go back to Liberia is genuinely curious about the answer.

Most commentators agree that there is no First Amendment bar to imposing liability on a proprietor who refuses to sell goods to a customer because of the customer's race, even if this refusal is achieved through the statement "my merchandise is not for sale to African Americans." According to Kent Greenawalt, statements such as "I refuse to sell goods to you" or "get out of my store" are situation-altering utterances. Situation-altering utterances "do not dominantly involve claims of fact or value," but rather are "a means of changing the social context in which we live."²²⁰ Situation-altering utterances are not protected by the First Amendment, because they "are ways of doing things, not of asserting things."²²¹ Therefore, the proprietor who says "my merchandise is not for sale

²¹⁹ This hypothetical is based on *Weiss v. United States*, 595 F. Supp. 1050, 1053 (E.D. Va. 1984) (employees created hostile environment for Jewish co-worker through a variety of hostile insults).

²²⁰ KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 57 (1989).

²²¹ *Id.* at 58.

to African Americans" does not escape liability simply because his discriminatory conduct is achieved through speech.

There is an important yet subtle difference between this argument, and my rejection of the "speech as conduct" argument (the claim that speech can be restricted whenever it has the same harmful effects as conduct that may be legitimately proscribed, discussed in Part II(B)). The reason that hostile proprietor speech intended to drive patrons away can be regulated is not because that speech has the same harmful effect as the proprietor's conduct of physically shoving an unwanted patron out the door. Rather, the speech is subject to regulation because the proprietor's intent in using it is to get rid of the patron. Unless the human relations commission can clearly establish that the proprietor spoke with such intent, the speech is entitled to First Amendment protection.

For example, in *Etienne v. Chaet's Vac-Video-TV*, discussed previously, proprietor Chaet told Etienne "Who are you to come into my store and tell me what to do. Why don't you go back to your country?"²²² If Chaet had made this statement the moment Etienne entered the store and asked for service, the totality of the circumstances would indicate that Chaet's intent was to drive Etienne away. In fact, Chaet made the statement after a heated dispute with Etienne, indicating that the intent of the statement was not to deny Etienne service. The statement was instead an expression of Chaet's frustration that Etienne had refused to pay for repair work that had been performed on his vacuum cleaner.

Under the argument that speech may be restricted whenever it has the same harmful effect as proscribable conduct, the intent prong of the proposed standard would be unnecessary. Chaet's statement "Why don't you go back to your country?" could be regulated regardless of the circumstances in which he said it, since it probably doesn't matter to Etienne whether Chaet's remarks came after a dispute over services or at the moment Etienne entered the store. In both cases, Etienne would experience roughly the same harm, and he would likely never return to Chaet's store. The "speech as conduct" argument focuses only on the harm to Etienne, whereas the proposed standard examines the proprietor's intent.

²²² *Etienne v. Chaet's Vac-Video-TV*, 2003 WL 22056881, at *2 (Mass. Comm'n Against Discrimination 2003).

V. CURRENT FIRST AMENDMENT DOCTRINE ALLOWS FOR ADEQUATE REGULATION OF HOSTILE PATRON SPEECH

In addition to regulating proprietor speech, some courts require proprietors to control the speech of their patrons. Proprietors who fail to take action to suppress the offensive speech of patrons are subject to liability for acquiescing to the existence of a hostile environment.

Like proprietor speech, hostile patron speech can be either targeted or non-targeted.²²³ *Targeted hostile patron speech* occurs when a patron directly insults another patron. *Non-targeted hostile patron speech* occurs when one patron overhears the hostile speech of another patron, or when a patron is exposed to a hostile message on another patron's t-shirt.

As I explain in this section, the government can regulate targeted hostile patron speech under current First Amendment jurisprudence when that speech rises to the level of fighting words. Fighting words have minimal constitutional value, particularly when they are spoken to members of protected categories who do not want to hear them. Therefore, courts can and should continue to allow hostile public accommodations laws to suppress hostile patron speech rising to the level of fighting words.

Non-targeted hostile patron speech is a different matter. This speech has constitutional value, because it communicates ideas to potentially willing recipients. In addition, although members of protected categories may occasionally face unwanted exposure to this speech—through overhearing others' conversations, or viewing t-shirts with hostile messages—the harm resulting from this exposure is not nearly as severe as the harm occurring through exposure to targeted insults.

²²³ See *supra* table and accompanying notes 41-49 (overview of the four categories of hostile speech).

