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REGULATING WORKPLACE SEXUAL HARASSMENT AND UPHOLDING THE FIRST AMENDMENT—AVOIDING A COLLISION

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I. INTRODUCTION

THE other contributors to this Symposium have ably articulated the governing general principles in evaluating the constitutionality of any "hate speech" regulation—*i.e.*, any regulation of speech that conveys group-based hatred or discrimination. Therefore, I will focus on some hard questions that are posed in implementing these principles in particular factual contexts. Within the American Civil Liberties Union (ACLU), we regularly face concrete situations that force us to wrestle with difficult questions about the specific application of general principles. Although we all share a commitment to free speech and equality principles, we often disagree about how best to foster those values in particular factual settings. Such disagreement is especially acute in factual settings where free speech and equality principles seem to be in tension with each other.

After commenting upon the central, broadly accepted general principles that govern hate speech controversies, this Article will turn to an area in which scholars and judges are just beginning to address the application of these principles: cases alleging that some gender-based hate speech in the workplace constitutes prohibited sexual harassment, violating the equality rights of female employees. This Article concentrates on two recent, much-discussed cases in which the female employees' claims for relief from sexual harassment collide with the free speech claims of other employees or of the employer. These cases are *Robinson v. Jacksonville Shipyards, Inc.*,[1] and the case brought by female employees against Stroh's Brewery.[2] Finally, this Article explains

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1. 760 F. Supp. 1486 (M.D. Fla. 1991). For a discussion of issues related to the *Robinson* case, see *infra* notes 43-61 and accompanying text.

2. For a discussion of the issues involved in the pending litigation against Stroh's Brewery, see *infra* notes 62-68 and accompanying text.

that allowing broader regulation of workplace sexual harassment, beyond the general principles set forth, could well undermine rather than advance women's equality.

II. GENERAL LEGAL PRINCIPLES GOVERNING REGULATION OF CAMPUS OR WORKPLACE HARASSMENT

Before turning to specific controversies concerning the implementation of widely accepted general principles governing hate speech regulation, I would like to elaborate upon some key aspects of these general principles.

A. *Free Speech Principles*

Most importantly, there is broad consensus within the legal community that hate speech in a public forum is and should be protected. This consensus is epitomized by the legal community's reaction to the famous (or, for some, infamous) *Skokie* case.[3] In that case, which occurred in the late 1970s, the ACLU championed the free speech rights of a small group of neo-Nazis to stage a peaceful demonstration in front of the Village Hall in Skokie, Illinois. Because Skokie contained a large Jewish population, many of whom were Holocaust survivors, the proposed demonstration generated much controversy among the Jewish community in particular and among the public more generally. From a legal perspective, though, the case was simple. With a single exception—a trial court judge in the Illinois state judicial system (who soon had to run for re-election)[4]—every one of the many state and federal court judges to rule on the case held that the First Amendment protected the free speech rights of the neo-Nazis.[5]

3. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); Village of Skokie v. National Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978). For an excellent account of both the specific Skokie controversy and the general issues it raised, see ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979).

4. *See* Village of Skokie v. National Socialist Party of Am., 366 N.E.2d 347, 349 (Ill. App. Ct. 1977) (noting that circuit court judge, in unpublished order, had enjoined defendant from conducting demonstration in Skokie), *aff'd in part, rev'd in part*, 373 N.E.2d 21 (Ill. 1978).

5. *Village of Skokie*, 366 N.E.2d at 347 (holding prior restraint of demonstration unconstitutional), *aff'd in part, rev'd in part*, 373 N.E.2d 21 (Ill. 1978) (concluding that swastika is symbolic speech with First Amendment protection); *see also* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.) (determining that ordinances enacted by Skokie in further attempt to limit neo-Nazi demonstration violated First Amendment), *aff'd*, 578 F.2d 1197 (7th Cir.) (same), *cert. denied*, 439 U.S. 916 (1978).

Despite differences of opinion regarding other aspects of the hate speech debate, all participants in this Symposium agree with the established, fundamental principle that was reaffirmed in the *Skokie* case: hate speech in a public forum is constitutionally protected. Although Professor Charles Lawrence has urged that certain aspects of the established constitutional principles applicable to hate speech regulation should be modified,[6] he has not questioned the rulings in the *Skokie* litigation. To the contrary, he has explicitly endorsed the *Skokie* holdings protecting the right to express group-based hatred in a public forum.[7] Floyd Abrams in his presentation referred to the 1942 writings by sociologist David Riesman, in which Professor Riesman advocated restrictions on public forum hate speech.[8] However, upon further reflection, Professor Riesman subsequently recanted that position. Specifically, in the late 1970s, Professor Riesman expressed his support of the ACLU's position in the *Skokie* case.[9]

Corresponding to the consensus that hate speech in a public forum should be protected is the consensus that hate speech in certain other settings should not receive First Amendment protections. In particular, in settings where the listeners have important privacy interests, hate speech may not be directed at them, in order to protect those interests. The clearest example of such a setting is the home. Accordingly, the Supreme Court has ruled that some types of expression may be restricted in order to protect the privacy right to be free from unwanted intrusions into the

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6. *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (advocating regulation of certain racially motivated hate speech in non-public forum contexts). *But see* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (responding to Lawrence).

7. *See, e.g.*, Lawrence, *supra* note 6, at 457 & n.103.

8. David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 731 (1942) ("The isolated person is as helpless in the face of systematic defamation by opposing groups (or of destructive non-defamatory falsehoods, for which there is not even a theoretical remedy in many cases), as in the face of concerted economic power."); David Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085 (1942) (discussing defamation laws of Germany, France and England as providing necessary backdrop for discussing regulation of growing fascist group defamation tactics in United States); David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282 (1942) (describing United States libel laws as inadequately controlling fascist hate speech without further government regulation).

9. *See* SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 330, 437 n.23 (1990) (noting that Riesman became member of ACLU "*because* of the ACLU's defense of the Nazis' right to demonstrate in Skokie").

home.[10] However, the Court has held that free speech values may outweigh privacy concerns, even in the home, requiring individuals to receive certain unwanted communications there.[11]

Another type of setting in which the Court has recognized that privacy rights justify restraints on unwanted expression is one where the speaker's audience is "captive." Although the Supreme Court has not precisely defined the concept of a "captive audience,"[12] the definition at least requires that the individuals in question be in a particular place at a certain time to pursue an important purpose.[13] Even so, the Court has recognized that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech,"[14] and therefore the Court has ruled that, in public places, we bear the burden of overlooking expression we find offensive.[15] As Professor Tribe has cautioned, the "captive audience" concept "is dangerously encompassing, and the Court has properly been reluctant to accept its implications whenever a regulation is not content-neutral."[16]

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10. *See, e.g.*, Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970) (upholding statutory right of addressee to compel mailer of erotic material to remove addressee's name from mailing list and stop all future mailings); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (upholding ordinance barring use of sound trucks in "loud and raucous" manner, in part because individual homeowner was "practically helpless to escape" noise).

11. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980) (rejecting "captive audience" objection to utility company's insertion of materials advocating nuclear power development in its billings, reasoning that customers could "escape exposure to the objectionable material simply by transferring the bill insert from envelope to wastebasket").

