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Sexual Harassment in the Workplace: Accommodating Free Speech and Gender Equality Values

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I am deeply honored to participate in this important, stimulating gathering. I actually read through the entire convention catalogue, with its descriptions of the more than 700 programs you have scheduled. This provided a fascinating overview of the many diverse issues that your members are exploring—a true intellectual feast!

I must admit, it is a little intimidating to be giving a speech before an audience of professional speech teachers and critics! I hope you will judge my performance charitably, recognizing that I have far less formal training in public speaking than many of you. Contrary to the article about me that appeared in the September, 1992, issue of the Association's publication, *Spectra*, I did not do any college-level debating. Not that I didn't want to or try to; I certainly did. But I went to Harvard-Radcliffe College back in the days before coeducational living. While all our classes were coeducational, extracurricular activities such as debate were based in the male-only residential houses at Harvard College, while all female students lived at Radcliffe College.

Therefore, in one fell swoop, I was denied both equality rights and free speech rights. This experience was certainly my loss, but perhaps it was the ACLU's gain; experiences such as this certainly shored up my resolve to become a human rights activist! Looking back on such experiences twenty-five years later, I realize how much progress has been made, even in one generation. That is an encouraging perspective, and counters my sometimes overwhelming awareness of how much progress is yet to be made.

Dedication to Charles Caruson

Because of the gender discriminatory policies at my college a generation ago, my only formal training in forensics was in high school. I was on the Minnesota state championship team from Hopkins High School, in Hopkins, Minnesota, two years in a row, 1967 and 1968. High school debate was definitely one of my most important educational experiences—perhaps *the* most—in my entire life, not only in terms of oral advocacy skills, but also more generally, in terms of research, analysis, and critical thinking.

In fact, I would like to dedicate this keynote address to my extraordinary high school

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This article is an expanded version of the keynote address that Professor Strossen delivered at the Annual Convention of the Speech Communication Association in Chicago, Illinois, on October 31, 1992. For a more detailed discussion of the issues addressed in this article, *see* Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 Villanova L. Rev. 201 (1992).

debate coach, Charles Caruson. I truly do not think I would be standing here before this important audience today, in my capacity as President of the American Civil Liberties Union and Professor of Law at New York Law School, were it not for all that I learned from him.

I recently learned that Charles Caruson died suddenly, in August, 1992. Now it is too late for me to thank him directly for the enormous constructive impact he had on my life. But it is not too late for me to thank all of *you*—on behalf of all of *your* students, including the many who are too busy or too shy to express this thought to you themselves. I know that all of you are transforming your own students' lives in the same positive way that Charles Caruson transformed mine. And I also know that your students will in turn carry that spark of inspiration, of excitement, of intellectual awakening, on to the next generation. That is because so many of them will be moved by your example—as I was moved by Charles Caruson's outstanding example—to become teachers themselves.

I cannot think of any more important mission in life—or, I might add, any more important form of human rights activism—than what Charles Caruson did for his students and what you do for yours: touching young minds, challenging them to think critically, and to express themselves effectively. So, to each of you: my sincerest thanks. You are pursuing a noble calling.

A New Legal Challenge Presented by "The Communication Century"

Now let me turn to the theme of this Convention: "The Communication Century." As David Zarefsky said in his welcoming statement, published in the Convention Catalogue, in this exciting communications age, "We've seen the personal computer, the cellular telephone, and FAX machine change the way we live." I have certainly witnessed all of these developments first-hand, because my husband, Eli Noam, is a telecommunications guru. He is the founding director of the Columbia Institute for Tele-Information, or "CITI," at Columbia University. Eli's involvement in telecommunications has given his mother a new variation on the age-old maternal lament. Lately she complains to Eli: "You never call; you never write; you never FAX"!

Consistent with the Convention's broad, forward-looking theme, I decided to discuss a very current, challenging and unresolved free speech controversy: the extent to which speech or expression in the workplace may be treated as prohibited sexual harassment. This is an especially timely subject, in the wake of Professor Anita Hill's charge that Clarence Thomas had sexually harassed her before he was nominated to the Supreme Court. That controversy catapulted the issue of workplace sexual harassment to the forefront of public consciousness. Previously, the issue had received relatively little attention in general. Likewise, scant attention had been paid to the specific aspect of workplace sexual harassment that I'm addressing: the tension between free speech and equality values when sexual harassment claims are based on expression, as they often are.