A. TARGETED HOSTILE PATRON SPEECH

*Neldaughter v. Dickeyville Athletic Club*²²⁴ is a good example of targeted hostile patron speech. In *Neldaughter*, the Wisconsin Equal Rights Division held that the organizers of an informal community softball league could be held liable for the hostile comments that spectators made to players of one of the participating softball teams, if the organizers failed to take action to suppress the hostile speech.²²⁵ Stacie Neldaughter, a lesbian, organized a softball team to participate in the Dickeyville Athletic Club softball league.²²⁶ Whenever Neldaughter's team played in the tournament, spectators as well as players on other teams shouted insulting comments, such as "fag," "dyke," "queer," "go home," and "she's got AIDS."²²⁷

An Administrative Law Judge concluded that Neldaughter was "subjected to harassment based on her sexual orientation by the spectators and opposing players at the softball games her team played."²²⁸ The ALJ reasoned that the players' and spectators' remarks "created a hostile environment that had the effect of denying the full and fair enjoyment of the softball diamond to Neldaughter."²²⁹ The organizers of the tournament escaped liability only because it was unclear whether they had authority to control the spectators because the organizers did not own the softball diamond where the games were played.²³⁰

Unlike proprietors, patrons engaging in hostile speech do not themselves face liability. Instead, it is the proprietor who faces liability if he or she fails to suppress the hostile speech of patrons. Even though it is the proprietor, rather than the government, that regulates hostile patron speech, the patron's First Amendment rights are still implicated. This is because the proprietor's motivation for regulating patron speech stems from a fear of government-imposed liability.

²²⁴ *Neldaughter*, Equal Rights Div. No. 9132522 (Wis. Dep't of Indus., Labor & Human Relations June 26, 1992) [hereinafter *Neldaughter I*], *aff'd*, *Neldaughter*, Equal Rights Div. Case. No. 9132522, at 2 (Wis. Labor & Indus. Review Comm'n May 24, 1994) [hereinafter *Neldaughter II*].

²²⁵ *Neldaughter II*, *supra* note 224, at 2.

²²⁶ *Neldaughter I*, *supra* note 224, at 2.

²²⁷ *Id.* at 3.

²²⁸ *Id.* at 6.

²²⁹ *Id.*

²³⁰ *Neldaughter II*, *supra* note 224, at 4-5.

Of course, proprietors are free to restrict the speech of their patrons in whatever ways they see fit,²³¹ and many proprietors voluntarily regulate hostile patron speech in order to maintain the pleasant atmosphere necessary to attract more business. But the government cannot circumvent the patron's First Amendment rights simply by requiring proprietors to suppress patron speech the government does not like.²³² In *Peterson v. City of Greenville*,²³³ the Court invalidated the government's similar attempt to circumvent the Constitution. A Greenville city ordinance required restaurants to be segregated.²³⁴ Attempting to comply with the ordinance, a restaurant manager refused to serve ten black customers.²³⁵ The Court concluded that the city had violated the customers' equal protection rights; although it was the

²³¹ See, e.g., *Noah v. AOL Time Warner*, 261 F. Supp. 2d 532, 546 (E.D. Va. 2003) (citing *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976)) ("[P]laintiff claims that AOL violated his First Amendment rights by issuing him warnings and briefly terminating his account, allegedly in response to his pro-Islamic statements. Yet, even assuming the truth of plaintiff's allegations, the First Amendment is of no avail to him in these circumstances; it does not protect against actions taken by private entities, rather it is 'a guarantee only against abridgment by government, federal or state.'").

²³² Many commentators have reached the same conclusion with respect to Title VII's similar requirement that employers take action to restrict employee speech that contributes to a hostile work environment. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 511-12 (1991) ("The government may no more compel a person to censor the protected speech of those over whom he has control on the ground that the government finds it offensive, than the government may compel a person to express a message that he chooses not to express."); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 689 (1997) ("[W]hen the law condemns employee speech and effectively compels employers to regulate it [through threat of civil liability], as in the case of Title VII's law of discriminatory harassment, we cross the state action threshold and confront constitutional issues . . ."); Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 94, at 1817 ("The government cannot escape First Amendment scrutiny for its speech restriction by forcing someone else, on pain of liability, to implement that restriction."); Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 400 n.5 (1996) (same).

²³³ 373 U.S. 244 (1973).

²³⁴ *Id.* at 246-47.