12. *See* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 88, 121 (1991) (showing how current case law is "riddled with inconsistency and ambiguity," and proposing factors courts should consider in employing captive audience concept and balancing it against free speech interests; goal is to make doctrine "a method of analysis, not just a catchy slogan").

13. *See id.* at 89-103.

14. *Rowan*, 397 U.S. at 738.

15. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-12 (1975) (holding that ordinance banning movies showing nudity on drive-in screens visible from street could not be upheld to protect sensibilities of involuntary passers-by); Cohen v. California, 403 U.S. 15, 21 (1971) (observing that individuals offended by expression on defendant's jacket worn in courthouse corridor "could effectively avoid further bombardment of their sensibilities simply by averting their eyes").

16. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, at 949-50 n.24 (2d ed. 1988). For an argument that the "captive audience" concept should be construed narrowly, see Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken to?*, 67 NW. U. L. REV. 153 (1972). Haiman reasons that

> human beings have a significant ability mentally to reject many assaulting stimuli. The process known as "selective perception" enables us to generally choose what we wish to assimilate from the multitude of sensory bombardments surrounding us. . . . [W]e also have a strong ten-

It could be plausibly argued that the doctrine extends to students who are required to be at particular places on campus to pursue their education and to employees who are required to be at particular locations in the workplace to pursue their jobs.[17] Some courts[18] and commentators[19] have applied the captive audience theory to employees at work. However, a recent article persuasively argues that "the Court has . . . never found that employees in the workplace are 'captive,' and there are good reasons for it not to do so."[20] Moreover, even if employees were reasonably viewed as captive audiences in certain workplace areas, that still would not justify the selective prohibition or punishment of speech based on its content or viewpoint.[21] Therefore,

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> dency to screen out or distort messages that are inconsistent with . . . our current beliefs. . . .
>
> Given these tendencies . . . . one might argue that the possibilities of unwelcome messages penetrating the psychological armor of unwilling audiences are so small that we ought to be worrying more about how to help unpopular communicators get through to reluctant listeners than how to give further protection from speech to those who may already know too well how to isolate themselves from alien ideas.

Id. at 184.

17. Strauss, *supra* note 12, at 100-03.

18. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) ("[F]emale workers . . . are a captive audience in relation to the speech that comprises the hostile work environment."); Resident Advisory Bd. v. Rizzo, 503 F. Supp. 383, 402 (E.D. Pa. 1980) (holding that workers at job site were captive to harassing messages delivered over loudspeakers; only way to avoid speech was to quit jobs).

19. *See* J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 ("Few audiences are more captive than the average worker."); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 36 (1990) ("Employees at work, like residents in their homes, may qualify for captive audience status.").

20. Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1832-33 (1992) (noting that Court has never upheld content-based speech restrictions on "captive audience" rationale outside the home).

21. *See id.* at 1840-43 (citing Supreme Court decisions). Likewise, the ACLU approves of speech regulations to protect captive audiences only when they are content- and viewpoint-neutral. *See* ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION (rev. ed. 1992) [hereinafter ACLU POLICY GUIDE], at Policy No. 43. The policy, entitled *Captive Audiences*, states:

> [T]he First Amendment is not inconsistent with reasonable regulations designed to restrict sensory intrusions so intense as to be assaultive. Reasonable regulations are those that apply only to time, place and manner *without regard to content* . . . . What constitutes a "reasonable" regulation will necessarily vary depending upon such factors as (1) the size of the . . . area involved, (2) the duration [or] frequency with which an individual is in the area . . . , or (3) the extent to which alternatives exist so that the individual can reasonably be called upon to avoid the area . . . . Assaultive sensory intrusions are those that are objectionable

speech could not be selectively punished for conveying discriminatory attitudes toward women or members of racial minorities.

B. *Equality Principles*

The legal community's consensus supporting the foregoing free speech principles is matched by a consensus supporting the right to equality of opportunity regardless of one's membership in certain socially defined groups, including groups defined in terms of race, gender, national origin or religion. Because the pursuit of education and employment facilitates both the exercise of rights and the enjoyment of life, our legal system has consistently recognized that equality values are especially compelling in these contexts. In its landmark ruling in *Brown v. Board of Education*,[22] the Supreme Court stressed the special importance of education, and therefore of eliminating race-based discrimination in education.[23] The special importance of equality in employment was recognized by Congress' passage of Title VII of the 1964 Civil Rights Act, which bars employment discrimination on the basis of race, gender and other invidious classifications.[24]

Meaningful equality of opportunity in the educational and employment spheres requires more than mere non-discrimination at the entry level. It is not enough simply to open the doors of universities and workplaces to African Americans, women and members of other groups that have traditionally been excluded. Meaningful equality of opportunity also encompasses a full chance to participate and to succeed in both arenas. Thus, for

> to the average person because of an excessive degree of intensity, e.g., volume or brightness, and which cannot be avoided.

Id. (emphasis added).

22. 347 U.S. 483 (1954).

23. *Id.* at 493 ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

24. 42 U.S.C. § 2000e-2(a)(1) (1988) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

example, the courts[25] and Congress[26] have recognized that employees should be protected from harassment that is based on their race, gender or other group membership. Likewise, many universities have taken measures to protect students from such harassment.[27]

In both settings, the prohibited harassment may consist of words or expressive conduct.[28] Yet, this expression may be prohibited, consistent with the First Amendment, for several reasons. First, the mere fact that harassing conduct consists in part of expression never has been viewed as sufficient to immunize it from regulation. Even the ACLU, which takes a broad view of the First Amendment, never has argued that the First Amendment protects targeted individual harassment just because it uses the vehicle of expression.[29] Second, as previously indicated, those to whom harassing expression is directed on campus and in the workplace may well constitute "captive audience" members, entitled to protection from unwanted verbal assaults. Finally, conduct that violates the right to equal educational or employment opportunities

25. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1985) ("[A] claim of 'hostile environment' sex discrimination is actionable under Title VII . . . ."); *see also* Horn v. Duke Homes, 755 F.2d 599, 601 (7th Cir. 1985) (holding that "leers . . . obscene gestures . . . [and] lewd comments" constitute sexual harassment); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977) (finding sexual harassment in verbal and physical threats); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (concluding that employee's state of psychological well-being is term, condition, or privilege of employment within meaning of Title VII), *cert. denied*, 406 U.S. 957 (1972).

26. 1991 Civil Rights Act § 101(2)(b), 42 U.S.C.A. § 1981(b) (West Supp. 1992) (prohibiting discrimination in "making, performance, modification, and termination of contracts"), *overruling* Patterson v. McLean Credit Union, 491 U.S. 164, 176-78 (1989) (finding racial harassment not actionable under 1866 Civil Rights Act, which prohibited discrimination in "mak[ing] and enforce[ment]" of contracts; Court interpreted latter term as applying only to contract formation and unlawful dismissal, but not to conditions of employment itself).

27. *See* CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, A SPECIAL REPORT: CAMPUS LIFE, IN SEARCH OF COMMUNITY, 17-23 & app. B, tbl. 8 (1990) (showing that 60% of chief student affairs officers surveyed reported that campuses had written policies on bigotry, racial harassment or intimidation; another 11% reported they were working on such policies).

