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Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII

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COMMENTS

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I. INTRODUCTION

A. *Lois Robinson's Story*

Lois Robinson is a first-class welder.¹ She has worked at Jacksonville Shipyards, Inc. ("JSI") since 1977. JSI owns and runs several shipyards, where the workers are primarily engaged in ship repair. Employees describe JSI as "more or less a man's world,"² or perhaps

1. This and all other in facts Part I, unless otherwise noted, are taken from Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1491-1502 (M.D. Fla. 1991).

2. *Id.* at 1493.

better put, "a boy's club."³ In 1986, only six of the 952 skilled craftworkers employed by the company were women. There has never been a female leaderman, quartermaster, foreman, or superintendent at the Shipyard.

At the beginning of her employment, Robinson did not complain about the numerous pinups, calendars, and posters of nude women displayed at the workplace or the sexually suggestive comments made by her male co-workers.⁴ She suspected complaints would not be well received, and feared retaliation. Other female co-workers were similarly disinclined to complain, both because they feared ridicule, and because they believed management would not make changes or discipline the male employees anyway.⁵

As time went on, however, Robinson became bolder. She began to complain to her leaderman about sexually oriented pictures in common work areas.⁶ Offensive graffiti and some pictures were removed on a few occasions, but were soon posted again or replaced with new ones. Her supervisors trivialized her concerns, professed a lack of authority, or promised to "look into it."⁷ The pictures remained; new

3. *Id.*

4. Robinson's testimony described "a visual assault on the sensibilities of female workers at JSI that did not relent during working hours." *Id.* at 1495. Posters, plaques, photos torn from magazines, and calendars of nude and partially nude women decorated the shipyard. One depicted a nude female torso with the words "USDA Choice" written on it; another showed a picture of a woman's pubic area with a meat spatula pressed on it. *Id.* Others included a picture of a nude woman with long blonde hair wearing high heels and holding a whip, calendars featuring Playboy playmate of the month pictures, a dart board with a drawing of a woman's breasts with her nipple as the bull's eye, pornographic magazines, and sexually oriented cartoons. *Id.* at 1496-98.

Robinson also testified about "comments of a sexual nature" she recalled hearing from co-workers at JSI. *Id.* at 1498. Among the remarks Robinson recalled were "'Hey pussycat, come here and give me a whiff,' 'I'd like to get in bed with that,' 'I'd like to have some of that,' 'Black women taste like sardines,' 'That one there is mine' (referring to a picture in a magazine), 'You rate about an 8 or 9 on a scale of 10.'" *Id.* She recalled one occasion when a fitter told her he wished her shirt was tighter (because he thought it would be sexier), an occasion when a foreman candidate asked her to come sit on his lap, and innumerable occasions on which a co-worker or supervisor called her "honey," "dear," "baby," "sugar," "sugar-booger," and "momma." *Id.*

The court also received evidence of abusive language and graffiti on the walls of the JSI workplace and in Robinson's work area. Examples referred to in the opinion were: "lick me you whore dog bitch," "eat me," and "pussy." *Id.* at 1499.

5. Top management condoned the display of photos of nude women, and often had their own pictures. *Id.* at 1494. JSI's suppliers delivered advertising calendars to the management of JSI, and management distributed them among the JSI employees, who hung them on the walls. *Id.* at 1493.

6. Robinson's leaderman testified that "at one point 'it was getting to be an almost every night occasion [Robinson] wanted something scribbled out or a picture taken [sic] down.'" *Id.* at 1499 (alteration in original).

7. *Id.* at 1514.

photographs were posted; co-worker verbal harassment of Robinson accelerated. Robinson finally met with the Yard Superintendent, Chief Shop Steward, and Vice-President, who told her that JSI had no policy against the posting of nude photographs. Posting pinups was a "natural thing" in a nautical workplace.⁸ Robinson should look the other way if she did not like the pinups—after all, she had chosen the JSI work environment. Besides, she was told, the men had "constitutional rights."⁹ Any rule banning the pictures would be an infringement on their freedom of expression.

As it turned out, Federal District Judge Howell W. Melton in Jacksonville found the argument that the men had constitutional rights to post nude pinups in the workplace less than compelling. In 1986, Robinson sued the shipyard company, charging that JSI had created and encouraged a sexually hostile working environment. Specifically, she claimed that the pervasive presence of photos and posters of nude women, as well as the everyday use of language demeaning to women, constituted an environment that violated her civil rights under Title VII of the Civil Rights Act of 1964.¹⁰

Lois Robinson won the first round of her case. Applying the elements of a hostile environment claim of sexual discrimination laid out in *Meritor Savings Bank v. Vinson*,¹¹ the district court found that Robinson was subjected to unwelcome harassment based upon sex, which affected a term, condition, or privilege of her employment, and that JSI knew or should have known of the harassment but failed to take effective remedial action.¹² The court decided that the presence of sexually suggestive photographs and pinups of nude and partially nude women could support a claim that a workplace environment was hostile to women within the meaning of Title VII. Accordingly, the court ordered JSI to "adopt, implement, and enforce a policy and procedures for the prevention and control of sexual harassment."¹³

The sexual harassment policy that the court directed JSI to adopt is a revised version of the policy proposed by Robinson and her attorneys from the National Organization for Women ("NOW") Legal Defense and Educational Fund. It includes a "Statement of Prohibited Conduct" that prohibits the usual range of behavior typically considered sexually harassing: physical sexual assaults, intentional

8. *Id.* at 1516.

9. *Id.* at 1515.

10. 42 U.S.C. § 2000(e)-2 (1988).

11. 477 U.S. 57 (1986).

12. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522-32 (M.D. Fla. 1991).

13. *Id.* at 1537.

physical conduct such as touching, grabbing, or patting another employee's body, and preferential treatment to an employee for submitting to sexual conduct.¹⁴ In addition, the policy specifically prohibits:

sexually oriented . . . remarks, jokes, or comments about a person's sexuality or sexual experience directed at or made in the presence of any employee who indicates or has indicated in any way that such conduct in his or her presence is unwelcome . . . [and] [s]exual or discriminatory displays or publications anywhere in JSI's workplace by JSI employees, such as . . . displaying pictures, posters, calendars, graffiti, objects, promotional materials, reading materials, or other materials that are sexually suggestive, sexually demeaning, or pornographic, or bringing into the JSI work environment or possessing any such material to read, display or view at work.¹⁵

*Robinson v. Jacksonville Shipyards, Inc.*¹⁶ was immediately hailed in the national news media as a milestone for women's rights, a ground-breaking decision for women in male-dominated trades.¹⁷ The Legal Director of NOW's Legal Defense Project, Alison Wetherfield, expressed hope that the decision would be "extremely influential."¹⁸ Robyn Blumner, Florida Director of the American Civil Liberties Union, on the other hand, expressed concern that the decision might conflict with First Amendment rights to free expression. "The question is, should this be a legal issue? . . . It would be courteous of her co-workers to respect her wishes and take [the pictures] down. Should they be legally compelled to do so? No."¹⁹

B. *The Controversy over Robinson v. Jacksonville Shipyards, Inc.*

As of this writing, JSI has filed a notice of appeal, and the ACLU

14. *Id.* at 1542.

15. *Id.* at 1542. The policy then clarifies the types of pictures prohibited:

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.

Id.

16. 760 F. Supp. 1486 (M.D. Fla. 1991).

17. See, e.g., Amy D. Marcus & Ellen J. Pollock, *Judge Rules Against Pinups in Workplace*, WALL ST. J., Jan. 23, 1991, at B2; Tamar Lewin, *Nude Pictures are Ruled Sexual Harassment*, N.Y. TIMES, Jan. 23, 1991, at A14; *Nude Pinups at Work Ruled Sexual Harassment*, MIAMI HERALD, Jan. 24, 1991, at B4; Susan Tift, *A Setback for Pinups at Work*, TIME, Feb. 4, 1991, at 61.

18. *Nude Pinups at Work Ruled Sexual Harassment*, *supra* note 17, at B4.

19. *Id.*

has committed its resources as *amicus curiae* to contest, on First Amendment grounds, the district court's injunctive relief to Robinson.²⁰ Although the trial court focused upon whether pictures of nude women, posted in a workplace, harass women within the meaning of Title VII, the appeal will also test whether a court can force a private employer to adopt a workplace policy that prohibits expression ordinarily protected against government interference by the First Amendment.

Robinson thus raises two distinct but equally controversial questions. First, is the First Amendment a viable defense against a proven claim of sexual harassment? Second, do sexually explicit pictures have such a different impact on women than on men that a work environment marked by pinups and girly calendars actually *discriminates* against women?

The issues raised by *Robinson* mirror the broader social controversy over the regulation of pornography, a subject that inevitably arouses contention.²¹ Some feminists have argued that pornography harms women by encouraging violence against them and by reinforcing a view of women as sex objects and second-class citizens.²² Despite some acceptance of this view, efforts to ban pornography have been definitively rebuffed by the courts,²³ and roundly rejected by most civil libertarians²⁴ and many feminists.²⁵ If pornography harms

20. The ACLU's decision to support JSI's appeal was a controversial one, even within the ACLU. See David Pereyra, *Sex Harassment Case Sparks ACLU Debate*, XS MAG., Oct. 30, 1991, at 16.

21. This Comment uses the word "pornography" to refer to sexually explicit material, written or in pictures, that portrays women in subordinate or sexually submissive poses. It uses the descriptive terms "sexually explicit" and "sexually oriented" when referring to a broader class of sexual imagery that includes pornography, but also includes forms of erotica not subsumed under this Comment's definition of pornography.

22. This argument has been put forth most forcefully in CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987), and ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981).

23. See *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

24. See, e.g., DONALD A. DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* (1990); Thomas I. Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL'Y REV. 130 (1984); Steve G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988); Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986); Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. REV. 201 (1987) (book review).

25. See, e.g., *Amicus Curiae Brief of Feminist Anti-Censorship Taskforce for American Booksellers Ass'n, American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), *aff'd*, 475 U.S. 1001 (1986). This brief, written by individuals actively supporting feminist and civil liberties principals, and joined by The Women's Legal Defense Fund and numerous women's rights activists, argued against state censorship of pornography. Strossen,

women because it fosters a particular view of women, the argument goes, then pornography is precisely the type of expression—the unpopular opinion—that deserves the strongest First Amendment protection. In the landmark *American Booksellers Association v. Hudnut*²⁶ opinion, the Court of Appeals for the Seventh Circuit used precisely this analysis to strike down a local Indianapolis ordinance designed to restrict the commercial dissemination of pornography.²⁷

At first blush, *Hudnut* seems to preclude the *Robinson* court's imposition of a harassment policy that bans sexually oriented pictures in the workplace. Under the view of the First Amendment embraced in *Hudnut*, even if workplace displays harass women—in fact *because* workplace displays harass women—they are protected by the First Amendment, and courts may not impose restrictive policies. JSI's defense counsel argued at trial that the *Hudnut* analysis applied to the *Robinson* case,²⁸ and chances are, the ACLU will also rely upon *Hudnut*. However, although the parallels between the cases are inviting, this Comment argues that the *Hudnut* First Amendment analysis simply does not apply to sexual harassment cases like *Robinson*.