²³⁵ *Id.* at 245.

manager who refused service to the customers, the manager was acting pursuant to the city ordinance.²³⁶

Most incidents of hostile patron speech are similar to the hostile speech in *Neldaughter*: patrons insult members of protected categories using fighting words. For example, at a swimming pool a white patron called a black patron a “nigger” and a “mother-fucker,” and told the black patron to “get out of the god-damn pool.”²³⁷ At a university student parade, a group of white fraternity boys pointed at a group of black students and said “Look at that bunch of niggers!”²³⁸ At the all-male Franklin Lodge of Elks, a male member called a female applicant for membership a “fucking bitch.”²³⁹

These kind of targeted fighting words have minimal constitutional value. The speech does not further the First Amendment interest in attempting to persuade others of one’s ideas because the recipients of hostile speech are unlikely to alter their opinions in response to the speech.²⁴⁰ And because the speech is targeted solely to members of protected categories, rather than spoken to the world at large, there is no opportunity for others to respond to or be convinced by the ideas.

Moreover, current First Amendment doctrine allows targeted hostile patron speech to be regulated, albeit not on the basis of its content alone. As mentioned previously in the discussion of *R.A.V. v. St. Paul*,²⁴¹ the presumptive unconstitutionality of viewpoint-based speech regulations does not apply when “a particular content-based subcategory of a proscribable class of speech” is “swept up incidentally within the reach of a statute directed at conduct rather than speech. . . . Thus, for example, sexually derogatory

²³⁶ *Id.* at 248. See also *Traux v. Raich*, 239 U.S. 33 (1915) (holding that state law requiring that at least eighty percent of an employer’s employees be citizens denied non-citizen employee equal protection of the laws; although the employer was free to fire the non-citizen employee at any time, the state could not attempt to force the employer to fire the non-citizen employee).

²³⁷ Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, AM. SOC. REV., Feb. 1991, at 101, 107-8.

²³⁸ *Id.* at 111.

²³⁹ *Marcoux v. Franklin Lodge of Elks*, No. PAS 6079-97 (N.H. Comm’n Human Relations Aug. 4, 1999), <http://www.nh.gov/hrc/decisions/Franklin.html>.

²⁴⁰ See discussion *supra* Part IV(B) (making the same point with respect to targeted hostile proprietor speech).

²⁴¹ See notes 50 to 62 and accompanying text.

'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices."²⁴² In effect, Title VII's purpose justifies the incidental proscription of only a particular subcategory of fighting words, while a statute regulating the same subcategory of fighting words based solely on their content would be invalid.

Inspired by the Civil Rights Act of 1964, hostile public accommodations laws were originally enacted to prohibit proprietors from engaging in discriminatory conduct, such as refusing to admit members of protected categories to their accommodations or providing poor service to members of protected categories. Only more recently have public accommodations laws been construed more expansively, to prohibit proprietor speech that may create a "hostile environment" which denies certain patrons "full and equal enjoyment" of the accommodation. Therefore, public accommodations laws fall within *R.A.V.*'s category of statutes "directed at conduct rather than speech" which can therefore regulate proscribable speech, including fighting words, based on the speech's viewpoint.

Some may contend that the broader exception which I've outlined for targeted hostile proprietor speech should apply to targeted hostile patron speech as well. Because hostile patron speech is somewhat less harmful to its recipients than hostile proprietor speech, it should be restricted only to the extent allowed by current First Amendment doctrine, rather than restricted more extensively by the proposed exception.

The harm that stems from hostile proprietor speech is twofold. Most immediately apparent is the emotional harm that stems from the speech itself, but a potentially more pernicious and longer-lasting harm may occur as well. If the public accommodation is one that the patron depends upon for necessities (such as the only grocery store in the neighborhood), the patron may feel compelled to submit to the hostile speech, fearing that if she responded to the speech, the proprietor would prohibit her from patronizing the accommodation. Of course, the proprietor's discriminatory retaliation against the patron would be blatantly illegal, but some patrons may not have access to the legal resources necessary to secure an injunc-

²⁴² *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992).

tion against the proprietor's infringement of their rights. Such patrons may instead be forced into a demeaning, self-effacing cycle of servility, in which they quietly endure the proprietor's hostile speech instead of countering the proprietor's insults with their own. In fact, much of the discrimination in the Jim Crow South occurred precisely through this type of "asymmetrical 'deference ritual' in which blacks were typically expected to respond to discriminating whites with great deference."²⁴³ Functioning "as a symbolic means"²⁴⁴ by which black victims were forced to convey appreciation to their white oppressors, these deference rituals could "be seen in the obsequious words and gestures—the etiquette of race relations—that many blacks . . . were forced to utilize to survive the rigors of segregation."²⁴⁵