28. *See, e.g.*, Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 484, 491-98 (1991) (discussing numerous sexual harassment claims in which complained-of conduct was expression); Volokh, Comment, *supra* note 20, at 1800-16 (same).

29. *See, e.g.*, ACLU POLICY GUIDE, *supra* note 21, at Policy No. 72a (*Free Speech and Bias on College Campuses*), discussed and quoted *infra* at text accompanying notes 30-35, and reproduced as Appendix A to this Article; Policy No. 316 (*Sexual Harassment in the Workplace*), discussed and quoted *infra* note 36 and accompanying text.

should not be condoned simply because it includes expressive elements.

The principles outlined thus far, as to which there is broad consensus, may be summarized as follows: hate speech in a public forum is protected, but hate speech that harasses particular individuals in certain other settings, such as the campus or the workplace, may be prohibited. So far, so good. But now we reach the difficult matter of applying these broad principles to particular factual situations. What exactly is harassment? When does expression cross the line from protected free speech to prohibited harassment?

C. *Reconciling Free Speech and Equality Principles*

As is always the case in free speech and other constitutional controversies, the broad governing principles have to be applied in a contextual fashion, sensitive to all the relevant facts and circumstances in each particular case. The ACLU's policies governing verbal harassment on campus and in the workplace provide some helpful guidelines for evaluating whether a specific expression should be protected or not.

For example, the ACLU's policy concerning campus hate speech codes, *Free Speech and Bias on College Campuses*,[30] states that it "does not prohibit colleges and universities from enacting disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy."[31] Although the policy recognizes that these "are imprecise terms susceptible of impermissibly overbroad application,"[32] it provides the following guidance as to their contours:

> [E]ach term defines a type of conduct which is legally proscribed in many jurisdictions when directed at a specific individual or individuals and when intended to frighten, coerce, or unreasonably harry or intrude upon its target. Threatening telephone calls to a minority student's dormitory room, for example, would be proscribable conduct under the terms of this policy. Expressive behavior which has no other effect than to create an unpleasant learning environment, however, would not be

30. ACLU POLICY GUIDE, *supra* note 21, at Policy No. 72a. For the complete text of this policy, see Appendix A.

31. ACLU POLICY GUIDE, *supra* note 21, at Policy No. 72a, at 142a.

32. *Id.* at 142a n.3.

the proper subject of regulation.[33]

The ACLU policy recognizes that, as is true of all speech restrictions, "great care must be taken to avoid applying" campus hate speech codes to protected expression.[34] Accordingly, the ACLU policy stresses that careful, fact-oriented analysis should be undertaken regarding the manner in which any such code is applied, including an examination of "time, place, pattern of conduct, and the existence of an authority relationship between speaker and target."[35]

The ACLU's policy concerning sexual harassment in the workplace also articulates some criteria for the sometimes difficult task of line-drawing between protected expression and prohibited harassment. This policy provides the following definition of proscribable harassment:

> Where conduct or expression is sufficiently pervasive or intense that its effect on a reasonable person in those particular circumstances would be to hinder significantly a person from functioning as an employee or significantly adversely effect mental, emotional, or physical well-being on the basis of sex. Conduct or expression that meets this definition is actionable because of the unique characteristics of the workplace—including the existence of authority relationships, the economic necessity to remain, and the limited opportunity to respond—even though it might not be actionable in other settings. Such behavior need not amount to constructive discharge, and is not immunized because expression is involved. Harassment under this policy is actionable whether or not it was directed at any particular employee.[36]

To summarize the foregoing discussion, whether speech is protected or prohibited turns on its context. Where is the speech taking place? Is it in a public forum or a nonpublic setting? Is it in a place where the audience members have strong privacy interests? What is the relationship between the place where the speech takes place and the audience? Is the audience captive, in that they are required to be in that place? How large is the audi-

33. *Id.*
34. *Id.* at 142b.
35. *Id.* at 142b n.2.
36. ACLU POLICY GUIDE, *supra* note 21, at Policy No. 316.

ence? Is the speech directly targeted at a single individual or a small group of individuals, or is it addressed to a broader group? What is the relationship between the audience and the speaker? Is there a hierarchical relationship? Different constellations of answers to the foregoing questions can lead to differing conclusions as to the protected or unprotected status of the particular speech at issue.

III. APPLICATION OF GENERAL PRINCIPLES TO CLAIMS OF SEXUAL HARASSMENT IN THE WORKPLACE

A. *Overview*

To illustrate the line-drawing questions that are presented in particular factual situations, I would like to discuss two current cases concerning sexual harassment in the workplace. I prefer to focus on the workplace harassment issue, rather than that of campus hate speech, because sexual harassment in the workplace has received far less scholarly or judicial attention. While numerous articles have discussed the appropriate accommodation of free speech and equality concerns in the context of campus hate speech controversies,[37] only a few articles have discussed the parallel question in the context of workplace harassment.[38] Likewise,

37. *See, e.g.*, J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991) (advocating greater ability to regulate racially abusive speech on university campuses than in society at large because of need to protect academic values); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) (discussing proper characterization and extent of campus racism and describing and evaluating various rules enacted to deal with problem); Lawrence, *supra* note 6 (explaining both sides of hate speech—free speech debate and proposing method for regulating hate speech); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991) (using various university racist speech regulations as basis for discussion of First Amendment protections regarding hate speech); Strossen, *supra* note 6, at 494 (maintaining "that equality will be served most effectively by continuing to apply traditional speech-protective precepts to racist speech because a robust freedom of speech ultimately is necessary to combat racial discrimination"); Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1 (1991) (advocating strong First Amendment position regarding hate speech regulation to limit power of censorship); David F. McGowan & Ragesh K. Tangri, Comment, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CALIF. L. REV. 825 (1991) (arguing that public university regulations regarding race-based speech should only be permitted to restrict "fighting words" and certain limited offensive nonpublic speech); Evan G.S. Siegel, Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351 (1990) (exploring legal implications of campus regulations regarding hate speech and concluding that such policies will fail to cure problems at issue).

38. Browne, *supra* note 28, at 545 ("The one circumstance in which expression might be relied upon consistent with the first amendment to support a

although the courts have adjudicated numerous workplace sexual harassment cases in which the complained-of conduct constituted expression,[39] almost none have even acknowledged that the First Amendment was implicated, let alone seriously discussed this aspect of the cases.[40] In contrast, two federal courts recently have ruled on free speech challenges to university codes regulating hate speech.[41]

It seems especially propitious to focus on the intersection of free speech and equality concerns in the context of workplace sexual harassment at this time, for two reasons. First, legal, as well as public, interest in the subject was recently stimulated by Anita Hill's charges that Clarence Thomas had subjected her to such harassment when she worked for him. Second, now that a rich scholarly literature, as well as some judicial decisions, have explored the problem of distinguishing protected hate speech from unprotected harassment on campus, it seems helpful to draw upon those writings to assess the similar problem posed by workplace harassment claims.