This Comment contends that a First Amendment defense to sexual harassment in the workplace is anomalous. Employees, for all practical purposes, have no speech rights in the workplace, due to the state action doctrine²⁹ and the at-will employment doctrine.³⁰ Employers, although they enjoy the protection of the First Amendment, are likewise restricted, by federal law, in what they may say to their employees. The policies and mandates of both the National

supra note 24, at 223 n.98. See generally WOMEN AGAINST CENSORSHIP (Varda Burstyn ed., 1985).

26. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

27. The *Hudnut* ordinance defined pornography as "the graphic sexually explicit subordination of women, whether in pictures or in words," *id.* at 324, and prohibited its production, sale, exhibition, or distribution, *id.* at 325. According to the court, "The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way . . . is lawful. . . . Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful. . . . The state may not ordain preferred viewpoints in this way." *Id.*

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

29. The constitutional guarantees of individual rights, including the First Amendment, shield individuals only from state action, generally taken to mean action by any level of government, from local to national. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 18 (2d ed. 1988).

30. The at-will employment doctrine is a common law doctrine governing the employment relationship whereby the employer is entitled to dismiss its employees, and the employees are entitled to quit their jobs, for any reason or for no reason, without committing a legal wrong. See *infra* notes 80-86 and accompanying text. See generally MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 1.01 (1988).

Labor Relations Act ("NLRA")³¹ and Title VII—acts which explicitly regulate employee-employer relations—have traditionally provided courts with the justification for imposing regulations that infringe on speech, when such regulations are necessary to correct statutory violations.

This Comment also argues that the *Robinson* holding that nude photographs can constitute a hostile environment is a limited one, applicable only in specific workplace circumstances. This limited holding, however, has great potential for facilitating a broader understanding of sexual harassment, and for furthering efforts to expose and modify male workplace norms that have hindered the sexual integration of many male-dominated trades.

Part II of this Comment reviews the current state of sexual harassment law and predicts an increase in the litigation of cases like *Robinson* in which defendants use the First Amendment to counter sexual harassment claims based upon generalized characteristics of the work environment. Part III discusses the traditional role of the First Amendment in the private sector workplace, in public employment cases, under the NLRA, and under Title VII racial harassment cases.

Part IV addresses the viability of a First Amendment defense to a sexual harassment claim. It contends that the civil libertarian concern over worker rights to sexually harassing expression is somewhat surprising given the types of speech routinely squelched by employers through the power and threat of dismissal. A concern over employee rights to sexually harassing expression is not analogous to libertarian concerns over worker speech rights. Rather, the free speech defense in *Robinson* and sexual harassment cases like it is actually an employer claim to its rights to plenary control of the workplace. The conflict in such cases is not between employee freedom from sex discrimination and employee free speech, but between employee freedom from sex discrimination and employer workplace control. As between these two assertions of rights, the employer prerogative to control speech in the workplace is subordinate to the statutory mandates of Title VII to provide a discriminatory-free environment. Thus *Robinson* makes no departure from First Amendment precedent by granting injunctive relief in the workplace to correct the federal statutory violation. This Part concludes by discussing *Robinson's* First Amendment analysis, recasting it in light of the preceding workplace free speech inquiry.

31. 29 U.S.C. §§ 151-168 (1988).

Part V turns to the question of whether sexually explicit photographs in a workplace actually discriminate against women. First, it summarizes the evidence presented in *Robinson* on stereotyping and argues that the evidence provides the necessary link, missing in the *Hudnut* context, between the pinup pictures and the sex-based harm. Next, it confronts potential objections to the *Robinson* holding. It argues that feminists' concerns over the specter of protective policies to shield women from sexual vulgarities, and civil libertarian fears of Big Sister in the workplace are misplaced. It concludes with some implications of the *Robinson* analysis for the future of sexual harassment law.

II. SEXUAL HARASSMENT AND THE FIRST AMENDMENT

A. *Hostile Environment Sexual Harassment*

The concept of sexual harassment as a recognized legal harm is a surprisingly recent phenomenon. Before the mid-1970's, victims of unwelcome sexual conduct on the job did not even have a name, much less a cause of action, for their injury. But in the 1970's, as large numbers of women reentered the workforce, feminists transformed women's experiences on the job—employment and promotions conditioned on sex, unwanted sexual advances, threatening and belittling references to woman as sex objects—into “an experience with a form, an etiology, a cumulativeness”³²—and ultimately, a legal claim.³³ Since the first judicial recognition of the claim under Title VII in 1976,³⁴ sexual harassment has become an established form of sex discrimination in employment.

Title VII makes it 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.”³⁵ In 1981, Equal Employment Opportunity Commission (“EEOC”) Guidelines to Title VII interpreted the behavior proscribed by the Act to include sexual harassment. The Guidelines delineated two variants, mirroring the development in caselaw of a “quid pro quo” claim and a “hostile environment” claim.³⁶ Under the Guidelines, quid pro quo claims involve “unwelcome sexual

32. MACKINNON, *supra* note 22, at 106.

33. For an account of the beginnings and early development of sexual harassment law, see CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

34. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

35. 42 U.S.C. § 2000(e)-2(a)(1) (1988).

36. 29 C.F.R. § 1604.11(a) (1990).

advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" by a supervisor when submission to such conduct is made a term or condition of employment.³⁷ This type of harassment forces an employee to choose between submitting to unwelcome sexual demands or losing employment opportunities and benefits. Hostile environment claims are based on the language of Title VII that prohibits discrimination "with respect to . . . conditions . . . of employment."³⁸ EEOC Guidelines characterize 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."³⁹

In *Meritor Savings Bank v. Vinson*,⁴⁰ the United States Supreme Court adopted the language of the EEOC Guidelines and held that a claim of hostile environment sex discrimination was actionable under Title VII.⁴¹ *Vinson* recognized that an environment that fosters the degradation of women hinders a female employee's productivity, self-image, and ability to advance, as well as erodes her professional image in the eyes of co-workers. An employee should not be forced, simply because she is a woman, to endure abusive conditions in order to earn a living.⁴²

Vinson, and the earlier holdings that had first established the hostile environment sexual harassment claim, built upon the discrimination analysis that had developed in the context of racial harassment.⁴³ Courts had used Title VII to protect workers from a working environment heavily charged with racial discrimination, even if particular instances of harassment were not directed specifically toward the plaintiff and did not result in a tangible economic detriment.⁴⁴ The *Vinson* Court found no reason why Title VII should not prohibit a

37. *Id.*

38. 42 U.S.C. § 2000(e) (1988).

39. 29 C.F.R. § 1604.11(a) (1990).

40. 477 U.S. 57 (1986).

41. *Id.* at 66. "Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.*

42. *Id.* at 67 (citing *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982)).

43. The first case to recognize a cause of action based upon a racially discriminatory work environment was *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), which held that a state of psychological well-being is a term, condition, or privilege of employment within the meaning of Title VII.

44. See, e.g., *Henson*, 682 F.2d 897; *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982); *Rogers*, 454 F.2d 234; see also *infra* part III.B.2 for a discussion of racially hostile environment discrimination.

hostile environment based on discriminatory sexual harassment.⁴⁵ "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."⁴⁶

Vinson remains the only Supreme Court case that rests on a claim of a sexually hostile environment. It held that for a hostile environment claim to be actionable, it must be "sufficiently severe or pervasive 'to alter conditions of [the victim's] employment and create an abusive working environment,'"⁴⁷ and directed the trier of fact to consider the "record as a whole" and "the totality of circumstances" in making that determination.⁴⁸ Unfortunately, the facts and analysis of *Vinson* do not make clear exactly what conditions constitute an intimidating, hostile, or offensive working environment.⁴⁹ The plaintiff's charges that a co-worker had fondled her in front of other employees and had touched and fondled other women employees were sufficient to support a hostile environment claim. But what if the co-worker had, as in *Robinson*, communicated the same message by talking about women's bodies, referring to them by sexually explicit nicknames, or displaying explicit photos of women?

Subsequent sexual harassment caselaw reflects confusion and uncertainty about the contours of hostile environment sexual harassment, as well as "discomfort with the transformative potential of the new claim."⁵⁰ The courts of appeals disagree on whether verbal com-

45. *Vinson*, 477 U.S. at 66.

46. *Id.* at 67 (quoting *Henson*, 682 F.2d at 902).

47. *Id.* (quoting *Henson*, 682 F.2d at 904).

48. *Id.* at 69 (citing EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(b) (1985)).

49. The trial court did not admit evidence to support the charges of hostile environment. *Id.* at 61. The Supreme Court affirmed the court of appeals' remand for consideration of whether a hostile environment existed. "Since it appears that the District Court made its findings without ever considering the 'hostile environment' theory of sexual harassment, the Court of Appeals' decision to remand was correct." *Id.* at 68. For a discussion of the inadequacies of the *Vinson* opinion, see Wendy Pollack, *Sexual Harassment: Women's Experience v. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 53-62 (1990).

50. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1199-1202 (1989). Two questions have been particularly troubling for the courts, and have resulted in inconsistent holdings among the circuits. First, when is the harassment pervasive enough to constitute a violation? Second, should the factual determination be made from the objective view of the reasonable person, the objective view of the reasonable woman, the subjective view of the particular defendant, or the subjective view of the particular plaintiff? See Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1458 (1984). Both of those questions are implicated in the inquiry of whether sexually explicit words and pictures, absent directed overt sexual conduct, will support a claim of hostile environment sexual harassment.

ments or sexually oriented visuals, standing alone, will sustain a hostile environment claim. In 1986, in *Rabidue v. Osceola Refining Co.*,⁵¹ the Court of Appeals for the Sixth Circuit held, apparently as a matter of law,⁵² that the vulgar language of a male co-worker and sexually oriented posters in the workplace did not unreasonably interfere with a woman's work performance, nor create an intimidating, hostile, or offensive environment.⁵³ Four years later, in *Andrews v. City of Philadelphia*,⁵⁴ the Court of Appeals for the Third Circuit held that the pervasive use of derogatory and insulting terms relating to women, and the posting of pornographic pictures in common areas, *could* serve as evidence of a hostile environment.⁵⁵ The Court of Appeals for the Ninth Circuit has explicitly rejected the *Rabidue* reasoning.⁵⁶ The Seventh Circuit, on the other hand, fashioned a demanding standard in *Scott v. Sears, Roebuck & Co.*⁵⁷ for determining whether a plaintiff had stated a claim, making it difficult for a plaintiff to posit hostile environment harassment on the basis of words or pictures alone.⁵⁸ The plaintiff in *Scott* complained of repeated propositioning, winking, physical touching, and degrading comments; the court found no hostile environment.⁵⁹

Until recently, most hostile environment sexual harassment claims have either been brought in tandem with quid pro quo claims, or have involved overt co-worker sexual conduct directed against the plaintiff.⁶⁰ Courts sometimes view quid pro quo behavior (a demand

51. 805 F.2d 611 (6th Cir. 1986).