It is ironic that so little attention had been paid to this issue, because it is very similar to another issue that has received enormous attention: the regulation of campus hate speech or harassment—*i.e.*, the extent to which colleges and universities may prohibit expression that harasses on the basis of race, gender and other invidious classifications. This subject has been the focus of judicial rulings,[1] as well as numerous articles in law reviews and other publications.[2]

In contrast to the highly analogous issue of free speech in the campus harassment

context, the issue of free speech in the workplace harassment context has received scant judicial or scholarly attention, despite the fact that expression has been deemed to be prohibited harassment in the workplace since at least 1981. (Campuses did not begin to debate or to adopt hate speech codes until the late 1980s.) The Equal Employment Opportunity Commission issued guidelines that classified certain expressive conduct as proscribable workplace harassment in 1981. Since then, in numerous cases, judges have been treating employees' speech as punishable harassment, and issuing orders prohibiting such speech.[3]

Although the courts have adjudicated numerous workplace sexual harassment cases in which the complained-of conduct constituted expression, almost none have even acknowledged that First Amendment values were implicated, let alone seriously discussed that aspect of the cases.[4] The reason was probably that the lawyers, as specialists in employment law, did not raise free speech concerns until recently, when they became aware of the free speech arguments being raised in the comparable campus harassment context. Accordingly, there has not been a single fully litigated case focusing on the proper accommodation between free speech and gender equality values in the workplace sexual harassment setting. Now, though, two such cases are working their way through the judicial system. One is a complaint by Lois Robinson against Jacksonville Shipyards, Inc., in Jacksonville, Florida. The other involves complaints by several female workers against the Stroh Brewery in St. Paul, Minnesota.

Likewise, until recently there was almost no academic discussion of the tension between free speech and equality values posed by many workplace sexual harassment claims, also in direct contrast to the campus harassment issue. This contrast no doubt reflects the fact that academics tend to be most directly concerned about their own environments. Of course, free speech is especially important on campus, but not in terms of its overall impact on the lives of average Americans. Rather, what happens in the nonacademic workplaces where so many adults spend such a large percentage of all waking hours, is of vastly more pervasive importance.

Because of the recent increase in complaints of sexual harassment, including those based on expressive conduct, it is important to examine the free speech dimension of this issue. While promoting women's equality in the workplace is an important goal, so too is promoting free expression in the workplace.[5] Moreover, history has demonstrated that gender equality and free speech are mutually reinforcing, rather than antagonistic goals. Therefore, overly broad limitations on expression should be avoided, not only to maximize freedom of speech, but also to promote women's equality.

I will first summarize the general legal principles that govern whether expression in the workplace may constitute punishable sexual harassment. I then discuss the application of these principles to the two current cases on point, to illustrate how to accommodate equality and free speech concerns in particular situations. Finally, I explain why overly broad regulation of expressive conduct, under the rubric of sexual harassment, may well undermine women's equality.

Applicable Legal Principles

Free Speech Principles

Expression that conveys sexist or sexual[6] ideas is generally protected—along with all expression that conveys ideas that particular audience members might consider objectionable or offensive—when it is addressed to a general audience in a public setting.[7] However,

such expression may be unprotected in certain circumstances. For example, if it is repeatedly targeted directly at an individual even in a public setting, it may well amount to proscribable harassment. Furthermore, in nonpublic settings, listeners may have privacy rights which override a speaker's wish to address them, such as the right to be free from unwanted intrusions into the home.[8] The Court has held, though, that free speech values may outweigh privacy concerns even in the home, requiring individuals to receive certain unwanted communications there.[9]

Restraints on unwanted expression may also be warranted where the speaker's audience is "captive." Members of a captive audience are required to be in a particular place at a certain time in order to pursue an important purpose. Given the significance of maintaining freedom of speech, the Supreme Court has construed the captive audience concept narrowly. It has ruled that, outside the sanctuary of the home, we usually bear the burden of overlooking expression we find offensive.[10]

It could be plausibly argued that employees who are required to be at particular locations in order to perform their jobs should be viewed as captive audience members. Some courts[11] and commentators[12] 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."[13] 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.[14] Therefore, workplace speech could not be selectively punished for conveying discriminatory attitudes toward women.