To put in perspective some workplace harassment problems that involve relatively difficult accommodations between compet-

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claim of hostile environment is when expression is used to show motive, but the expression may not be used to add weight to the assertion that the environment was hostile."); Strauss, *supra* note 19, at 49 ("Sexist speech [in the workplace] can be regulated . . . consistent with the first amendment so long as the speech is made with discriminatory intent or causes a direct discriminatory effect, or if the offended listener constitutes a captive audience. A ban on non-directed speech which holds no one captive and which does not discriminate would . . . violate the constitution."); Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 452-53 (1991) (concluding that "[w]hen the workplace ratio of men to women, the positions of women within the workplace hierarchy, and the traditional role of women within the workplace or occupation reveals a pattern of male dominance, courts may infer that pinup posters and the like stereotype woman [sic] as sex objects," and violate Title VII); Volokh, Comment, *supra* note 20, at 1846 (recommending that liability be imposed for only that subset of speech creating hostile work environment that speaker knows is offensive and that is directed at employee because of her sex).

39. *See* Browne, *supra* note 28, at 491-98 (discussing numerous sexual harassment claims in which complained-of conduct was expression); Volokh, Comment, *supra* note 20, at 1800-16 (same).

40. *See* Browne, *supra* note 28, at 501 (stating that "[s]urprisingly, the first amendment is seldom invoked" in cases involving offensive expressive conduct in workplace); Horton, Comment, *supra* note 38, at 418 (noting that in *Robinson*, "[f]or perhaps the first time in a sexual harassment case, a court addressed First Amendment issues at length").

41. *See* UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1180-81 (E.D. Wis. 1991) (holding university hate speech rule unconstitutionally overbroad and unduly vague); Doe v. University of Mich., 721 F. Supp. 852, 864-67 (E.D. Mich. 1989) (same).

ing free speech and equality concerns, I would first like to describe two workplace situations that represent the two extremes on the spectrum between clearly protected expression and clearly unprotected harassment. On the one hand, if an employee chooses to read *Playboy Magazine* in the employees' cafeteria during his or her lunch break, that expressive activity should be protected, even if female employees are offended or insulted by it. As the Supreme Court repeatedly has emphasized, the mere fact that expression offends the sensibilities of some who are exposed to it is not sufficient justification for restricting it; if it were, we would have no free speech.[42] On the other hand, if a supervisor repeatedly makes unwelcome sexually explicit overtures to an employee, thus adversely affecting the employee's ability to function effectively at work, that conduct should be unprotected, even though it consists entirely of expression.

In between these extremes, reasonable advocates of free speech and gender equality may disagree about the particular balance to be struck between these two sets of values. For example, suppose a supervisor chooses to decorate his office with *Playboy* pinups that are offensive to his assistant, who is required to spend much of her work time in that office; how should the balance be struck in that situation?

Now let's turn to the two actual cases as to which there has been widespread discussion and disagreement within the feminist and civil liberties communities.

B. Robinson v. Jacksonville Shipyards, Inc.

One set of challenging issues is posed by *Robinson v. Jacksonville Shipyards, Inc.*,[43] in which the United States District Court for the Middle District of Florida upheld claims of sexual harassment on hostile work environment grounds[44] and issued extensive re-

42. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (unanimously holding that public figure may not recover damages for emotional harm caused by publication of ad parody offensive to him); Cohen v. California, 403 U.S. 15 (1971) (overturning breach of peace conviction premised on offensive nature of words on jacket worn in courtroom hallway).

43. 760 F. Supp. 1486 (M.D. Fla. 1991).

44. "Hostile environment" sexual harassment claims are based on Title VII's language prohibiting discrimination "with respect to . . . conditions . . . of employment." 42 U.S.C. § 2000e-2(a)(1) (1988). Guidelines of the Equal Employment Opportunity Commission (EEOC) define such harassment as unwelcome sexual behavior by anyone in the workplace that creates an "intimidating, hostile, or offensive work environment," or has the "purpose or effect of unreasonably interfering with an individual's work performance." 29 C.F.R. § 1604.11(a) (1992).

medial orders. Plaintiff Lois Robinson was one of a "very small number of female skilled craftworkers employed" at the Shipyards.[45] Her allegations of sexual harassment centered around "the presence in the workplace of pictures of women in various stages of undress and in sexually suggestive or submissive poses, as well as remarks by male employees and supervisors which demean women."[46] There was some evidence of several incidents in which the sexually suggestive pictures and comments were directed at Robinson.[47] As to most such pictures and remarks, though, there was no evidence that they were directed specifically at Robinson. Nonetheless, they were the primary evidence upon which the district court relied in finding liability.[48]

The district court's ruling is currently on appeal before the United States Court of Appeals for the Eleventh Circuit. In March 1992, the national ACLU and its Florida affiliate filed a joint *amicus curiae* brief which challenged certain aspects of the lower court's decision as transgressing free speech principles. (Thus, the ACLU brief was in part supportive of, and in part divergent from, the positions of both the female plaintiff and the defendant employer.) Because of the difficulties entailed in applying agreed-upon legal principles to particular factual situations, the national and Florida ACLU organizations engaged in lengthy internal discussions before finalizing the *amicus* brief.

These internal debates received a great deal of media attention, no doubt because they dramatized the difficulty of the free speech and equality issues implicit in many workplace harassment claims. For example, a *USA Today* article on the case was entitled, *Harassment, Free Speech Collide in Florida*, and subtitled, *National and State ACLU Offices Square Off*.[49] The text reads, in part:

> ACLU v. ACLU. Strange but true. The American Civil Liberties Union appears heading for an embarrassing public rift in a landmark case involving free-speech rights. The ACLU of Florida plans to defend the right of shipyard workers to make vulgar comments and hang photos of nude women. . . . The ACLU Women's Rights Project, based in the national office in New York, will file

45. *Robinson*, 760 F. Supp. at 1491.

46. *Id.* at 1490.

47. *Id.* at 1496-99.

48. *Id.* at 1522-32.

49. Dennis Cauchon, *Harassment, Free Speech Collide in Florida: National and State ACLU Offices Square Off*, USA TODAY, Nov. 20, 1991, at 9A.

> a legal brief opposing the Florida group if it doesn't soften its First Amendment position.[50]

The *USA Today* article quotes me as saying that the alleged conflict between the Florida and national offices "shows the wonderful diversity in the ACLU."[51] Spoken like a true politician! In seriousness, though, this point gives me the opportunity to express my wholehearted agreement with Professor Fred Schauer's observation, during his presentation at this Symposium, that there should be free speech about free speech.[52] Far from being embarrassed that there is full and open discussion, including disagreement, within the ACLU, I am proud of that fact. It demonstrates that the ACLU really is committed to freedom of thought and of expression. To the contrary, I would be embarrassed if there were no freedom to debate and to dissent within the ACLU, if the organization really were the calcified monolith that George Bush caricatured during the 1988 presidential election campaign.

Given the complexities of many current civil liberties issues, it is inconceivable that thoughtful civil libertarians would unanimously agree on all the governing principles, let alone on how those principles should be applied to particular factual situations. Thus, the first flaw in the *USA Today* article was its suggestion that there is something embarrassing about disagreement among civil libertarians on how to apply free speech and equality principles to the facts at issue in a workplace sexual harassment case.

The second flaw in the *USA Today* article is its oversimplification of the issues. This is illustrated by a caption that appeared beneath my photograph. The caption said, "Strossen: Believes nude photos not free speech."[53] Obviously that statement is inaccurately oversimplified. As I have explained in the present Article, every free speech issue is fact-specific.[54] Therefore, one cannot make blanket assessments about the protected or unprotected nature of any type of speech. It certainly is not true that nude photographs in the workplace are categorically *un*protected by the First Amendment. Likewise, it is equally untrue that such photographs are generically *protected* by the First Amendment.