Hostile patron speech is unlikely to coerce its recipients into a cycle of servility, simply because recipients know that other patrons cannot prevent them from accessing the accommodation. In addition, unlike hostile proprietor speech, hostile patron speech is typically non-recurring—an encounter with a hostile patron is typically a one-time incident, unlikely to re-occur during future visits to the accommodation.²⁴⁶ Therefore, a recipient of hostile patron speech is less likely to be deterred from continuing to patronize an accommodation than a recipient of comparable hostile proprietor speech.

²⁴³ Feagin, *supra* note 237, at 102.

²⁴⁴ *Id.* (citing Erving Goffman, *The Nature of Deference and Demeanor*, 58 AM. ANTHROPOLOGIST 473, 477 (1956)).

²⁴⁵ *Id.* See generally BERTRAM W. DOYLE, *THE ETIQUETTE OF RACE RELATIONS IN THE SOUTH* (1937).

²⁴⁶ *Neldaughter* presents a notable exception to the generally non-recurring nature of hostile patron speech. See *supra* notes 8, 31-34 and accompanying text. In *Neldaughter*, spectators yelled insults at Stacie Neldaughter's softball team at each game during the season. Informal community sports leagues are more likely to present recurring instances of hostile patron speech, since the same participants play in the league throughout an entire season. However, the hostile speech at issue in informal sports leagues is also more likely to rise to the level of fighting words, which can be regulated under current First Amendment doctrine. It is much more likely that an angry spectator would scream "Shut up, you fucking nigger!" at a spectator, see *Hawaii v. Hoshijo*, 76 P.3d 550, 554 (Haw. 2003), than "Shut up, you undertalented, underprepared beneficiary of a profoundly misguided and disruptive policy of affirmative action!," see *supra* note 128.

B. NON-TARGETED HOSTILE PATRON SPEECH

In 1997, four women applied for membership in the all-male Franklin Lodge of Elks. After narrowly failing to win the two-thirds vote necessary to be accepted for membership, the women sued the Lodge for violating New Hampshire's public accommodations statute.

In one sense, the case presented a fairly straightforward and unremarkable application of basic anti-discrimination law. In fact, the evidence that the Lodge had rejected the women solely because of their gender was so overwhelming that the Lodge did not even contest this point. After determining that the Lodge was a public accommodation, the New Hampshire Commission on Human Rights, followed by the Superior Court and eventually the New Hampshire Supreme Court, did not have much difficulty in finding that the Lodge's denial of the women's applications for membership violated the public accommodations statute.

But the Commission on Human Rights (Commission), in a decision ultimately affirmed by New Hampshire's Supreme Court, went further. The Commission concluded that the women were entitled to \$40,000 in damages²⁴⁷ because they had suffered "emotional harm"²⁴⁸ as a result of derogatory comments made by Lodge members opposed to granting the women membership privileges. Most of these "emotional[ly] harm[ful]" derogatory remarks were not even direct face-to-face insults.²⁴⁹ Instead, they were angry remarks made by lodge members to other lodge members, which the women found out about only because their friends or family members happened to overhear some of the conversations.²⁵⁰

²⁴⁷ Marcoux v. Franklin Lodge of Elks, No. PAS 6079-97, Sec. VII. Award of Damages, Part F. Total Damages (N.H. Comm'n Human Rights June 21, 1999), <http://www.nh.gov/hrc/decisions/Franklin.html>. Because the opinion is not paginated, I refer to specific sections using opinion headings and subheadings.

²⁴⁸ *Id.* at Sec. VII. Award of Damages, Part A. Compensatory Damages.

²⁴⁹ The opinion cites only two examples of direct face-to-face personal insults. One Elks member called complainant JoAnne LaBonte a "fucking bitch," and another Elk member made unspecified "harassing" comments to complainant Renee LaBonte. *Id.* at Sec. V. Analysis.