Equality Principles

Important as free speech values are, equality principles are of comparable stature; there is a right to equality of opportunity in employment regardless of one's gender. The special importance of equality in employment was recognized in Congress' passage of Title VII of the 1964 Civil Rights Act, which bars employment discrimination on the basis of gender, along with other invidious classifications.[15]

Meaningful equality of opportunity in employment requires more than mere nondiscrimination at the entry level. It is not enough simply to open the doors of workplaces to women; they must also have a full opportunity to participate and to succeed. Thus, the courts[16] and Congress[17] have recognized that employees should be protected from harassment that is based on their gender. Moreover, courts have ruled that the prohibited harassment may consist of words or expressive conduct.[18]

Application of General Principles to Claims of Sexual Harassment in the Workplace

The principles outlined thus far, as to which courts and commentators generally agree, may be summarized as follows: sexist speech in a public forum is protected, but sexist speech that harasses particular individuals in certain other settings, such as 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 between protected free speech and prohibited harassment?

As is often true in cases involving free speech and equality rights, the appropriate resolution is highly fact-specific, depending on all the facts and circumstances involved in the particular situation at issue. Relevant considerations include the following: 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? Is the audience "captive," in that they are required to be in that place? Is the speech directly targeted at a single individual or a small group of individuals, or is it addressed to a broader group? Is there a hierarchical relationship between the speaker and the audience members? 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.

The American Civil Liberties Union recently refined its policy concerning sexual harassment in the workplace, articulating criteria for the sometimes difficult task of line-drawing between protected expression and prohibited harassment. That policy provides the following definition of proscribable harassment:

> Sexual harassment exists . . . [w]here 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 to significantly adversely affect 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.[19]

The range of situations can be illustrated through two scenarios, one from each extreme of 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 lunchbreak, that expressive activity should be protected, even if other employees are offended 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.[20] On the other hand, if a supervisor repeatedly directs unwanted sexually explicit remarks to an employee, thus adversely affecting her ability to function effectively, 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 which are offensive to his assistant, who is required to spend much of her worktime in that office; how should the balance be struck in that situation?

Two Recent Sexual Harassment Cases

Two recent, much-discussed cases pit the female employees' claims for relief from sexual harassment against the free speech claims of other employees or of the employer: *Robinson v. Jacksonville Shipyards, Inc.*[21] and a lawsuit against the Stroh Brewery.

Robinson v. Jacksonville Shipyards, Inc.

Plaintiff Lois Robinson was one of a "very small number of female skilled craftworkers employed" at the Shipyards.[22] 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."[23] Although some evidence indicated that, on

several occasions, sexually suggestive pictures were directed at Robinson herself, most of the complained-of images were not directly targeted at her.[24] Nevertheless, they constituted the primary evidence upon which the district court relied in finding liability.[25]

Likewise, the judge's remedial order was not limited to prohibiting employees from forcing unwanted sexually explicit images upon Ms. Robinson or other female employees. Rather, it broadly purged all "sexually suggestive" images—a category defined in sweeping terms[26]—from the workplace in general. Employees were not only prohibited from displaying any "sexually suggestive" materials in public workplace areas, but they were also barred from possessing, looking at, and displaying such materials in their own private workspaces at any time.[27] The judge's rationale for this sweeping order was the theory that all sexually suggestive images of women undermine their equality, and thus lead to violations of Title VII's prohibition on employment discrimination.[28]

The district court's ruling is currently on appeal before a federal appellate court. The American Civil Liberties Union filed an *amicus curiae* brief in the appellate court which challenged certain aspects of the lower court's order 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.)

Consistent with the fact-specific nature of all free speech issues, determining whether the proscribed pictures are protected depends on various contextual factors. 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, if individual employees post nude photographs in their own lockers, 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.

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 any other pictures in these areas. Under these circumstances, reasonable advocates of free speech and equality could differ about whether the posting of nude photographs should be protected. On the one hand, one could plausibly argue that the common areas are important forums 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 reasonably argue 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 ACLU *amicus* brief in the *Jacksonville* case 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:

> [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, . . . 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 Shipyard workplace.[29]

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, 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 consisted entirely of obnoxious and offensive speech or other expressive activity. However, expressive activities 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.[30]

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.[31]

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 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."[32] 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.[33] 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 reflect this distinction.[34]

The Stroh Brewery Case

Sweeping as the *Robinson* order was, in banning all sexually suggestive images from the workplace, an even more sweeping ban on such imagery is being sought in a series of cases pending before a state trial court in Minnesota.[35] Female employees of the Stroh Brewery in St. Paul, Minnesota have charged that a television advertisement for Old Milwaukee beer, which is produced by Stroh Brewery, contributes to sexual harassment in the brewery, and therefore should be banned from the air to remedy the harassment.[36] The advertisement depicts a group of men on a fishing trip who fantasize that Old Milwaukee beer is delivered to them by the Swedish Bikini Team, a group of bikini-clad women. At the time of writing, this case had not yet proceeded to trial nor resulted in any judicial ruling on the merits.