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50. *Id.*

51. *Id.*

52. *See* Frederick Schauer, *The Sociology of the Hate Speech Debate*, 37 VILL. L. REV. 805, 806 (1992).

53. Cauchon, *supra* note 49, at 9A.

54. For a discussion of the fact-specific nature of free speech issues, see *supra* text accompanying notes 30-36.

As always in free speech controversies, whether or not nude photographs are protected in the workplace depends on a whole range of contextual factors. There are some situations where such photographs would clearly be protected, others where they would clearly be unprotected, and still others where the photographs' status would be unclear. For example, if male employees repeatedly attached nude photographs to a female employee's locker, or inserted them inside her locker, against her wishes, that conduct—albeit expressive—would clearly constitute unprotected harassment. On the other hand, as previously noted, if individual employees look at nude photographs in a magazine, without directly displaying them to any other employee who does not want to see them, that conduct—even if offensive to some employees—would clearly constitute protected expressive activity.

Only with respect to some situations between these two extremes was there disagreement among ACLU activists about whether the challenged expressive conduct fell on the protected or unprotected side of the line. For example, the management of Jacksonville Shipyards allowed its employees to post nude photographs of women on the walls of common work areas, but forbade the posting of other types of materials in these areas.[55] Under such circumstances, individuals who are committed to both free speech and equality in the workplace might reasonably disagree about whether or not Jacksonville Shipyards employees should be allowed to continue to post nude photographs in the common areas.

On the one hand, one could reasonably argue that the common areas are important arenas in which employees can express themselves through the posting of pictures, and that the photographs were not directly targeted at other employees, hence not constituting harassment. On the other hand, one could plausibly contend that employees can express themselves through posting pictures on their own lockers, and should not be free to impose any unwanted images upon objecting fellow employees, who are forced to see them in the common areas.

The *amicus* brief that the state and national ACLUs submitted to the Eleventh Circuit in the *Robinson* appeal is sensitive to both of these plausible views, and argues for a remedial order that would foster both free speech and equality values. The brief reads, in pertinent part, as follows:

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55. *Robinson*, 760 F. Supp. at 1493-94.

> [T]he Order bans the public display of "sexually suggestive" materials without regard to whether the expressive activity is directed at any employee. . . . For this reason, *amici* suggest that, as written, this remedial provision is overbroad. However, in light of the fact that [Jacksonville Shipyards] has itself historically banned all public displays of expressive activity *except* sexual materials, this Court may wish to consider the imposition of a workplace rule that would right the balance—i.e., encourage freedom of expression while reducing the one-sidedness of the visual environment. Such a rule could require the employer, if it permits the posting of sexual materials, also to permit the posting of other materials—materials critical of such sexual expression, as well as other political, religious or social messages, which are currently banned in the Jacksonville Shipyards workplace. Good faith implementation of such a rule would require the employer to ensure fair access to all competing messages. Such a rule would implement a "more speech" approach to counter offensive speech, and would offer increased opportunity for expression while providing alternatives to those who find certain expression objectionable.[56]

Throughout, the ACLU *amicus* brief in *Robinson* strikes an appropriate balance between equality and free speech concerns, carefully distinguishing between protected speech and punishable harassment. The thrust of the brief is captured in its Summary of the Argument section, which reads as follows:

> The proper standard of liability for "hostile work environment" sexual harassment under Title VII must be carefully crafted to reconcile the First Amendment's guarantee of freedom of speech and the right to be free from sexual harassment in the workplace. In this case the relevant conduct as alleged by Robinson [the plaintiff] consisted entirely of obnoxious and offensive speech or other expressive activity. However, expressive activi-

56. Brief for Amicus Curiae, American Civil Liberties Union Foundation of Florida, Inc. and American Civil Liberties Union, Inc. at 21-22, Robinson v. Jacksonville Shipyards, Inc. (No. 91-3655) (filed with 11th Circuit on Mar. 9, 1992).

ties cannot constitutionally be held to be unlawful "harassment" simply because of their offensiveness. . . .

The District Court did not undertake the proper inquiry in determining liability. Instead, the District Court proceeded from the erroneous assumption that expression can constitute harassment merely because an employee finds it offensive. Most of the expression relied on by the District Court for its finding of harassment consisted of sexually explicit pin-ups, pictures, calendars, and remarks, none of which was specifically directed at Robinson. Although there was evidence in the record of comments specifically directed at Robinson, the District Court failed to make such a finding. If it had found evidence of expression directed at Robinson, the District Court's inquiry should have turned to whether Robinson suffered definable consequences that demonstrably hindered or completely prevented her from continuing to function as an employee. The District Court likewise failed to undertake this inquiry.[57]

The ACLU was specifically concerned that three of the district court's remedial orders were overbroad and therefore violative of First Amendment protections. The brief explained:

Certain aspects of the District Court's remedial order are not narrowly tailored, and therefore violate the First Amendment. First, the Order bans possession, reading and privately displaying "sexually suggestive" materials. Second, it prohibits jokes and other comments "in the presence" of any employee who objects. Third, it bans the public display of "sexually suggestive" materials without regard to whether they are directed at any employee. These provisions amount to a prior restraint on otherwise lawful speech, and are unconstitutionally overbroad.[58]

The court's prohibition on displaying "sexually suggestive" materials extended to a breathtakingly broad range of pictures and photographs, given the court's open-ended definition of the central term:

A picture will be presumed to be sexually suggestive if it

57. *Id.* at 5-6.
58. *Id.* at 6.

> depicts a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body.[59]

This sweeping definition encompasses innumerable items that employees might legitimately choose to display or look at, including reproductions of countless artistic masterpieces, numerous women's magazines and photographs of wives or daughters.

The ACLU brief's specific comments regarding the last of the three overly broad remedial orders—the one banning the public display of "sexually suggestive" materials—were excerpted above.[60] Further guidance for drawing a line between protected expression and prohibited harassment is provided by the brief's comments regarding the first two overly broad remedial orders—those banning private displays of "sexually suggestive" materials and jokes in the presence of an objecting employee:

> [The Order] ban[s] possessing, reading, and privately displaying "sexually suggestive" materials. . . . This ban would prohibit employees from keeping pornography in their backpacks or lockers or showing it to others discreetly in the locker room. Moreover, the Order's definition of "sexually suggestive" is unnecessarily broad, as it could be construed to apply to photographs of family and friends. Clearly there is no interest served by these prohibitions, particularly since the banned expressive activity occurs in areas that other employees ordinarily could avoid.
>
> Second, the Order overbroadly enjoins jokes and other speech "in the presence" of any employee who objects. . . . There is a difference between some employees telling jokes that another employee finds offensive, and other employees engaging in such joke-telling every time the offended employee is within earshot, so as to taunt her. The former may be offensive and insensitive, but is protected. The latter could well amount to a directed pattern of harassment. Any remedial . . . order must re-

59. *Robinson*, 760 F. Supp. at 1542.