52. *MACKINNON*, *supra* note 22, at 115.

53. The court explained: "Sexual jokes, sexual conversations and girlie magazines may abound [in some work environments]. Title VII was not meant to—or can [sic]—change this." . . . The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment." *Rabidue*, 805 F.2d at 620-22 (quoting *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

54. 895 F.2d 1469 (3rd Cir. 1990).

55. *Id.* at 1485.

56. *Ellison v. Brady*, 924 F.2d 872, 877 (9th Cir. 1991) ("We do not agree with the standards set forth in . . . *Rabidue*, and we choose not to follow [that decision]"). In *Ellison*, the court found that a reasonable woman would have considered the conduct of a co-worker who sent her bizarre love notes sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment. *Id.*

57. 798 F.2d 210, 212 (7th Cir. 1986).

58. Under *Scott*, harassment must cause "such anxiety and debilitation to the plaintiff that working conditions [a]re 'poisoned' within the meaning of Title VII." *Id.* at 213.

59. *Id.* at 214.

60. In *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989), for example, the plaintiff charged that co-workers broadcast obscenities directed to her over the public address system, and that her supervisor urged her to have sex with a co-worker and touched her offensively. In addition, she alleged that other employees drew sexually explicit pictures and graffiti on the elevator, and kept sexually oriented calendars on the walls and in their lockers. The plaintiff in *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), suffered

for sex in exchange for job benefits) and directed sexual conduct (unwelcome touching or "sexual pranks" played upon the plaintiff) as contributing to an offensive or abusive environment.⁶¹ When a case rests on a plaintiff's proof that her employer conditioned job opportunities on sexual favors, or that workplace norms include the unwelcome touching, grabbing, or fondling of female employees, the case need not make clear what kinds of behavior, standing alone, would constitute a hostile environment.

However, "attitude, language, and pictures"—rather than touching, grabbing, and fondling—are the work conditions now ripe for litigation, according to K.C. Wagner, former Program Director for Working Women's Institute and currently a self-employed consultant on issues of women and the work environment.⁶² Although women have made significant inroads in getting courts to recognize the more egregious examples of sexual harassment as discrimination, the next step in the development of sexual harassment law must be to "transform[] the male-centered norms that created . . . the workplace as women now find it."⁶³ This task presents a variety of new challenges.⁶⁴

Scholars and litigators generally concede that sexual harassment law has had less impact on blue collar workers than on white collar

repeated and unwelcome sexual advances. In addition, pinups, sexually explicit drawings of the plaintiff's body, and a list of sexually charged nicknames of female residents decorated the walls of the workplace. Plaintiffs in *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988), alleged severe and pervasive verbal abuse as well as offensive and unwelcome touching by co-workers. And in *Shrout v. Black Clawson Co.*, 689 F. Supp. 774 (S.D. Ohio 1988), the plaintiff employee's supervisor made sexual remarks to her, offensively touched her, and left sexually explicit material on her desk. The record showed that "any female subordinate walking in the hallways of the defendant's . . . facility was likely to be sexually accosted," *id.* at 781, that the work atmosphere was replete with sexual kidding, and that it was common practice for male managers to make sexual remarks to female subordinates. *Id.* at 780.

61. See, e.g., *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (upholding a finding of hostile environment sexual harassment based on supervisor's repeated instances of offensive conduct, racial and sexual remarks, showing of racist pornography to plaintiff, and direct propositioning of plaintiff).

62. Telephone Interview with K.C. Wagner (Feb. 5, 1991).

63. Abrams, *supra* note 50, at 1186.

64. Abrams argues that the "next feminist task" is to "reveal and challenge the male-centered attitudes that structure the workplace" and that "the primary analytic tool of the assault on exclusion," the "equality principle," is inadequate to the task. *Id.* at 1185. She presents the view that claims for equality gain women little with respect to the intangibles that constitute male workplace norms—acceptable forms of camaraderie, evaluations of what constitutes a successful employee, prescribed boundaries. Abrams proposes a view of gender discrimination that combines both the equality principle and a dominance or antisubordination principle. Her approach would challenge policies or attitudes that contribute to the subordination of a historically dominated group. The analysis of the *Robinson* case captures the spirit of Abrams' approach to discrimination analysis. See *infra* part V.

professionals.⁶⁵ That the numbers of women working in traditionally male-dominated trades such as welding, construction, and plumbing remain low suggests that these work environments remain hostile to women. Studies suggest that for women who do cross the barriers and secure jobs in male-dominated trades, harassment is less likely to come from supervisors by way of demand for sexual favors, and more likely to come from co-workers by way of "sexual taunts and other actions . . . intended to drive the women away."⁶⁶ Thus, if the structures that maintain sex segregation in the blue collar trades are to be successfully dismantled, sexual harassment law must begin to focus on claims that attack generalized hostile environments.

As the claims of hostile environment sexual harassment progress beyond overt sexual advances to more subtle claims that challenge male workplace norms, the strategy of those defending the claims is likely to change. As plaintiffs argue that sexual speech alone constitutes an abusive workplace, or that pornographic or sexually suggestive photos, magazines, or posters displayed in the workplace create a hostile environment, defendants may begin to argue, as JSI is arguing in *Robinson*, that the First Amendment protects their right to the offending speech or expression.⁶⁷

B. *The First Amendment Defense to Sexual Harassment*

The First Amendment has not been a common defense in sexual harassment cases.⁶⁸ Typically, defendants argue that the alleged

65. See, e.g., Elvia R. Arriola, "What's the Big Deal?" *Women in the New York City Construction Industry and Sexual Harassment Law, 1970-1985*, 22 COLUM. HUM. RTS. L. REV. 21, 29 (1990) (arguing that the law of sexual harassment developed in response to the white middle-class women's movement); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1834 (1990) (arguing that women in male-dominated jobs are more likely to be subjected to harassment, and that harassment is driving away the small number of women currently employed in non-traditional jobs).

66. Schultz, *supra* note 65, at 1832 n.321; see also Pollack, *supra* note 49, at 37, 50 n.51.

67. See Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991). Browne laments that workplace regulation of offensive speech has proceeded for the past decade without First Amendment objection, and calls for a narrowing of the construction of Title VII. *Id.* at 482-83. He argues that the definition of a hostile work environment adopted by courts in sexual harassment cases is "inconsistent with contemporary First Amendment jurisprudence." *Id.* at 481.

68. See Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 3 (1990); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment* 1990 DUKE L.J. 375. Balkin finds it "surprising that defense counsel have not regularly raised First Amendment challenges . . . in the developing law of workplace harassment." Balkin, *supra*, at 423. In one of the few sexual harassment cases that mention the First Amendment, the court noted that a free speech issue was raised but concluded that it "need not be considered in this case," presumably because the court determined that the contested expression could not support an action for hostile environment sexual harassment.

behavior or speech never occurred, or that if it did, it did not constitute harassment within the meaning of Title VII. A First Amendment defense generally arises only when a defendant admits the fact of the speech and concedes its impact, or when, as in *Robinson*, the court makes a determination of sexual harassment and imposes injunctive relief. Understandably, the First Amendment is a defense of last resort. However, if the next step in the progression of sexual harassment law is to challenge behaviors that defendants wish to preserve, rather than simply deny, the First Amendment is likely to play a more prominent role.⁶⁹

Sexual harassment litigators may be inspired to use a First Amendment defense by the current debate over accelerated instances of racial and sexual harassment on college campuses.⁷⁰ The First Amendment has emerged as a powerful weapon against recent university efforts to curb discrimination by prohibiting hate speech. In *Doe v. University of Michigan*,⁷¹ the ACLU successfully represented a plaintiff who challenged the University's antihate speech policy.⁷² The district court found that the policy, which prohibited stigmatizing or victimizing individuals or groups on the basis of, among other things, race or sex, swept within its scope verbal conduct protected by the First Amendment.⁷³ "The conflict between the left-libertarian conception of free speech and the progressive agenda of guaranteeing racial and sexual equality" is no less apparent in the

Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 431 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986). In *Jew v. University of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990), defendants raised the First Amendment, once plaintiff had proved that a sexually denigrating pattern of verbal conduct generated bias against her and motivated a denial of promotion. Rejecting the defense, the court held, without elaboration, that "[r]ights of free speech and academic freedom do not immunize professors . . . or their universities from Title VII liability for a hostile work environment generated by sexual-based slander." *Id.* at 961.

69. Balkin, for example, predicts an increasing number of First Amendment defenses in the years ahead, in both racial and sexual harassment cases, due to the "ideological drift" of the First Amendment, a transformation overtaking the principle of free speech whereby the traditional "friend of left-wing values" has become ally of business interests and other conservative groups. Balkin, *supra* note 68, at 383, 423.

70. See, e.g., Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collusion*, 85 NW. U. L. REV. 343 (1991); Kent Greenawalt, *Insults and Epithets: Are they Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484.

71. 721 F. Supp. 852 (E.D. Mich. 1989).

72. Strossen, *supra* note 70, at 489 n.17.

73. *Doe*, 721 F. Supp. at 864-66. The court reasoned that an "anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed" was unconstitutional. *Id.* at 863.

workplace than on university campuses.⁷⁴ Success with First Amendment defenses to harassment policies on campuses is bound to translate into First Amendment defenses in workplace sexual harassment cases.⁷⁵

The ACLU Sexual Harassment Policy Statement indicates that the ACLU believes generalized hostile environment sexual harassment claims trigger more First Amendment concerns than do claims resting on directed sexual conduct. The Policy Statement limits its recognition of environmental sexual harassment to

where a pattern and practice of sexual conduct or expression is *directed at a specific employee* and has definable consequences for the individual victim that demonstrably hinders or completely prevents her or his continuing to function as an employee. . . . This policy does not extend to verbal harassment that has no other effect on its recipient than to create an unpleasant working environment.⁷⁶

The ACLU's support of the employer in *Robinson*, then, is not inconsistent with its stated policy, and may indicate an increased willingness to support First Amendment defenses to hostile environment claims in the future.