The plaintiffs allege that they were repeatedly subjected to targeted, unwanted physical contacts and other sexual advances at the brewery. 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.[37] 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.[38]

In support of their effort to limit the beer advertisement, the plaintiffs argue that it contributes to a climate at its brewery in which sexual harassment is tolerated.[39] This attenuated, speculative causal connection between complained-of speech and anti-social conduct is 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.[40]

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.[41] For example, in decisions that it has subsequently 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.[42] In contrast, at least since its 1969 decision in *Brandenburg v. Ohio*,[43] the Court consistently has insisted that there must be a very close causal connection between speech and any harm it will allegedly cause, for the latter to justify suppressing the speech. The plaintiffs in the *Stroh* case should not be permitted to turn the constitutional clock back to the World War I era, when an alleged but unsubstantiated connection between speech and some societal danger was sufficient to punish any controversial or unpopular speech.

Overly Broad Restrictions on Expressive Conduct Disserve Gender Equality

As discussed above, some limited types of expressions may be prohibited in order to protect the equality rights of women who must be in the workplace to pursue their jobs. To broaden the range of prohibited expressive conduct, beyond the circumscribed criteria set forth in the ACLU policy,[44] would not only undermine the central guarantee of free speech, but also would fail to serve the avowed purpose of advancing gender equality.

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." 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. Some restricted women from entire occupations or limited their hours of work. Others granted women benefits that men did not enjoy, including a minimum wage, overtime pay, lunch breaks and rest breaks. 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*:[45] "As minors, though not to the same extent, she ["Woman"] has been looked upon in the courts as needing 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."[46]

As the Supreme Court noted in 1974, in actual operation, these "protective" laws "put women not on a pedestal, but in a cage."[47] This protective labor legislation at best was only partially beneficial to women; historical evidence reveals that it always carried concealed costs, such as the loss of jobs. Moreover, any doctrine resting upon the incomparability of the sexes cannot be confined to circumstances that may at first appear "beneficial"; the principle can always then be used to "justify" the denial of rights.

In today's context, singling women workers out for special "protection" could undermine women's equality in additional ways. For example, invoking women's special reproductive role, certain employers have excluded fertile women from 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.[48]

"Protectionist" measures designed to shelter women from sexually explicit expression in the workplace conform to the general pattern of gender-specific "protectionist" measures, by actually operating to women's detriment. Regardless of the benevolent intent of such 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 in a context highly analogous to the present one: the controversy over whether certain "pornography," defined as "subordinating" to women, should be censored. While some feminists advocate such censorship, others oppose it, in part because of its paternalistic effect.[49]

For example, in 1985, the Feminist Anti-Censorship Task Force ("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," as a violation

of women's civil rights. To the contrary, the FACT brief argued, the Dworkin-MacKinnon law would itself violate women's civil rights.[50] 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.[51]

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 relied on[52] the judicial ruling invalidating the Dworkin-MacKinnon ordinance in *American Booksellers Ass'n v. Hudnut*.[53] 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*."[54]

Putting aside the legal distinctions, previously discussed,[55] 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 still 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.[56]

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 Pornography Victims' Compensation Act.[57] The opposing groups include 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 individuals to make these choices for themselves.[58]

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.[59] More recently, repeated attempts have been made to ban the feminist magazine *Ms.* from high school libraries,[60] and the Supreme Court has approved the Department of Health and Human Services' "gag rule," which prevented the millions of women served by

federally-funded family planning clinics from receiving full and accurate information about their reproductive options.[61]

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: "[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."[62] 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.