60. For these comments, see *supra* text accompanying note 56.

flect this distinction.[61]

C. *Sexual Harassment Allegations Against Stroh's Brewery*

In addition to the *Robinson* case, another case alleging sexual harassment in the workplace recently has received substantial media attention. This is the case in which female employees of Stroh's Brewery in St. Paul, Minnesota have charged that a television advertisement for Old Milwaukee beer (which is produced by Stroh's Brewery) contributes to sexual harassment in the brewery, and therefore the advertisement should be taken off the air to remedy the harassment.[62] The advertisement depicts a group of men on a fishing trip who fantasize that Stroh's beer is delivered to them by the Swedish Bikini Team, a group of bikini-clad women. At the time of this writing, the case had not yet proceeded to trial nor resulted in any judicial ruling on the merits.

The plaintiffs' factual allegations suggest that they were the victims of pervasive sexual harassment at the brewery. Plaintiffs allege that they were repeatedly subjected to targeted, unwanted physical contacts and other sexual advances. If the plaintiffs can substantiate these allegations, they should be able to establish liability and to secure a remedial order prohibiting any further harassment in the workplace itself.[63] However, the remedial order could not properly extend to the company's television advertisement. As commercial speech, the advertisement is within the scope of First Amendment protection.[64] Because the com-

61. Amicus Brief at 20-21, *Robinson* (No. 91-3655).

62. Arthur S. Hayes, *Stroh's Case Pits Feminists Against ACLU*, WALL ST. J., Nov. 14, 1991, at B6.

63. *See, e.g.*, Henry J. Reske, *Stroh's Ads Targeted*, A.B.A. J., Feb. 1992, at 20. The allegations include: "being subjected to obscene and sexist comments, pornographic magazines and posters, slaps on the buttocks by male employees, and male co-workers following them home." *Id.* During the investigation, the plaintiffs' attorney, Lori Peterson, had the idea that the company's advertising could be implicated as contributing to the hostile work environment. " 'I thought, [the company is] harassing [the female employees] with [its] own advertising' . . . . To [Peterson], it was crystal clear that the women viewed the advertising as a company endorsement of harassment and that the men used it as a weapon." *Id.*

64. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (holding that ban on attorney's use of illustrations in advertising was unconstitutional); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (concluding that city's general ban on billboards, which affected non-commercial advertising, was unconstitutional under First and Fourteenth Amendments); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (stating that regulation on utility advertising violated First and Fourteenth Amendments); Friedman v. Rogers, 440 U.S. 1 (1979) (deciding that regulation regarding optometry practice advertising was constitutional as means of ensuring fair and full

plaining female employees are not forced to watch the advertisement, it cannot be taken off the air under the "captive audience" rationale.

Therefore, to limit the beer advertisement, one would have to argue that Stroh's airing of it contributes to a climate at its brewery in which women are more likely to be sexually harassed. This attenuated, speculative causal connection between complained-of speech and anti-social conduct is simply too remote to justify suppressing speech. As the Supreme Court has repeatedly held, speech may only be restricted if it causes actual or imminent harm—i.e., if it creates a "clear and present danger" of violence or illegality. For example, the Court has held that advocacy of illegal conduct may not be prohibited on the theory that it might result in such illegal conduct; only intentional incitement of illegal activity, which will imminently cause such activity, may be proscribed.[65]

The argument that Stroh's television advertisements should be suppressed because they might lead to harassment at Stroh's Brewery is an attempt to revive the discredited "bad tendency" test that was used to suppress speech earlier in this century.[66] For example, in decisions that subsequently have been overturned, the Supreme Court sustained convictions of individuals who criticized the United States' role in World War I, on the theory that such criticism might undermine national security.[67] In contrast, at least since its 1969 decision in *Brandenburg v. Ohio*,[68] the Court consistently has insisted that there must be a very close causal

commercial speech); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding that statute restricting pharmaceutical advertising was unconstitutional because such advertising was protected speech under First Amendment).

65. *See, e.g.*, TRIBE, *supra* note 16, § 12-9.

66. *See* Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1130 (1989) (noting that in cases decided in 1920s and 1930s, "the mere 'bad tendency' of offending speech, however remote the consequences, was considered a sufficient constitutional basis for its limitation").

67. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1928) (upholding conviction for distribution of communist leaflet on rationale that it could lead to overthrow of government); Abrams v. United States, 250 U.S. 616 (1919) (noting that speech calling for general strike was threat to national security); Debs v. United States, 249 U.S. 211 (1919) (holding that speech supporting socialism could be regulated to protect nation from internal strife); Frohwerk v. United States, 249 U.S. 204 (1919) (upholding Espionage Act, enacted to regulate speech seen as threat to national security).

68. 395 U.S. 444 (1969) (holding that for speech to be regulated, state must show that it is direct incitement of imminent lawless action and is likely to incite or produce such action).

connection between speech and any harm it will allegedly cause, for such harm to justify suppressing the speech.

IV. OVERLY BROAD RESTRICTIONS ON WORKPLACE SEXUAL HARASSMENT DO NOT EFFECTIVELY ADVANCE, AND COULD WELL UNDERMINE, GENDER EQUALITY

As discussed above, certain narrowly defined categories of hate speech may be prohibited to protect the equality rights of individuals who must be on campus or in the workplace to pursue their educations or their jobs. To broaden the range of prohibited hate speech would not only undermine the central guarantee of free speech, but it also would fail to serve the avowed purpose of advancing gender equality. Overly broad definitions of prohibited harassment or hate speech are at best ineffective in advancing equality, and at worst they are counterproductive.

Throughout American history, measures designed to afford special "protection" to women in the work force have in fact undermined women's full and equal participation. Any overly broad restriction of sexually explicit speech in the workplace that is designed to "protect" female workers would follow in this tradition. As the philosopher George Santayana observed, "Those who cannot remember the past are condemned to repeat it."[69] Accordingly, a brief review of the relevant history is in order.

By the early twentieth century, more than half of the American states had enacted some form of special "protective" labor laws for women workers.[70] Some laws restricted women from entire occupations or limited their hours of work.[71] Other laws granted women benefits that men did not enjoy, including a minimum wage, overtime pay, lunch breaks and rest breaks.[72] The classic defense of gender-based employment legislation intended to aid women workers is contained in the Supreme Court's 1908 decision in *Muller v. Oregon*:[73]

> As minors, though not to the same extent, she ["Woman"] has been looked upon in the courts as needing

69. 1 GEORGE SANTAYANA, THE LIFE OF REASON (1905).

70. JUDITH A. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION 31-33 (1978).

71. ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 185-86 (1982); WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 45 (Barbara F. Reskin & Heidi I. Hartmann eds., 1986).

72. KESSLER-HARRIS, *supra* note 71, at 181-83, 185, 187.

73. 208 U.S. 412 (1908).