Finally, recent Supreme Court opinions have weakened long-recognized employee civil rights, signaling a judicial retrenchment against the progressive agenda of equal protection in employment discrimination.⁷⁷ At the same time, legal commentators contend that the

74. Balkin, *supra* note 68, at 421.

75. Various writers have suggested parallels between a sexual harassment claim in the workplace and on the university campus. See, e.g., Ellen E. Lange, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 4 S. CAL. L. REV. 105 (1990) (suggesting an application of the Title VII analysis of workplace sexual harassment to the educational setting under Title IX); Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 Tex. L. R. 530 (1987) (same). The campus and the workplace share some characteristics for purposes of a sexual harassment analysis. On both the university campuses and in the workplace, sexual overtures take on particular meaning due to the potential for abuse of power, by employers and by professors. However, in terms of environmental sexual harassment, and for purposes of a First Amendment analysis, there are important differences between the two locations. This Comment examines the First Amendment defense to sexual harassment in the workplace, and considers the particular context of the workplace central to the analysis. The rationale does not necessarily transfer to the unique circumstances of the university campus, where the concern for academic freedom carries significant weight.

76. ACLU Sexual Harassment in the Workplace, Policy #316 (on file with the *University of Miami Law Review*) (emphasis added).

77. See *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 915 (1989) (Marshall J., dissenting) ("the latest example of how this Court, flouting the intent of Congress, has gradually diminished the application of Title VII to seniority systems"); *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (plaintiff has burden of showing that employer practice had disparate impact and that it did not serve a legitimate business practice); *Martin v. Wilks*, 490 U.S. 754 (1989) (white firefighters who were not joined as parties to suit resulting in consent

First Amendment is increasingly being used to promote a conservative agenda.⁷⁸ The political climate thus points to an arguably inevitable application of the First Amendment defense to workplace discrimination cases, to the dismay of many who value the protection it has afforded minority voices over the years.

In sum, the *Robinson* case may well be a bellwether for future hostile environment sexual harassment cases. For perhaps the first time in a sexual harassment case, a court addressed First Amendment issues at length. On appeal, a major issue will be whether the sexual harassment policy imposed on JSI as injunctive relief violates the First Amendment.

III. THE FIRST AMENDMENT AND THE WORKPLACE

A. *Employee Free Speech: The Status Quo*

Although First Amendment defenses are not common in sexual harassment cases, workers' and employers' rights to say what they will in the workplace is not uncontested terrain. Most of the debate over workplace speech pits an employee's speech rights against the employer's power to dismiss for exercising those rights. In such contests, the employer almost always wins. Other workplace speech cases deal with governmental interference with employer speech rights. In these cases, courts have interpreted both the NLRA and Title VII to permit state regulation of employer workplace speech when that speech contravenes the purpose of the statutory protection. In fact, speech rights in the workplace—whether those of the employee or the employer—have traditionally played second fiddle to other policy and statutory considerations.

decree that included goals for hiring and promoting blacks were permitted to challenge the decree even though the court recognized such a holding would be burdensome and would discourage civil rights litigation); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (defendant in sex discrimination case may avoid liability by proving by a preponderance of the evidence that it would have made the same decision without taking plaintiff's gender into account); *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1988) (in challenges to promotion criteria, employer has burden of proving that its practices serve a business necessity, and employee must prove that equally effective nondiscriminatory criteria exist); see also R. Michael Fischl, *Job Bias Barrage*, WASH. LEGAL TIMES, Aug. 7, 1989, at 12 (contending that these opinions reveal the Court's view of discrimination as a deliberate, discrete act rather than as a complex structural phenomenon).

78. See Balkin, *supra* note 68, at 384 ("Business interests and other conservative groups are finding that arguments for property rights and the social status quo can more and more easily be rephrased in the language of the First Amendment."); see also Lawrence, *supra* note 70, at 480 (arguing that First Amendment zealotry has "paint[ed] the harassing bigot as a martyred defender of democracy"); Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW* 253 (David Kairys ed., 1982) (arguing that the First Amendment increasingly serves corporate and propertied interests).

1. THE PRIVATE SECTOR: STATE ACTION, AT-WILL EMPLOYMENT DOCTRINE, PUBLIC POLICY EXCEPTIONS, AND THE NLRA

In the private sector, employees do not have First Amendment protection, given the state action doctrine and the at-will employment doctrine. Under the state action doctrine, constitutional guarantees of individual rights, including First Amendment rights, shield individuals only from government interference.⁷⁹ At-will employment derives from a common law doctrine that governs the employment relationship and entitles the employer to dismiss its employees for any or no reason, without committing a legal wrong.⁸⁰ The practical effect of these doctrines is to permit most private employers to impose whatever speech policies they choose upon employees, and to regulate those policies with the threat of dismissal. Private employers, like JSI, are limited in regulating the speech of their employees only by the narrow range of public policy exceptions to the at-will doctrine recognized by the common law, and by the NLRA.

Common law public policy exceptions to the at-will employment doctrine guide state courts to prohibit discharge of employees for illegitimate reasons, such as an employee's refusal to violate the law on the employer's behalf.⁸¹ Similarly, state law protects employees from discharge based on the invocation of a statutory right designed for the protection of the employee, such as worker's compensation.⁸² Some jurisdictions extend protection to employees who report employer violations of the law, but even those that recognize this "whistleblower" exception confine the protection to employees whose report addresses a well-defined and important public policy.⁸³

79. See generally *TRIBE*, *supra* note 29, ch. 18.

80. For an historical account of the doctrine, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976). For arguments that the doctrine should be limited, see Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979). For a defense of the at-will doctrine, see Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

81. See *Petermann v. International Bhd. of Teamsters, Local 396*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (discharge for refusal to commit illegal act was itself illegal); see also *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (employee cannot be discharged for refusal to dump bilge into navigable waters in violation of environmental laws); *Vermillion v. AAA Pro Moving & Storage Co.*, 704 P.2d 1360 (Ariz. Ct. App. 1985) (employee cannot be fired for refusing to participate in theft); *Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (discharge of employee for compliance with duty of serving on jury frustrates public policy).

82. *Sventko v. Kroger Co.*, 245 N.W.2d 151 (Mich. Ct. App. 1971) (employer cannot discharge worker for filing a claim for worker's compensation benefit that would negatively affect the employer's insurance rating).

83. For example, an employee may be protected from discharge for volunteering information about possible criminal conduct of employers, *Parna v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1982), but not for reporting that an employer's research methods are unethical, *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980), or for reporting

Beginning in the early eighties, courts began to find an employer obligation to dismiss only for "just cause," implied from oral representations or employee handbooks.⁸⁴ Employers reacted to this legal development by inserting disclaimers into their handbooks, and courts have held these contractual waivers valid.⁸⁵ Most state courts have failed to follow the example of California courts, which have found an implied-in-law covenant of good faith and fair dealing in employment contracting.⁸⁶ Thus, despite significant litigation over the issue, most private employees remain subject to the at-will doctrine, and can be fired for any reason—including their speech.

Another umbrella of protection for private sector employee speech is the NLRA. Under the NLRA, employers must allow employees to organize a union, bargain collectively over terms and conditions of employment, and engage in other concerted activities, without fear of management retaliation.⁸⁷ An early case interpreted the Act to protect workers' rights to distribute union literature and solicit for membership on company property without fear of management retaliation.⁸⁸ However, the right has been cobbled with restrictions. The solicitation may not take place during an employee's working time,⁸⁹ in workplaces frequented by the public,⁹⁰ or in areas where solicitation would threaten efficient operations.⁹¹ Similarly, the right of unions to picket to publicize their views, established by *Thornhill v. Alabama*⁹² in 1940, has since been restricted by amend-

that a company's product is unsafe, *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974).

84. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 53 (1990); see also *Toussaint v. Blue Cross and Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980).

85. See WEILER, *supra* note 84, at 55 n.18 (collecting cases dismissing employee suits for unjust discharge where the employer has clearly communicated disclaimer to employee).

86. *Id.*; see also *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443 (1980).

87. Section 7 of the NLRA gives employees the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of . . . other mutual aid or protection." 29 U.S.C. § 157 (1988). Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1) (1988). Section 8(a)(3) of the Act makes it an unfair labor practice to discourage union membership by discrimination in regard to hiring, tenure of employment, or any term or condition of employment. 29 U.S.C. § 158(a)(3) (1988).

88. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

89. See *id.* at 793 n.10.

90. See *Marshall Field & Co.*, 98 N.L.R.B. 88 (1952) (holding that employer may prohibit solicitation of its restaurant employees within the restaurant), *modified on other grounds and enforced*, 200 F.2d 375 (7th Cir. 1952); *McDonald's Corp.*, 205 N.L.R.B. 404 (1973) (same).

91. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978) (holding that hospitals can prohibit solicitation in patient care areas).

92. 310 U.S. 88 (1940).

ments to the Act limiting picketing for recognition to thirty days,⁹³ and by the Supreme Court's rejection of First Amendment protection for "secondary boycott" picketing.⁹⁴ Picketing rights were further diminished by a series of doctrines dictating where picketing may take place,⁹⁵ when it may occur,⁹⁶ and the subjects it may address.⁹⁷ Finally, although the right to engage in concerted activities for mutual aid and protection theoretically encompasses the right to speak freely about workplace issues on the job,⁹⁸ courts have consistently rejected protection for employee complaints viewed as personal gripes.⁹⁹

Accordingly, private sector employees enjoy limited protection under the NLRA, but only for some types of speech in some circumstances. Beyond the narrow limits of the public policy exceptions and the NLRA protection for union-related speech, private sector management is free to dictate what an employee may and may not say by wielding the ever-powerful threat of dismissal.¹⁰⁰ Private employers

93. 29 U.S.C. § 158(b)(7) (1988).

94. See *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607 (1980) (upholding ban on peaceful picketing aimed at convincing consumers of a secondary employer—one who does business with the targeted employer—not to purchase a struck product). But see Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984) (discussing the lack of consistency in the Court's First Amendment treatment of secondary boycott law).

95. See *Local 761, Int'l Union of Elec., Radio & Mach. Workers (General Electric) v. NLRB*, 366 U.S. 677 (1961) (union workers may not picket at gate reserved exclusively for use by employees of neutral independent contractor); *Moore Dry Dock*, 92 N.L.R.B. 549 (1950) (a picket at a common or ambulatory work site is unlawful unless the picketing is conducted reasonably close to the situs of the primary employer and pickets clearly identify the picketed employer).