²⁵⁰ Elks member Alby Morang stated to another Elks member that the only reason women would want to become Elks was that "[t]hey are either cunts or assholes." Elks member Clark Fuller asked complainant JoAnne LaBonte's husband why he couldn't control his "little woman." Elks member David Marceau asked complain-

The Commission asserted that the speech of the lodge members was a form of “unlawful discrimination.”²⁵¹ It went on to list some examples of this “unlawful discrimination”: “[S]everal [Lodge] members made derogatory and anti-female comments . . . about them to other members. . . . Some of the complainants testified about instances of members making harassing remarks to their husbands or friends about ‘controlling their women.’”²⁵² The one “harassing remark”²⁵³ which the Commission found “especially egregious”²⁵⁴ was made to a bartender employed by the Lodge, not to one of the four females suing the Lodge for hostile environment harassment.²⁵⁵

The Commission also cited as an example of “unlawful discrimination” a statement in an Elks’ newsletter that the “‘women’s actions might destroy the lodge.’”²⁵⁶ But given the context in which it was made, this statement could not be fairly construed as hostile anti-female speech—much less “unlawful discrimination,” as the Commission claimed it was. The newsletter’s statement was alluding to the women’s decision to sue the lodge, not to their applications for membership.²⁵⁷ And the statement was not unreasonable. After failing by only one vote to gain the required two-thirds approval for membership, the women did not cooperate with the Lodge leadership’s attempts to hold another vote. Instead, the women “immediately poisoned the well of good feeling, even

ant Renee LaBonte’s fiancée “who wore the pants in the family and told him he was ‘pussy-whipped.’” Other Elks members complained among themselves that the women “wanted to take control and ‘run the lodge.’” *Id.* at Sec. V. Analysis. Elks member Buddy Miller told a bartender employed by the Lodge that “‘If some women would come in and give us blow jobs—we’d let them all in. That’s all they’re good for anyway.’” *Franklin Elks Lodge v. Marcoux*, No. 99-E-353, 2002 WL 33956972, at 5–6 (N.H. Sup. Ct. Aug. 2, 2002).

²⁵¹ *Marcoux v. Franklin Lodge of Elks*, No. PAS 6079-97, Sec. VII. Award of Damages, Pt. A. Compensatory Damages (N.H. Comm’n Human Rights June 21, 1999), available at <http://www.nh.gov/hrc/decisions/Franklin.html>.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ The remark in question was Elks member Buddy Miller’s statement to a bartender that the “‘women can get in if they give us blow jobs.’” *Id.* at Sec. V. Analysis.

²⁵⁶ *Id.* at Sec. VI. Conclusion.

²⁵⁷ *Franklin Elks Lodge v. Marcoux*, No. 99-E-353, 2002 WL 33956972, at 6 (N.H. Sup. Ct. Aug. 2, 2002) (stating that Elks member Samanto Quain wrote in the *Big E News* “that the women wanted to destroy the lodge by bringing this suit”).

among those who supported them,” by announcing that they were going to sue the Lodge and buy new cars with the money they won.²⁵⁸ Ultimately, the lawsuit ended up costing the Lodge \$64,000 (not including attorney’s fees)²⁵⁹ – an amount equal to roughly half its yearly budget.²⁶⁰

The Commission’s decision was affirmed by the New Hampshire Superior Court, which reasoned that the “degrading and humiliating comments”²⁶¹ provided sufficient evidence for the Commission to “conclude that the complainants suffered emotional harm and to award damages on that basis.”²⁶² On appeal, the New Hampshire Supreme Court affirmed, concluding that the “numerous lewd, derogatory and profane comments”²⁶³ that members of the lodge “made about . . . the petitioners”²⁶⁴ constituted “intentional misconduct”²⁶⁵ permitting the imposition of compensatory damages.²⁶⁶

I recount the facts of *Franklin* in detail because the case provides a compelling illustration of the threat to free speech stemming from an expansive reading of a public accommodations statute. Under *Franklin*, proprietors must restrict any patron speech that, if overheard by a member of a protected category, would be perceived as hostile. This requirement applies even if no members of protected categories are present when the hostile remarks are spoken because the possibility always exists that someone might tell the member of the protected category about the hostile speech. (Recall the New Hampshire Supreme Court’s conclusion that liability could be imposed upon the Lodge for “derogatory and profane

²⁵⁸ *Marcoux v. Franklin Lodge of Elks*, No. PAS 6079-79 (N.H. Comm’n Human Rights June 21, 1999) (Loren Jean, Comm., dissenting), available at <http://www.nh.gov/hrc/decisions/Franklin.html>.