> especial care that her rights may be preserved. . . . [S]he is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained.[74]

As the Supreme Court noted in 1973, in actual operation, these "protective" laws "put women, not on a pedestal, but in a cage."[75] This protective labor legislation at best has been only partially beneficial to women; historical evidence reveals compellingly that it has always carried concealed costs, such as the loss of jobs and the depression of women's wages.[76] Moreover, any doctrine resting upon the incomparability of the sexes cannot be confined to circumstances which may at first appear "beneficial"; the principle can always then be used to "justify" the denial of rights.[77] For example, by invoking women's special reproductive role, certain employers have excluded women from high-paying jobs that entail exposure to certain substances that might impair their fetuses, even if the women do not intend to have children, and even though there is evidence that these substances could damage the male reproductive functions as well.[78]

"Protectionist" measures designed to shelter women from sexually explicit expression conform to the general pattern of gender-specific "protectionist" measures by actually operating to women's detriment. Regardless of the benevolent intent of such

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74. *Id.* at 421-22.

75. Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

76. For example, the required eight-hour work day for women (but not for men) resulted in a loss of jobs for women in gender-integrated jobs, probable wage depression for women in gender-segregated jobs and a net loss of employment for immigrant women. *See* BARBARA A. BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 36, 48, 268, 272-77 (1975); Elisabeth M. Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88 J. POL. ECON. 476 (1980).

77. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 494 (1974) (finding that insurance program that excluded pregnancy-related disability was not "invidious discrimination under the Equal Protection Clause").

78. *See, e.g.*, International Union, UAW v. Johnson Controls, 111 S. Ct. 1196, 1197 (1991) (noting that company barred all women, except those with medically documented infertility, from positions involving actual or potential lead exposure); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1546 (11th Cir. 1984) (describing how hospital fired pregnant radiology technician on basis that any exposure to radiation was potentially harmful to fetus); Wright v. Olin Corp., 585 F. Supp. 1447, 1448 (W.D.N.C.) (discussing policy under which corporation classified positions as restricted, controlled and unrestricted; excluded fertile female employees from restricted jobs and limited access to controlled jobs), *vacated*, 767 F.2d 915 (4th Cir. 1984).

measures, they in fact reflect and reinforce a patronizing, paternalistic view of women's sexuality that is inconsistent with women's full equality. This point has been made by feminists in a context highly analogous to the present one: the controversy over whether certain sexually-oriented "pornography," defined as "subordinating" women, should be censored. While some feminists advocate such censorship, others oppose it.

For example, in 1985, the Feminist Anti-Censorship Taskforce (FACT) submitted a brief opposing a city ordinance drafted by feminist pro-censorship advocates Andrea Dworkin and Catharine MacKinnon, which punished "pornography," defined as any "sexually explicit subordination of women through pictures and/or words,"[79] that was "demeaning" to women as a violation of women's civil rights. To the contrary, the FACT brief argued, the Dworkin-MacKinnon ordinance would itself violate women's civil rights.[80] That brief's warning words are also applicable to overly broad restrictions on sexually explicit expression in the workplace:

> The ordinance presumes women as a class (and only women) are subordinated by virtually any sexually explicit image. . . .
>
> Such assumptions reinforce and perpetuate central sexist stereotypes; they weaken, rather than enhance, women's struggles to free themselves of archaic notions of gender roles. . . . In treating women as a special class, [this ordinance] repeats the error of earlier protectionist legislation which gave women no significant benefits and denied their equality.[81]

Significantly, the analogy between the Dworkin-MacKinnon ordinance and overly broad restrictions on sexually oriented expression in the workplace, under the rubric of sexual harassment, has been noted by advocates on both sides of the *Robinson* case. On the one hand, the attorney for Jacksonville Shipyards has re-

79. ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS 36 (1988).

80. *See* Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., in* American Booksellers Association v. Hudnut, 21 U. MICH. J.L. REF. 69 (1987-1988) [hereinafter *FACT Brief*] (arguing that anti-pornography ordinance suppresses constitutionally protected speech in manner particularly detrimental to women, unconstitutionally discriminates on basis of sex and reinforces sexist stereotypes).

81. *Id.* at 122.

lied on[82] the judicial ruling invalidating the Dworkin-MacKinnon ordinance in *American Booksellers Ass'n v. Hudnut*.[83] On the other hand, a recent law review article that supports the *Robinson* ruling argues that, "although the parallels between the cases are inviting, . . . the *Hudnut* First Amendment analysis simply does not apply to sexual harassment cases like *Robinson*."[84]

Putting aside the constitutional law distinctions previously discussed,[85] between measures limiting speech in a public forum (as the Dworkin-MacKinnon ordinance would have done) and those limiting speech in the workplace, the Dworkin-MacKinnon ordinance and restrictions on sexually-oriented workplace expression are united by a common vision of the harm that sexually explicit speech allegedly inflicts upon women. That vision, in turn, reflects a concept of women's unique vulnerability to speech about sex—and, indeed, to sex itself—that many feminists find antithetical to gender equality.[86]

Reflecting the view of many feminists that the Dworkin-MacKinnon approach to sexually-oriented speech undermines equality, in 1991 and 1992 many feminists and feminist groups opposed a proposed congressional statute that embodied the Dworkin-MacKinnon philosophy. The opposing groups included FACT, Feminists for Free Expression and various chapters of the National Organization for Women, including its two largest chapters (in California and New York). For example, Feminists for Free Expression explained:

> Women do not require "protection" from explicit sexual materials. It is no goal of feminism to restrict individual choices or stamp out sexual imagery. . . . Women are as varied as any citizens of a democracy; there is no agreement or feminist code as to what images are distasteful or even sexist. It is the right and responsibility of each woman to read, view or produce the sexual material she chooses without the intervention of the state "for her own good." We believe genuine feminism encourages

82. *See* Trial Brief for Defendants at 44-45, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (No. 86-927).

83. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

84. Horton, Comment, supra note 38, at 408, 433-36.

85. For a discussion of these constitutional law distinctions, see *supra* notes 3-21 and accompanying text.

86. *See, e.g.*, Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. REV. 201 (1987) (reviewing WOMEN AGAINST CENSORSHIP (Varda Burstyn ed., 1985)).

individuals to make these choices for themselves.[87]

There is yet another reason why weakening free speech in the workplace may undermine, rather than foster, gender equality: history has shown that a free speech regime is particularly important to the cause of women's equality. Historically, the suppression of free speech has been a major tactic of the anti-feminist movement. From 1873 until 1971, the Comstock Act was used to suppress information about contraception and abortion.[88] More recently, repeated attempts have been made to ban the feminist magazine *Ms.* from high school libraries,[89] and the Supreme Court has approved the Department of Health and Human Services' "gag rule," which prevents the millions of women who seek health care at federally-funded family planning clinics from receiving full and accurate information about their reproductive options.[90]

Advocates of social change, including feminists, have a special stake in preserving freedom of expression. Therefore, the important goal of promoting meaningful gender equality in employment, including the elimination of sexual harassment, must be pursued through means that are consistent with free speech. In fact, measures that focus on sexually-oriented expression divert attention and efforts from the most significant causes of gender discrimination.

Feminist scholars have identified the following as far more profound sources of women's inequality in employment, as well as in society more generally, than the availability of sexually-oriented expression:

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87. *See* Letter from Ad Hoc Committee of Feminists for Free Expression to the Senate Judiciary Committee 2 (Feb. 14, 1992) (on file with the *Villanova Law Review*).