96. See *Moore Dry Dock*, 92 N.L.R.B. 549 (1950) (picket on common or ambulatory work site is unlawful unless the primary employer is on the site at the time of the picket, engaged in its normal business); *Retail, Wholesale & Dep't Store Union Dist. 1199 v. NLRB*, 256 N.L.R.B. 74 (1981) (finding otherwise protected picketing unlawful because union failed to file the required 10-day notice required for picketing at health care institutions).

97. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (finding that the partial closing of a plant is not a mandatory subject of bargaining and therefore that the union may not legally picket over it); *Otis Elevator Co.*, 116 L.R.R.M. 1075 (1984) (holding the decision to transfer and consolidate operations is not a mandatory subject of bargaining and therefore the union may not legally picket over it).

98. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

99. See, e.g., *Adelphi Inst.*, 287 N.L.R.B. 104 (1988) (employee who asked a co-worker whether he had ever been placed on probation was not protected against discipline because he was not preparing for group action); *Meyers Ind.*, 281 N.L.R.B. 882 (1986) (discharged non-union truck driver who complained about safety defects on his truck and refused to drive it after an accident not protected because he was acting on his own behalf), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *Goodyear Tire & Rubber Co.*, 269 N.L.R.B. 881 (1984) (employee who refused to perform assignment because he believed equipment unsafe not protected because none of the other employees had complained).

100. Unions generally bargain for "just cause" provisions in the employment contract,

may fire workers for disparaging the company's product,¹⁰¹ for example, or for using derogatory and insulting language towards a supervisor,¹⁰² with impunity.

2. PUBLIC EMPLOYEES: THE FIRST AMENDMENT, ISSUES OF PUBLIC CONCERN, AND EMPLOYER CONTROL

In the public sector, where the employer is the government, employees do have First Amendment rights. Early public workplace speech cases recognized that "[s]peech about 'the manner in which government is operated or should be operated' is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment."¹⁰³ *Pickering v. Board of Education*¹⁰⁴ set out the test for determining whether employee speech should enjoy First Amendment protection: a balance is to be struck "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁰⁵ In practice, the government-as-employer's interest in workplace efficiency and discipline has almost always proven, in the *Pickering* balance test, to carry more weight than an employee's free speech rights.¹⁰⁶

*Connick v. Meyers*¹⁰⁷ further limited the scope of an employee's free speech rights by delineating between speech that addresses a public concern and speech characterized as a matter of personal interest. The First Amendment protects the former type of speech, as long as protection is not denied under *Pickering* as disruptive of the workplace. However, when the speech addresses a matter of personal

which may effectively prohibit discharges based on speech. See WEILER, *supra* note 84, at 50. However, any rights derived from the collective bargain are contractual, not statutory, in nature.

101. See *NLRB v. Local Union No. 1299, Int'l Bhd. Elec. Workers*, 346 U.S. 464 (1953) (upholding discharge of employees who distributed handbills criticizing the Jefferson Standard Broadcasting Company for poor quality programming, insufficient equipment, and "second-class" service).

102. See *Sullair P.T.O., Inc. v. NLRB*, 641 F.2d 500, 503 (7th Cir. 1981) (upholding discharge of employee who shouted "vulgar and obscene words of sexual connotation" at management).

103. *Connick v. Myers*, 461 U.S. 138, 156 (1983) (Brennan, J., dissenting) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

104. 391 U.S. 563 (1968).

105. *Id.* at 568.

106. See Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 3, 8-25 & nn.96-97 (1987) (collecting cases). As Massaro points out, "[A]ssumptions about broad freedom of speech within the public sector workplace are mistaken." *Id.* at 4.

107. 461 U.S. 138 (1983).

interest to the employee, the Court noted that "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."¹⁰⁸

Consequently, although the background assumption is that public employees have free speech rights that can be overcome only where the government's interest as employer is quite strong, just the opposite turns out to be true in practice.¹⁰⁹ An employee may not say anything that her employer believes might disrupt the efficiency of delivery of public services unless an overwhelming public interest is at stake, unpolluted by any personal interest on the part of the employee. Even if an employee proves that she was discharged because of speech of public concern, an employer will still prevail if it can prove, by a preponderance of the evidence, that it would have fired her anyway.¹¹⁰ In public employment, in other words, there is but a narrow First Amendment "public concern" exception to the otherwise almost universal understanding that in the workplace, employees speak freely at their peril.

B. *Employer Free Speech: The Status Quo*

Although in practice neither private nor public employees enjoy significant First Amendment protection against retaliatory dismissal, the First Amendment does protect employers against government interference. Still, that protection does not trump all other workplace rights. Both the NLRA and Title VII limit employer's free speech rights and employer's rights to control employee speech in the workplace.

108. *Id.* at 146. For a discussion of the implications of and rationale behind *Connick's* distinction between public concern and personal interest speech, see R. Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights are These, Anyway?*, 10 CARDOZO L. REV. 729 (1989). The purported distinction is, at best, a difficult one. *Id.* at 736. Fischl contends that courts are reading *Connick* as a "de facto labor exemption from First Amendment protection," *id.* at 737, and that the constitutional norms of free speech almost invariably give way to underlying political and cultural assumptions about labor relations. *Id.*

109. See Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990). Estlund collects cases demonstrating courts' use of the *Connick* public concern test to summarily dismiss public employee's free speech claims. *Id.* at 37 n.218. These cases include claims for improper discharge of a day care center employee for protesting the use of corporal punishment, *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545 (5th Cir. 1989), and of a police officer for his criticisms of the administration of an emergency response unit, *Brown v. City of Trenton*, 867 F.2d 318 (6th Cir. 1989). See also Massaro, *supra* note 106, at 18 (discussing additional obstacles to employee's success on a free speech claim, including the Supreme Court's procedural due process decisions and the "good faith defense" in section 1983 cases).

110. See *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1976).

1. NLRA RESTRICTIONS ON EMPLOYER SPEECH

The NLRA, while assuring employees protection against retaliation for some union organizing speech, also restricts employer speech. The seminal case of *NLRB v. Gissel Packing Co.*¹¹¹ held that employer speech that constituted unfair labor practice under the Act did not enjoy First Amendment protection. An employer, said the Court, "is free to communicate to his employees any of his general views about unionism . . . so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"¹¹² But if the employer's statements to the employees imply any threat of retaliation, that speech is "without the protection of the First Amendment."¹¹³ The *Gissel* Court considered the context of the labor setting essential in assessing the employer's expression as an unfair labor practice. According to the Court, "any balancing of [the employee's rights] must take into account the economic dependence of the employees on their employers."¹¹⁴

Gissel, of course, did not resolve the issue of which employer's statements constitute threats, and which are simply predictions of possible economic consequences of unionization. Subsequent cases vary in their distinction between threats and predictions, and the latitude they give employers to discuss the possible harmful effects of unionization.¹¹⁵ Nevertheless, it remains well settled that overt threats of economic retaliation are not an exercise of free speech, but are interferences with the right of self-organization protected by section 7 of the NLRA.¹¹⁶ When employer speech constitutes a violation of the NLRA, the First Amendment simply does not protect it.

Cases interpreting the NLRA restrict employer speech in a variety of other ways. The Act prohibits employers from making any speech to a large group of employees on company premises within twenty-four hours of a scheduled election,¹¹⁷ questioning employees about their union allegiance without certain safeguards,¹¹⁸ making

111. 395 U.S. 575 (1969).

112. *Id.* at 618.

113. *Id.* at 619. The speech at issue in *Gissel* was that of an employer who argued that the union was strike-happy, and warned that a strike could lead to economic woes for the company and the closing of the plant.

114. *Id.* at 617.

115. See JULIUS G. GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 50-51 (1988). The results are inconsistent, according to Getman, because "the cases vary so much in tone and detail while the adjudicators are almost certain to vary in attitude, bias, and assumption." *Id.* at 51.

116. See, e.g., *NLRB v. Alco Mining Co.*, 425 F.2d 1128 (5th Cir. 1970).

117. *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953).

118. *Thomas Indus. v. NLRB*, 687 F.2d 863 (6th Cir. 1982); *NLRB v. A.W. Thompson*,

campaign appeals or arguments that "inflamm[e] the racial feelings of voters,"¹¹⁹ discussing the union with small groups of employees away from the employees' work stations¹²⁰ or in employee's homes,¹²¹ and offering benefits to employees during a union organizing campaign.¹²²

Employers, then, like employees, are not completely unrestricted in what they may say and how they may say it. The NLRA represents a congressional determination that in certain contexts, the goals sought by the statutory scheme render workplace regulations that affect employer speech rights beyond the reach of the First Amendment.

2. TITLE VII RESTRICTIONS ON EMPLOYER SPEECH

Another line of caselaw supports the notion that the First Amendment does not shield employers from state imposition of workplace speech regulations. Courts have recognized racial harassment hostile environment claims under Title VII since 1971.¹²³ The First Amendment has not impeded courts' imposition of injunctive remedies upon employers in racial discrimination cases.¹²⁴

Inc., 651 F.2d 1141 (5th Cir. 1981). The guidelines required are set out in *Stuksnes Constr. Co.*, 165 N.L.R.B. 1062, 1063 (1967).

119. *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 70-71 (1962).

120. *People's Drug Stores Inc.*, 119 N.L.R.B. 634 (1957) (setting aside an election on the basis of the employer's interviewing employees in small groups away from their normal work places). *But see NVF Co.*, 210 N.L.R.B. 663 (1974) (rejecting the per se approach of *People's Drug Stores* and substituting an inquiry into all the facts in a particular case to determine whether, given the size of the groups interviewed, the locus of the interview, the position of the interviewer in the employer's hierarchy, and the tenor of the speaker's remarks, the discussions at issue were coercive).

121. *Peoria Plastics Co.*, 117 N.L.R.B. 545, 547 (1957); *The Hurley Company, Inc.*, 130 N.L.R.B. 282 (1961).

122. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

123. *Rogers v. Equal Opportunity Comm'n*, 454 F.2d 234 (5th Cir. 1971), *cert denied*, 406 U.S. 957 (1972).