Conclusion

General principles of free speech and equality must be applied to every particular sexual harassment claim in a way that is sensitive to the specific facts involved, and that respects both sets of concerns. To regulate expressive conduct more broadly than this article has advocated would disserve both sets of principles. This conclusion is well stated in a letter that Feminists for Free Expression sent to the Senate Judiciary Committee, opposing the Pornography Victims' Compensation Act. It is applicable to the workplace sexual harassment controversy too, because it underscores the reasons why overly broad restrictions on sexually oriented speech in the workplace would undermine women's equality, as well as free speech:

> Freedom of expression is especially important for women's rights. While messages reflecting sexism pervade our culture in many forms, sexual and nonsexual, suppression of such material will neither reduce harm to women nor further women's goals.
>
> Censorship has traditionally been used to silence women and stifle feminist social change. It has never reduced violence; it has led to the imprisonment of birth control advocate Margaret Sanger and the suppression of such works as *Our Bodies, Ourselves*, *The Well of Loneliness*, and the performances of Holly Hughes.[63]
>
> There is no feminist code about which words and images are dangerous or sexist. Genuine feminism encourages individuals to choose for themselves. A free and vigorous marketplace of ideas is the best guarantee of democratic self-government and a feminist future.

Speaking of a "free and vigorous marketplace of ideas," I cannot think of a more appropriate way to close than to thank all you speech and communications teachers, once again—by way of acknowledging my own unforgettable, exceptional speech teacher, Charles Caruson—for your invaluable contributions to that marketplace. So, thank you, and keep up your great work!

Notes

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1. *See* UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1180–81 (E.D. Wis. 1991) (university hate speech rule held unconstitutionally overbroad and unduly vague); Doe v. University of Mich., 721 F. Supp. 852, 864–67 (E.D. Mich. 1989) (same). The ACLU represented the plaintiffs who successfully challenged the overly broad hate speech rules in both these cases.
2. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431 (advocating campus hate speech regulation); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484, 494 (responding to Lawrence and maintaining that "a robust freedom of speech ultimately is necessary to combat racial discrimination").
3. *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); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1800–16 (1992) (same).
4. *See* Browne, *supra* note 3, at 501 ("[S]urprisingly, the first amendment is seldom invoked" in cases involving offensive expressive conduct in workplace).
5. The First Amendment's free speech guarantee, of course, only constrains "state action." Therefore, as a matter of constitutional law, only governmental employers are bound by First Amendment principles, and only governmental employees are protected by such principles. However, the ACLU supports legislation and other measures that will secure fundamental free expression rights for all employees, through its Taskforce on Rights in the Workplace. *See* ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION (rev. ed. 1993) [hereinafter "ACLU Policy Guide"], at Policy No. 53, entitled, "Free Speech Rights of Corporate Employees":

   > In all cases, the employee's right to free speech and association should be limited only by minimal and traditionally acceptable time, place and manner regulations, provided that the employee's exercise of the right does not substantially, materially and directly interfere with his or her bona fide job performance, or substantially, materially and directly obstruct other employees. This should not protect speech which directly interferes with the ability of the employee adequately to perform his/her job.

6. The one category of sexually oriented speech that the Supreme Court has ruled to be unprotected by the First Amendment is "obscenity," which it defined in Miller v. California, 413 U.S. 15, 24 (1973) (the "average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest ; the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."). *See also* Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747 (1982) (upholding state statutes regulating "child pornography," consisting of photographs or films of actual children engaging in sexual activities, *see Ferber* at 750–51, or in a state of nudity, *see Osborne* at 106–7).
7. *See, e.g.*, Collin v. Smith, 578 F. 2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (upholding free speech right of neo-Nazis to conduct demonstration in Skokie, Illinois, despite fact that their message was profoundly offensive and upsetting to many Skokie residents, many of whom were Jews and Holocaust survivors).
8. *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).

9. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980) (rejecting 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").
10. *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").
11. *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).
12. *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.").
13. Volokh, *supra* note 3, at 1832–33.
14. *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, *supra* note 5, at Policy No. 43, entitled "Captive Audiences":

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

    Id. (emphasis added).
15. 42 U.S.C. sec. 2003-2(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.").
16. *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.").
17. 1991 Civil Rights Act, sec. 101(2)(b), 42 U.S.C. sec. 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).
18. *See supra* note 3.
19. ACLU Policy Guide, *supra* note 5, at Policy No. 316.
20. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Texas v. Johnson, 109 S. Ct. 2533, 2544 (1989); Cohen v. California, 403 U.S. 15, 21–26 (1971).
21. 760 F. Supp. 1486 (M.D. Fla. 1991).
22. *Id.* at 1491.
23. *Id.* at 1490. Robinson also complained of "remarks by male employees and supervisors which demean women." *Id.*
24. *See id.* at 1496–99.
25. *Id.* at 1522–32.