88. 18 U.S.C. §§ 1461, 1462 (1964) (prohibited use of mail or common carrier to convey article, matter, thing, device or substance to be used to prevent contraception or produce abortion) (amended 1971 to remove "preventing contraception" language; current version at 18 U.S.C. §§ 1461, 1462 (1988)); 19 U.S.C. § 1305 (1964) (prohibited importation of any article regarding prevention of conception or causing unlawful abortion) (amended 1971 to remove "prevention of contraception" language; current version at 19 U.S.C. § 1305 (1988)).

89. *See, e.g.*, Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979).

90. *See* Rust v. Sullivan, 111 S. Ct. 1759 (1991). President Clinton pledged to revoke the "gag rule" and did so as one of his first official acts. *See* Elaine S. Povich, *Clinton Expected to Reverse Federal Policy on Abortion*, CHI. TRIB., Nov. 7, 1992, at C1; Robin Toner, *Settling In: Easing Abortion Policy: Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush*, N.Y. TIMES, Jan. 23, 1993, § 1, at 1.

> [the] sex segregated wage labor market; systematic devaluation of work traditionally done by women; sexist concepts of marriage and family; inadequate income maintenance programs for women unable to find wage work; lack of day care services and the premise that child care is an exclusively female responsibility; barriers to reproductive freedom; and discrimination and segregation in education and athletics.[91]

By targeting the foregoing problems, we can make meaningful contributions to promoting women's equality—at work and in society at large—consistent with free speech. In contrast, in terms of women's equality at work and elsewhere, overly broad restrictions on sexually-oriented workplace speech would do more harm than good.

V. CONCLUSION

Applying general principles governing the permissibility of restrictions on racist or sexist hate speech or harassment requires a sensitivity to factual details and distinctions from case to case. General principles that respect both free speech and equality concerns must be applied to each particular factual context in a way that furthers respect for both sets of concerns. To craft or apply rules that would regulate more broadly than this Article has advocated would disserve the goals of both free speech and equality.

91. *FACT Brief*, *supra* note 80, at 124.

APPENDIX A: ACLU POLICY STATEMENT FREE SPEECH AND BIAS ON COLLEGE CAMPUSES[92]

The significant increase in reported incidents of racism and other forms of bias at colleges and universities is a matter of profound concern to the ACLU. Some have proposed that racism, sexism, homophobia and other such biases on campus must be addressed in whole or in part by restrictions on speech. The alternative to such restrictions, it is said, is to permit such bias to go unremedied and to subject the targets of such bias to a loss of equal educational opportunity. The ACLU rejects both these alternatives and reaffirms its traditional and unequivocal commitment both to free speech and to equal opportunity.

Freedom of thought and expression are indispensable to the pursuit of knowledge and the dialogue and dispute that characterize meaningful education. All members of the academic community have the right to hold and to express views that others may find repugnant, offensive, or emotionally distressing. The ACLU opposes all campus regulations which interfere with the freedom of professors, students and administrators to teach, learn, discuss and debate or to express ideas, opinions or feelings in classroom, public or private discourse.[93]

The ACLU has opposed and will continue to oppose and challenge disciplinary codes that reach beyond permissible boundaries into the realm of protected speech, even when those codes are directed at the problem of bias on campus.[94]

This policy does not prohibit colleges and universities from enacting disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy.[95] The fact that words may be used in connection with otherwise actionable conduct

92. Adopted by ACLU Board of Directors at Board Meeting, October 13-14, 1990, and revised March, 1991.

93. See, generally, ACLU Policies #60, #63, #65, and #71.

94. The ACLU to date has opposed overbroad student speech codes adopted by the University of Connecticut, the University of Michigan, the University of Wisconsin and the University of California.

95. Although "harassment," "intimidation," and "invasion of privacy" are imprecise terms susceptible of impermissibly overbroad application, each term defines a type of conduct which is legally proscribed in many jurisdictions when directed at a specific individual or individuals and when intended to frighten, coerce, or unreasonably harry or intrude upon its target. Threatening telephone calls to a minority student's dormitory room, for example, would be proscribable conduct under the terms of this policy. Expressive behavior which has no other effect than to create an unpleasant learning environment, however, would not be the proper subject of regulation. See Policy # 316.

does not immunize such conduct from appropriate regulation.[96] As always, however, great care must be taken to avoid applying such provisions overbroadly to protected expression. The ACLU will continue to review such college codes and their application in specific situations on a case-by-case basis under the principles set forth in this policy and in Policy #72.[97]

All students have the right to participate fully in the educational process on a nondiscriminatory basis. Colleges and universities have an affirmative obligation to combat racism, sexism, homophobia, and other forms of bias, and a responsibility to provide equal opportunities through education. To address these responsibilities and obligations, the ACLU advocates the following actions by colleges and universities:

> (1) to utilize every opportunity to communicate through its administrators, faculty, and students its commitment to the elimination of all forms of bigotry on campus;
> (2) to develop comprehensive plans aimed at reducing prejudice, responding promptly to incidents of bigotry and discriminatory harassment, and protecting students from any further such incidents;
> (3) to pursue vigorously efforts to attract enough minorities, women and members of other historically disadvantaged groups as students, faculty members and administrators to alleviate isolation and to ensure real integration and diversity in academic life;
> (4) to offer and consider whether to require all students to take courses in the history and meaning of prejudice, including racism, sexism, and other forms of invidious discrimination;[98]

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96. For example, intimidating telephone calls, threats of attack, extortion and blackmail are unprotected forms of conduct which include an element of verbal or written expression.

97. In determining whether a university disciplinary code impermissibly restricts protected speech, there must be a searching analysis both of the code and the manner in which it is applied. Many factors, which are heavily fact-oriented, must be considered, including time, place, pattern of conduct, and the existence of an authority relationship between speaker and target.

98. See ACLU Policy #60, which states: "In the classroom, a teacher should promote an atmosphere of free inquiry. This should include discussion of controversial issues without the assumption that they are settled in advance or that there is only one 'right' answer in matters of dispute. Such discussion should include presentation of divergent opinions and doctrines, past and present, on a given subject. The teacher's own judgment forms a part of this material. If such judgment is clearly stated, students are better able to appraise it and to differ from it on the basis of other materials and views placed at their disposal

> (5) to establish new-student orientation programs and continuing counseling programs that enable students of different races, sexes, religions, and sexual orientations to learn to live with each other outside the classroom;
> (6) to review and revise course offerings as well as extracurricular programs in order to recognize the contributions of those whose art, music, literature and learning have been insufficiently reflected in the curriculum of many American colleges and universities;
> (7) to address the question of *de facto* segregation in dormitories and other university facilities; and
> (8) to take such other steps as are consistent with the goal of ensuring that all students have an equal opportunity to do their best work and to participate fully in campus life.

This policy is issued in connection with, and is intended as an interpretation and enhancement of, the binding resolution on racist speech adopted at the 1989 Biennial Conference. That resolution provides:

> The ACLU should undertake educational activities to counter incidents of racist, sexist, anti-semitic, and homophobic behavior (including speech) on school campuses and should encourage school administrators to speak out vigorously against such incidents. At the same time the ACLU should undertake educational activities to counter efforts to limit or punish speech on university campuses.

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than they would be if a teacher were to attempt to conceal bias by a claim to 'objective' scholarship. No set procedures for conduct of a class or for use of materials can guarantee the teacher's own integrity or take its place." [Board Minutes, January 26-27, 1991.]