124. *See, e.g., EEOC v. Beverage Canners, Inc.*, 897 F.2d 1967 (11th Cir. 1990) (upholding both the finding of a racially hostile environment where plant supervisors frequently made inflammatory, racially derogatory remarks in the presence of black employees, and the imposition of injunctive relief); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) (holding that Title VII requires employer to "take prompt action to prevent bigots from expressing their opinions in a way that abuses or offends their co-workers"); *Harris v. International Paper Co.*, 765 F. Supp. 1509 (D. Me. 1991) (finding racially hostile environment and directing employer to implement 5 programs immediately to remedy the Title VII violation); *Ways v. City of Lincoln*, 705 F. Supp. 1420, 1423 (D. Neb. 1988) (finding a racially hostile environment and imposing an injunction which required chief to form "plan for taking decisive action toward eliminating the racially hostile work environment" subject to court approval); *Butler v. Coral Volkswagen, Inc.*, 629 F. Supp. 1034, 1041-42 (S.D. Fla. 1986) (finding a hostile environment and permanently enjoining employer from discrimination on the basis of race by requiring that managerial staff attend training cases for human resource development, that manager raise the subject of racial harassment and

Race discrimination cases parallel sexual harassment cases in a number of ways. In each, litigants first attacked employers' overt denials of employment to minorities or women based upon race or sex. Later it became necessary, to further the goals of Title VII, to attack the more subtle means of discrimination that kept minorities and women out of certain workplaces or positions. *Rogers v. Equal Opportunity Commission*,¹²⁵ which established the hostile environment race claim under Title VII, recognized that employment discrimination is a "complex and pervasive phenomenon" and that employers will "undoubtedly devise more sophisticated methods to perpetuate discrimination" as patently discriminatory practices are outlawed.¹²⁶ Tacit approval of employee conduct that antagonizes and alienates minorities or women may well further an employer's inclinations to subvert the demands of Title VII. In recognition of this dynamic, courts hold employers responsible for the discriminatory conduct or expression of their employees where the employer knew or should have known of it, and failed to take adequate measures to eliminate it.¹²⁷ In other words, courts have considered the conduct and expression indicted in racially hostile environment cases to be as much that of the employer as the employee.

*Snell v. Suffolk County*¹²⁸ provides an enlightening analysis of the racially hostile environment claim under Title VII. In *Snell*, Black and Hispanic correction officers established a Title VII violation by showing that fellow officers had subjected them to verbal and other abuse. The court found that "[d]emeaning epithets [had] been regularly used . . . [s]currilous statements and cartoons [were] often posted on official bulletin boards. . . . [and] [p]laintiffs [had] repeatedly been mimicked in derogatory ways."¹²⁹

discrimination with all employees, and that the judicial order be posted conspicuously in defendant's workplace). Although in each of these cases the injunctive relief involved some regulation of speech, in no instance was the First Amendment a bar.

125. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

126. *Id.* at 238-39.

127. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990) (holding that under Title VII, liability exists where defendant had actual or constructive knowledge of sexually hostile environment); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184 (2nd Cir. 1987) (holding that Title VII prohibits an employer from standing by when the employer knows or reasonably should know that co-workers are harassing an employee because of that individual's race, color, religion, sex, or national origin).

128. 611 F. Supp. 521 (E.D.N.Y. 1985).

129. *Id.* at 525. "Jokes" circulating in the office included a fake minority officer civil service exam study guide with a decidedly racist cast, cartoons depicting a Klu Klux Klan member who had just shot a black person being remonstrated for hunting "out of season," pictures of naked black people with the caption "official runnin' Nigger Target," and a Klu Klux Klan application. *Id.*

The *Snell* court considered two arguments common to racial and sexual discrimination cases: first, that the prejudice displayed in the office was no greater than that displayed in society in general; and second, that Congress did not intend the ban on workplace discrimination to extend to joking. The court dispensed with the first argument in short order. While taking judicial notice that prejudicial language pervaded the state and county where the case was brought, the court considered it axiomatic that courts "not become involved in policing what citizens say and do in their homes and at social gatherings."¹³⁰ But "[t]he workplace is different because it is governed by Congress's mandate that discrimination in employment will no longer be tolerated in this country."¹³¹

In dealing with the second argument, that eradicating racial and ethnic joking was not what Congress had in mind in enacting Title VII, the court drew upon a solid body of sociological literature on the effects of racial jokes. The court recognized that racially stereotyped rough humor serves a variety of purposes. It can provide ventilation for suppressed hostility and fear, disguise affection, displace aggression, protect self-esteem, and define self-image. But the court concluded that the particular pattern of ethnic jokes in the Suffolk County Jail was designed to demean, harass, and intimidate. That, the court said, it could not tolerate because "Congress has flatly ruled that it will not be allowed in the workplace."¹³²

The court's remedy in *Snell* is similar to the one adopted in *Robinson*: the imposition of a workplace policy prohibiting the particular behavior that created the hostile environment. The policy forbade the use of certain epithets (nine of which were specifically listed), the posting or distribution of derogatory cartoons or written materials, and racial, ethnic, and religious slurs in the form of jokes.

Most important, *Snell* held that "the First Amendment does not bar appropriate relief in the instant case of discrimination in the workplace."¹³³ Title VII imposed an affirmative duty upon the

130. *Id.* at 528.

131. *Id.*

132. *Id.* at 531.

133. *Snell*, 611 F. Supp. at 531. The court declined to elaborate on this point, stating merely that the reasons were "beyond the scope of this opinion," and that it would be "inappropriate" to address the issue because neither party had raised it. *Id.* What the court did consider "appropriate" were "strong remedial steps . . . in the instant case." *Id.* The court here stood on solid ground. "Where racial discrimination is concerned, the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1527 (D. Me. 1991) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. at 418 (1975)) (imposing affirmative relief by ordering defendant to train

employer to provide a workplace free from harassment which the employer could not circumvent by tacit approval of racist workplace language and attitudes, and an assertion of First Amendment rights.

IV. THE FIRST AMENDMENT DEFENSE TO SEXUAL HARASSMENT: EMPLOYEE FREE SPEECH OR EMPLOYER CONTROL?

A. *Employee Free Speech and the Sexual Harassment Case*

The preceding Part argued that in both private and public sector workplaces, employee speech is, with rare exception, a matter of employer prerogative. The ACLU's concern over worker speech constrained by sexual harassment policies, then, is peculiar in the face of the lack of First Amendment protection generally afforded workers. The ready response to this declaration is, of course, that just because employees currently enjoy little protection for their speech is no reason to further limit that protection by disallowing sexual or sexist expression. Better perhaps to expand the exceptions to the at-will and state action doctrines, or to change the judicial application of the *Pickering/Connick* balance test to include a broader category of speech.

The argument that public and private employees currently enjoy minimal speech rights is not meant to endorse the at-will employment doctrine as a means of prohibiting employee speech, or to approve of the poverty of First Amendment protection for public employees or union members. Rather, this Comment, as a preliminary matter, questions why the speech in *Robinson* should merit more or different First Amendment concern than other workplace speech that is traditionally unprotected.

Within the workplace, courts recognize an employee's First Amendment rights when they perceive a threat to a right separate and distinct from the simple right to express oneself. In the private sector,

and educate supervisors and employees on issues of harassment and to adopt formal grievance procedures); accord *Johnson v. Brock*, 810 F.2d 219, 225 (D.C. Cir. 1987) (holding that district court must exercise its discretion in light of the prophylactic purposes of [Title VII] to ensure that discrimination does not recur). Injunctive relief is considered appropriate in racial discrimination cases, unless there is no reasonable expectation that the discrimination will continue or recur. See *Spencer v. General Elec. Co.*, 894 F.2d 651 (4th Cir. 1990) (declining to impose injunction only because there was no danger of recurrence since harassment involved isolated incident, offending supervisor had been fired, plaintiff had been transferred, and company had instituted a sexual harassment policy). Nor is an injunction an unusual remedy. See, e.g., *Jew v. University of Iowa*, 749 F. Supp. (S.D. Iowa 1990) (ordering promotion of plaintiff who was denied full professorship because of bias generated by sexually harassing hostile work environment).

the law honors an employee's speech rights only when denying them would force her to break the law. In public employment cases, courts protect employees' speech rights on matters of public concern only to preserve communication necessary to self-governance and democracy (in the state, rather than within the workplace). And in labor cases, the law protects the employee's speech rights only from threats to the statutory right to unionize and bargain collectively. But in *Robinson*, no right of the workers—beyond the simple desire to express themselves through the posting of pinups—is at issue. As dear as this right of self-expression may be, no work-related right and no state-sanctioned instrumental goal is frustrated by demanding that, in the workplace, Playboy playmates are off-limits.

On the other hand, a specific workplace right is furthered by a policy that prohibits discriminatory behavior, including speech. The injunction granting relief to Lois Robinson by imposing the sexual harassment policy on JSI gives meaning to her rights under Title VII.

Therefore, it is not inconsistent to support broader worker free speech in the public employment cases and worker empowerment in the labor cases, and also support a court-imposed regulation that prohibits some employee speech in sexual harassment cases. In both public employment and labor cases, a concept of fundamental fairness between employer and employee constrains the employer's built-in control over the employee's speech, and balances an inherently unequal power dynamic. But in sexual harassment cases, the fairness issue is one of equal treatment by management of male and female employees. Favoring the First Amendment right to free expression in this context feeds a power dynamic—discrimination against women—which not only favors men whether they are employers or employees, but is legislatively prohibited. Judicial imposition of a sexual harassment speech policy, therefore, does not really mediate between one employee's speech rights and another employee's right to a non-hostile environment. That would be an easy case, since private employees have no speech rights. Rather, a judicially mandated sexual harassment policy mediates between each employee's right to be protected against discrimination in the workplace and the employer's right to control employees' speech in the workplace.

B. *Employer Free Speech and the Sexual Harassment Case*

The plaintiff in *Robinson*, like the plaintiffs in *Gissel* and *Snell*, seeks to force her employer to adhere to statutory dictates governing the workplace; the employer claims that the remedy sought contravenes the First Amendment. The sexual harassment plaintiff-

employee aligns herself against the employer, who is directly or indirectly responsible for the environment and thus the expression of her fellow employees. When a sexual harassment lawsuit names employees as defendants, those employees enjoy, for the moment, an alliance with the employer.

In defending against a charge of sexual harassment, the employer and defendant-employees may ostensibly argue for "free" speech. But at bottom, an employer defending a hostile environment harassment claim, like the employer asserting its First Amendment right to coerce employees into voting down a union or to ignore co-worker vilification of minority employees, is simply defending its right to plenary control of the workplace.