²⁵⁹ *Franklin Lodge of Elks v. Marcoux*, 825 A.2d 480, 483 (N.H. 2003) (affirming Commission’s award of \$40,000 in compensatory damages plus attorney’s fees to the four women, as well as Commission’s order that Lodge pay \$24,000 in administrative fines).

²⁶⁰ The Lodge’s yearly budget in 1996, the year before the suit was brought, was \$148,000. *Id.*

²⁶¹ *Franklin Elks Lodge*, 2002 WL 33956972, at 17.

²⁶² *Id.* at 18.

²⁶³ *Franklin Lodge of Elks*, 825 A.2d at 488.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

comments . . . made . . . about the petitioners”²⁶⁷—despite the fact that the petitioners were not even present when the comments were made.) *Franklin* permits proprietors to be subjected to enormous liability if they don’t force their customers to abide by the elementary school adage, “If you can’t say anything nice, then don’t say anything at all.”

While targeted hostile speech that rises to the level of fighting words can be regulated consistent with the First Amendment, non-targeted hostile speech—even if it rises to the level of fighting words—cannot be. The principal justification permitting regulation of targeted fighting words—the state’s interest in preserving order and preventing fights from breaking out—simply does not apply in the context of non-targeted fighting words. As the Court explained in *Chaplinsky v. New Hampshire*, fighting words can be regulated because these words “‘have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.’”²⁶⁸ Where fighting words are not directly spoken to the offended individual, the chances of a “breach of the peace”²⁶⁹ are greatly reduced, if not eliminated entirely.

Permitting regulation of non-targeted hostile patron speech is also inconsistent with fundamental First Amendment values. Restricting speech on the grounds that someone, somewhere, at some unknown future time might find out about it and be offended “turns the First Amendment upside down.”²⁷⁰ The Supreme Court has said that when “the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities ‘simply by averting [our] eyes.’”²⁷¹ If captive auditors in school-board meetings²⁷² or courthouses²⁷³ cannot be shielded from speech

²⁶⁷ *Id.*

²⁶⁸ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (quoting *State v. Brown*, 68 N.H. 200 (1894); *State v. McConnell*, 70 N.H. 294 (1900)).

²⁶⁹ *See id.*

²⁷⁰ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

²⁷¹ *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000) (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)).

²⁷² *See Rosenfeld v. New Jersey*, 408 U.S. 901 (1972).

²⁷³ *See Cohen v. California*, 403 U.S. 15 (1971).

they may find extremely offensive, then, *a fortiori*, people cannot be shielded from learning through a third-party that someone else may have an unfavorable opinion of them.

Moreover, the harm imposed upon members of protected categories by non-targeted hostile patron speech is many orders of magnitude less than the harm imposed upon them by exposure to targeted hostile patron speech. In addition, the quantity of speech regulated by restrictions on non-targeted hostile patron speech is far greater. The combination of these facts lends support to the conclusion that any regulation of non-targeted hostile patron speech violates the First Amendment.

VI. CONCLUSION

Hostile speech, whether it comes from proprietors or patrons, causes very real harm to its recipients. As the court in *American Booksellers Association v. Hudnut* acknowledged, hostile ideas may sometimes prevail:

Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious—the beliefs of the Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others.²⁷⁴

Nonetheless, under “the First Amendment the government must leave to the people the evaluation of ideas.”²⁷⁵ One of the things that separates American society from totalitarian regimes “is our absolute right to propagate opinions that the government finds wrong or even hateful.”²⁷⁶

Consistent with the First Amendment, my proposal “leave[s] to the people the evaluation of ideas.”²⁷⁷ It permits regulation of hostile speech only when that speech is targeted at unwilling

²⁷⁴ *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 327–28 (1985).

²⁷⁵ *Id.* at 328.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 327.

listeners. It leaves proprietors free to communicate their ideas, no matter how offensive, to others who may be persuaded by them. Without doubt, this freedom means that people will be exposed to ideas so repugnant to them that to describe the speech as “provocative and challenging,”²⁷⁸ as the Court did in *Terminiello v. Chicago*, seems a laughable understatement. Yet tolerating the existence of such offensive speech is a fundamental precondition to the operation of the First Amendment. If the fact that speech offends some or even most people “were enough to permit government regulation, that would be the end of freedom of speech.”²⁷⁹

²⁷⁸ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

²⁷⁹ *Am. Booksellers*, 771 F.2d at 330.