26. *See infra*, text accompanying note 32.
27. 760 F. Supp. at 1542.
28. *See id.* at 1526:

> Pornography on an employer's wall or desk communicates a message about the way he views women. . . [I]t may communicate that women should be the objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual. Any of these images may communicate to male coworkers that it is acceptable to view women in a predominately sexual way. All of the views to some extend detract from the image most women in the workplace would like to project: that of the professional, credible coworker.

29. 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 (11th Cir.) (filed Mar. 9, 1992) [hereinafter "ACLU Brief"].
30. *Id.* at 5–6.
31. *Id.* at 6.
32. *Id.* at 1542.
33. *See supra* text accompanying note 29.
34. ACLU Brief, *supra* note 29, at 20–21.
35. *Additional Sexual Harassment Suits Filed Against the Stroh Brewery Co.*, BNA Daily Labor Report, Jan. 29, 1992, DLR No. 19, p. A–8.
36. *See* Arthur S. Hayes, *Stroh's Case Pits Feminists Against ACLU*, Wall St. J., Nov. 14, 1991, at B6; Henry J. Reske, *Stroh's Ads Targeted*, A.B.A. J., Feb. 1992, at 20 (plaintiffs' attorney believes Stroh's is "harassing [plaintiffs] with [its] own advertising"; plaintiffs' attorney said that "the women viewed the advertising as a company endorsement of harassment and . . the men used it as a weapon").
37. *See, e.g.*, Reske, *supra* note 36, at 20 (plaintiffs' 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").
38. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (holding ban on attorney's use of illustrations in advertising unconstitutional); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (holding city's general ban on billboards, which affected non-commercial advertising, unconstitutional); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (holding regulation on utility advertising unconstitutional); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding statute restricting pharmaceutical advertising unconstitutional).
39. *See* Stuart Elliott, *Suit Over Sex in Beer Ads Comes as Genre Changes*, N.Y. Times, Nov. 12, 1991, Section D, p. 22, col. 3.
40. *See, e.g.*, Laurence Tribe, American Constitutional Law (2d ed. 1988) sec. 12–9.
41. *See* Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 Cornell L. Rev. 1118, 1130 (1989) (in cases decided in the 1920s and 1930s, "the mere 'bad tendency' of offending speech, however remote the consequences, was considered a sufficient constitutional basis for its limitation").
42. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1928) (upholding conviction for distributing 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. U.S., 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).
43. 395 U.S. 444 (1969) (for speech to be regulated, state must show that it is intentional incitement of imminent lawless action and is likely to produce such action).
44. *See supra* text accompanying note 19.
45. 208 U.S. 412 (1908).
46. *Id.* at 421–22.

47. Frontiero v. Richardson, 411 U.S. 677, 684 (1975) (plurality opinion).
48. *See, e.g.*, International Union, United Auto. Workers v. Johnson Controls, 111 S. Ct. 1196, 1197 (1991) (company barred all women, except those with medically documented infertility, from positions involving actual or potential lead exposure).
49. *See* Nadine Strossen, *A Feminist Critique of "the" Feminist Critique of Pornography*, forthcoming in Virginia Law Review, August 1993 issue (available from author).
50. *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).
51. *Id.* at 122.
52. *See* Trial Brief for Defendants at 44–45, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (No. 86–927).
53. 771 F. 2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).
54. 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, 408, 433–36 (1991).
55. *See supra* text accompanying notes 7–14.
56. *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)).
57. S. 1521, 102nd Cong. 2nd Sess. (1991).
58. *See* Letter from Ad Hoc Committee of Feminists for Free Expression to the Senate Judiciary Committee 2 (Feb. 14, 1992) (available from author).
59. 18 U.S.C. secs. 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. secs. 1461, 1462 (1988)); 19 U.S.C. sec. 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. sec. 1305 (1988)).
60. *See, e.g.*, Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979).
61. *See* Rust v. Sullivan, 111 S. Ct. 1759 (1991).
62. Hunter & Law, *supra* note 50, at 124.
63. *See supra* note 58.