This assertion of employer control through the First Amendment is illustrated when an plaintiff-employee seeks First Amendment protection against dismissal. The employer, asserting the at-will employment doctrine or arguing that the *Pickering/Connick* balance test works in its favor, rejects notions that the First Amendment protects an employee's speech. But when, as in *Robinson*, *Gissel*, and *Snell*, a plaintiff-employee seeks to restrict the speech of other employees or management, the employer argues that both enjoy First Amendment protection. This reversal of position by management seems contradictory. However, from the employer's point of view, the two positions are entirely consistent; management's argument is simply that the employer, as employer, may set the terms of what is and is not appropriate speech on the job, without interference from the state.¹³⁴

It is hard to imagine a scenario where a private employer would accede to an employee's assertion of a First Amendment right to discuss confidential information with competitors, or to shout obscenities within earshot of customers. It is even less likely that an employer would incur the expense of litigating a case promoting the First Amendment rights of its employees unless the employer stood to gain from the employee's success. For example, although JSI protests the court's imposition of a policy prohibiting expression, JSI itself has denied employee's requests to post political materials, advertisements, and commercial materials in the workplace.¹³⁵ JSI employees have no legal recourse to argue that JSI's imposition of the no-political-posters

134. See Browne, *supra* note 67, at 511 (discussing an employer's First Amendment defense against a sexual harassment claim). "Although it might appear at first glance that the employer is asserting its employees' constitutional rights rather than its own, that is not so for several reasons . . . [W]hen liability is imposed because of the employer's failure to censor its employees, the employer is arguing that a law that holds it liable for failing to censor protected speech violates its own First Amendment rights." *Id.*

135. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1494 (M.D. Fla. 1991).

policy is unconstitutional. Only because JSI itself does not want to adopt the sexual harassment policy are its employees able to assert, through JSI, their free speech rights.¹³⁶

Employers do enjoy broad latitude to control the workplace, including the freedom to impose—or not impose—speech policies upon their employees. But as Part III pointed out, both the judiciary and Congress have the power to modify or restrict traditional employer control through a determination that policy concerns or statutory mandates outweigh an employers' right to control speech in the workplace. In private workplaces, public policy exceptions modify the at-will employment doctrine. In the context of union organizing, the NLRA restricts employer control of the workplace by protecting union-related speech and by limiting employers' speech to workers during a campaign. In public workplaces, the *Pickering/Connick* balance test restricts the government's control over workplace speech when the speech addresses an "issue of public concern."¹³⁷ Why then, should not Title VII operate as a legislative modifier on the employer prerogative to control workplace speech?

At least one commentator rejects the contention that labor speech and unfair labor practice cases have any application to Title VII sexual harassment cases.¹³⁸ Kingsley Browne argues that the reasoning of *Gissel* does not support a "general governmental right to regulate speech in the workplace,"¹³⁹ and that the strong governmental interests present in *Gissel* are absent in sexual harassment cases. He supports this argument by analogizing the *Gissel* speech to blackmail, but contends that sexually offensive speech has "no relation to any threat of future action."¹⁴⁰ What Browne fails to recognize is that while *Gissel* may not stand for a general right to governmental regulation of workplace speech, it does stand for the proposition that when Congress has determined, through legislation, that employers have affirmative duties under a federal statute, employers may not resort to

136. Browne asserts that "the employer receives little gratification from its employee's free speech," which leads one to wonder why an employer would go to the trouble to defend it. Browne, *supra* note 67, at 505. The response that the employer defends employee free speech to avoid litigation costs and damage awards is inadequate. Robinson was awarded no damages, and JSI could have avoided the litigation at any point by simply adopting a sexual harassment policy, or by telling the workers to take down the pinups. The conclusion that JSI got some "gratification" from the expression of its employees is unavoidable, and one suspects that keeping women out of the shipyard was a side effect of the pinups that the employers, no less than the employees, appreciated.

137. *Connick v. Meyers*, 461 U.S. 138, 146 (1983).

138. See Browne, *supra* note 67, at 513-15.

139. *Id.* at 514.

140. *Id.* at 515.

a First Amendment defense to circumvent those duties. Title VII is precisely analogous to the NLRA in this way. Furthermore, Browne misreads the impact of speech found harassing under Title VII. Sexually harassing speech indeed constitutes a threat of future action: the threat of an escalation of the speech to conduct, or of simply more of the same speech. The threat—or the promise—is that neither women nor minorities will enjoy the same workplace conditions of employment as do white males.

In addition, Browne argues that where the contested speech is that of the employee, *Gissel* does not apply because *Gissel* relied on the power differential between employer and employee, a dynamic that he contends does not exist between co-workers. But this argument denies what Browne has already asserted: that the employer is, in actuality, defending its own rights.¹⁴¹ Moreover, this lack of inequality argument assumes that the only power dynamic that exists in a workplace is between employer and employee. As the *Robinson* analysis shows, in a predominantly male workplace, where no females occupy supervisory positions, and where management supports the majority group's behavior, women experience a lack of power vis-à-vis both employers and male co-workers.

Both the employee and employer free speech cases provide a rationale for accepting the *Robinson* court's imposition of a policy that regulates speech in the JSI workplace. *Robinson* makes no unprecedented departure from courts' consistent understanding that workplace speech is not quite like speech outside the workplace. The mandate of Title VII to eradicate discrimination simply takes precedence over an employee's individual right to free expression—which is, in any case, virtually non-existent—and over an employer's right to control speech policies in the workplace—which is otherwise almost plenary.

C. *The Robinson First Amendment Analysis*

In light of the traditional role the First Amendment plays in the workplace and the myriad forms of speech regularly banned by both private and public employers, the civil libertarian concern over the rights of welders to display pinup shots in the JSI shipyard seems extraordinary. The controversy over *Robinson* may be because the case involves sexually explicit photographs, which brings to mind the First Amendment analysis applied in *American Booksellers Association v. Hudnut*.¹⁴² Didn't the *Hudnut* opinion decide for us that there

141. *Id.* at 511.

142. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

is a First Amendment right to demean women through language and pictures, just as there is a First Amendment right for Nazis to march in Skokie?¹⁴³

JSI's trial brief spent little time developing a First Amendment defense, but did argue that an injunction barring speech under Title VII would be unlawfully restrictive of free expression in the same way that the Indianapolis ordinances in *Hudnut* were unconstitutional.¹⁴⁴ That is, an injunction forbidding sexually oriented graphic materials in the workplace because of their message to women would, like the *Hudnut* ordinance, impose an unconstitutional viewpoint-based restriction on speech.

The plaintiff's characterization of the photos in the JSI workplace as messages fostering a view of woman as sex objects does sound suspiciously similar to the ideas that animated the *Hudnut* ordinance.¹⁴⁵ In adopting the ordinance, the Indianapolis City-County Council found that "[p]ornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women."¹⁴⁶ Similarly, *Robinson* justified its holding and injunction reasoning that the "presence of the pictures . . . sexualizes the work environment to the detriment of all female employees . . . , has a disproportionately demeaning impact on the women . . . [and] convey[s] a message that [women] do not belong."¹⁴⁷

Judge Melton, however, held that *Hudnut's* First Amendment

143. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party*, 373 N.E.2d 21 (Ill. 1978). In these cases, an American neo-Nazi group, represented by the ACLU, gained permission to demonstrate in Skokie, Illinois, a community with a large Jewish population that included many Holocaust survivors.

144. See Trial Brief for Defendants at 43-46, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (No. 86-927).

145. Catharine MacKinnon, who authored the ordinances tested in *Hudnut*, was a primary architect in the development of sexual harassment law. See MACKINNON, *supra* note 33.

146. INDIANAPOLIS ANTIPORNOGRAPHY ORDINANCE § 16-1(a)(2), reprinted in Marian L. Lausher, Note, *Redefining Pornography as Sex Discrimination: An Innovative Civil Rights Approach*, 20 NEW ENG. L. REV. 767 (1985) (app. C). MacKinnon herself puts the case even more strongly: "Pornography institutionalizes the sexuality of male supremacy, which fuses the erotization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be." MACKINNON, *supra* note 33, at 148.

147. *Robinson*, 760 F. Supp. at 1523.

analysis did not apply to *Robinson*.¹⁴⁸ The *Robinson* opinion does not define a specific class of sexual materials and deem them unprotected by the First Amendment as did the Indianapolis ordinance.¹⁴⁹ Rather, *Robinson* mandates a determination of whether pictures create a hostile environment by reference to the context in which the pictures appear. The contextual characteristics to be examined include the ratio of men to women, the number of women in positions of authority, the degree to which the industry or workplace was traditionally a male province, and the degree to which the workplace norms included sexual behavior.¹⁵⁰ Thus *Robinson* limits the assumption of the Indianapolis ordinances that sexually subordinating expression always harms women; only when the plaintiff empirically demonstrates male domination, rather than experientially or theoretically asserting it, will the court assume that sexually explicit photos have discriminatory potential.

Robinson's emphasis on context and identifiable harm means, most obviously, that the JSI sexual harassment policy will not apply outside the workplace. Part of the concern over the *Hudnut* ordinance was its virtual blanket ban on the display of pornography.¹⁵¹ JSI employees, unlike citizens subject to a *Hudnut* ordinance, are free to post, read, display, and distribute whatever sexual materials and photographs they desire—anywhere *but* the JSI shipyard. Moreover, the JSI policy need not be the model for all workplaces. A remedy, after all, may go no farther than is needed to correct the harm found. The JSI regulations are not necessarily appropriate or applicable to workplaces that do not share the unique characteristics of the JSI shipyard.¹⁵²

148. *Id.* at 1536.

149. *Id.* According to *Robinson*, the *Hudnut* ordinance was based on the proposition that "pornography conveys a message that is always inappropriate and always subject to punishment, regardless of the context." *Id.*

150. For a more complete discussion of the conditions necessary for a determination, under *Robinson*, that sexual photographs create a hostile environment, see *infra* part V.A.

151. The ordinance prohibited forcing pornography on a person "in any place of employment, in education, in a home, or in any public place." *Hudnut*, 771 F.2d at 325. The court expressed concern that the ordinance might apply even to pictures shown to medical students as part of their education. *Id.*

152. Whether in fact the *Robinson* injunction goes farther than necessary to correct the harm is a strongly contested aspect of the case. See Press Release, American Civil Liberties Union of Florida, "Marquez Misses Point in Pinup Case" (Dec. 10, 1991) (asserting that under the *Robinson* order, "an employee's picture of his wife in a bathing suit would be outlawed, not to mention any Jackie Collins novel"). Much is made of the fact that the harassment policy presumes a picture to be sexually suggestive (and therefore prohibited) 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." *Robinson*, 760 F. Supp. at 1542. The policy, however, goes on to read "and who is posed for

The specific ground for the court's rejection of the *Hudnut* analysis was its conclusion that the pictures at JSI were not protected speech because they "act[ed] as discriminatory conduct in the form of a hostile work environment."¹⁵³ The JSI photos as discrimination violated Title VII, and thus, like other speech that constitutes a crime—such as threats of violence, threats to intimidate witnesses, or blackmail—were not protected by the First Amendment.¹⁵⁴

The *Robinson* court's designation of the photographs at JSI as discriminatory conduct under Title VII, analogous to a crime, is unsatisfactory. First, the court did not explore its analogy of a Title VII violation to a crime such as blackmail, nor did it explain the unnecessary stretch from a criminal to a civil context. The opinion also overlooked the more pertinent labor law cases establishing that the state may regulate employer speech that constitutes an NLRA violation.¹⁵⁵ More important, the characterization of the pinups as conduct rather than speech is a circular approach to the problem. It simply begs the question at the heart of the First Amendment attack: if posting sexually explicit photographs of women *is* discriminatory conduct under Title VII and thus subject to censorship, is Title VII constitutional? This is the *Hudnut* question all over again.¹⁵⁶

the obvious purpose of displaying or drawing attention to the private portions of his or her body." *Id.*

153. *Robinson*, 760 F. Supp. at 1535.

154. *Id.* The *Robinson* court also reviewed various alternative justifications for regulating the sexual images at JSI, were they to be considered fully protected speech. The court considered the proposed regulation of discriminatory speech only a time, place, and manner regulation of speech. *Id.* In addition, the female workers at JSI were a "captive audience." *Id.* The captive audience doctrine arose over concern about unwanted communications in the home. See *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-37 (1970) (upholding law allowing post office to stop all mailings of erotic or sexually provocative mail to homes of those who request it); *FCC v. Pacifica Found.*, 438 U.S. 726, 744-51 (1976) (holding that the Federal Communications Commission has power to regulate indecent radio broadcasts because in the home, "the individuals' right to be let alone plainly outweighs the First Amendment rights of an intruder"). Although various writers have suggested that the captive audience concept is appropriate to the workplace, courts have not yet applied it in a workplace context. See Balkin, *supra* note 68, at 423 ("Few audiences are more captive than the average worker."); Strauss, *supra* note 68, at 35-37 ("Employees at work, like residents in their homes, may qualify for captive audience status"). *Robinson's* extension of this principle to the workplace was apparently a first, and referred to no caselaw. Ultimately, however, the opinion's First Amendment treatment rests on its determination that the photos in question were not protected speech, but were discriminatory conduct that violated Title VII. *Robinson*, 760 F. Supp. at 1535.

155. The court did find support for restrictions on expression in the workplace from racially abusive language cases and public employee speech cases. *Robinson*, 760 F. Supp. at 1536; see also *supra* part III.A.2 and B.2.

156. Speaking of the stalemate in the debate over the *Hudnut* antipornography ordinances, Christina Spaulding remarked, "The question then becomes: why isn't equality a sufficiently strong interest to justify the abridgement of certain kinds of speech. Why may the state

The *Hudnut* question—whether the statutory civil rights of minorities trump the First Amendment rights of the majority—is the wrong question to ask in the *Robinson* case. To begin with, it assumes that the conflict is between employees' rights to a non-hostile environment on the one hand, and free speech on the other. But the tension in *Robinson* and other sexual harassment cases, as noted earlier, is actually between the employee's right to a non-hostile environment and the employer's right to impose, or not impose, whatever workplace restrictions the employer sees fit. In addition, the limited reach of *Robinson*'s injunction, imposed *after* a finding that the pictures created an environment hostile to women, stands in sharp contrast to the *Hudnut* ordinance's ban on an entire class of photographs regardless of the context or their impact.

Hudnut faced off First Amendment rights to public expression of potentially damaging opinions against women's civil rights to participate in public life as full and equal citizens. *Robinson*, in contrast, pits employees' rights to be free from discrimination in the conditions of their employment against employers' rights to say whatever they want to employees, and to regulate, dictate, punish, approve of, encourage, or reward the speech of their employees. An employer's right to control the workplace does not overwhelm an employee's right to a workplace free of discrimination, or the employer's affirmative duty to provide one.

V. PINUPS AS SEXUAL HARASSMENT

Even if one accepts that an employer First Amendment defense does not apply to a workplace sexual harassment case, the popular reading of *Robinson*—that the government can ban Playboy calendars from a workplace—remains troubling to many. Do we really want to put nude photographs into the category of discriminatory conduct under Title VII? Why did the *Robinson* court understand pinup posters in the workplace as sources of discrimination against women, rather than simply bad taste or inappropriate behavior?

Robinson is apparently the first case in which the plaintiff presented expert evidence explaining why pinups in the workplace may constitute a hostile environment. The opinion, carefully read, provides a rationale for determining the circumstances in which sexual photographs constitute legal harassment. Part A describes the

endorse the view that 'sex should not look like this' when 'this' is obscene, but not when 'this' is degrading and violent [or discriminatory] toward women?" Christina Spaulding, *Anti-Pornography Laws as a Claim for Equal Respect: Feminism, Liberalism & Community*, 4 BERKELEY WOMEN'S L.J. 128, 136-37 (1988).

testimony and studies presented to the court in support of the theory that sexual imagery in the workplace discriminates against women. Part B addresses two policy objections to the *Robinson* holding, and contends that such objections are misplaced. Finally, Part C suggests that the *Robinson* analysis provides a reconciliation between two opposing theoretical frameworks for sex discrimination analysis, the equality principal and the dominance theory.

A. Stereotyping Women Workers as Sexual Objects

To state a claim for sexual harassment, a plaintiff must show that but for her sex, she would not have been the object of harassment.¹⁵⁷ Courts have recognized three categories of behavior that raise a presumption of the required causal link between harassment and a female victim's sex: behavior directed at women and motivated by an antiwoman animus;¹⁵⁸ sexual conduct directed at women;¹⁵⁹ and conduct which, though not directed against a particular group or individ-

157. Five elements comprise a hostile environment claim: (1) the plaintiff must belong to a protected category; (2) the harassment complained of must have been unwelcome; (3) the harassment must have been causally linked to the plaintiff's sex; (4) the harassment must affect a term, condition, or privilege of employment; and (5) the defendants must have known or should have known of the harassment and failed to take prompt, effective remedial action. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66-69 (1986); *Henson v. City of Dundee*, 628 F.2d 897, 903-05 (11th Cir. 1982); *Robinson*, 760 F. Supp. at 1522. The *Robinson* court dealt with elements (1) and (2) cursorily, stating that Robinson "indisputedly belonged to a protected category" (women) and that the harassing conduct was not solicited or incited. *Id.* Elements (3) and (4) are discussed *infra* Part V. As for the fifth element, corporate JSI and a number of individual managers at JSI were defendants. Some of the individual defendants in *Robinson* were found liable while others were not, depending upon the extent of their effective control over employment decisions in the workplace. The court imposed upon JSI, as corporate employer, both actual and constructive knowledge of the hostile state of its environment, found its remedial responses ineffective, and found JSI subject to direct and indirect liability. The *Robinson* decision treated the issue of employer liability at some length. *Id.* at 1527-32. For a discussion of the numerous issues raised by the various approaches to employer liability used by the courts, see Note, *Sexual Harassment Claims of Abusive Work Environment under Title VII*, 97 HARV. L. REV. 1449, 1460-63 (1984); Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 377-87 (1980).

158. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990) (the offensive conduct is not necessarily required to include sexual overtones in every instance); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988) (constant verbal attacks challenging women's capacity to be surgeons, although not explicitly sexual, were charged with antifemale animus and therefore contributed to hostile environment).

159. See, e.g., *Sparks v. Pilot Freight Carriers Inc.*, 830 F.2d 1554 (11th Cir. 1987) (reversing summary judgment on claim of sexual harassment where plaintiff's boss made repeated sexual advances); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (reversing summary judgment on plaintiff's claim that director repeatedly asked her to join him socially, made threatening sexual remarks to her, and suggested her employment status would improve if she cooperated with him).

ual, has a disproportionate effect on women.¹⁶⁰ The photographs at JSI, according to *Robinson*, fell into this third category.¹⁶¹

What is it about sexually explicit photos that affect women as a class differently than men? The testimony of Robinson's expert witnesses on the effects of sex role stereotyping in the workplace provided the court with the link between nude photographs of women and sex discrimination.¹⁶² According to Dr. Susan Fiske,¹⁶³ an expert on stereotyping, pinups of nude or scantily clad women, shot in sexually submissive poses, reinforce impermissible sexual stereotypes of women. They convey a message that women "are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment."¹⁶⁴ The sex-objectification of women disadvantages them, burdening them with a condition or term of employment to which men are not subject.¹⁶⁵

Reliance on stereotyping for cues about people and situations is so common that some consider it human nature. Behavior that grows out of stereotyped notions of race, religion, sex, or national origin is equally prevalent. However, within the context of the workplace, such behavior, to the extent that it affects an individual's compensation, terms, conditions, or privileges of employment, is discrimination, and therefore an unlawful employment practice under Title VII.¹⁶⁶ *Robinson's* contribution is the recognition that environmental sex-role stereotyping on the job is uniquely susceptible to detection and regulation.

For example, Fiske testified, and the court accepted as fact, that certain preconditions enhance the prevalence of stereotyping in any

160. See, e.g., *Waltman v. International Paper*, 875 F.2d 468 (5th Cir. 1989) (holding that graffiti, though not directed at plaintiff, was relevant to her claim and that even a woman who was not the object of harassment might have a Title VII hostile environment claim); *Andrews*, 895 F.2d at 1485-86 (noting that although men might react to obscene language and pornography as harmless and innocent, women might react otherwise).

161. *Robinson*, 760 F. Supp. at 1523.

162. Stereotyping is the study of category-based responses in human thought and perceptual processes. *Id.* at 1502. Stereotyping means responding to a person on the basis of a category, thus attributing to the person traits and characteristics associated with the category, rather than evaluating the individual on her own merits. The emotional manifestation of stereotyping is prejudice; the behavioral manifestation is discrimination. *Id.* at 1502-05.

163. Dr. Fiske is a professor of psychology at the University of Massachusetts at Amherst, and has published in numerous journals in her field. She also appeared as an expert witness on stereotyping in *Hopkins v. Price Waterhouse*, 618 F. Supp 1109 (D.D.C. 1985), *aff'd in relevant part*, 825 F.2d 458, 467 (D.C. Cir. 1987), *rev'd on other grounds*, 490 U.S. 228 (1989). For a discussion of *Hopkins* and the role that Fiske's testimony played in the Court's holding, see *infra* notes 170-73 and accompanying text.

164. *Robinson*, 760 F. Supp. at 1523.

165. *Id.* at 1505-06.

166. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

given environment.¹⁶⁷ First, stereotyping is more likely to occur in a skewed population—that is, where one group or category of people is smaller than another group. Second, stereotyping occurs with increased frequency when a power structure or hierarchy exists that excludes a group and thus inhibits that group's sense of belonging. Third, stereotyping is more prevalent in circumstances where specific stimuli in the work environment, such as sexual photographs, encourage or reinforce certain stereotypical categories.¹⁶⁸ Elimination of the conditions that reinforce stereotyping is a logical means of deterring it.

Applied to JSI, Fiske's analysis of stereotyping is simple. At JSI, men vastly outnumbered women. The JSI shipyard and the welding trade had a strong tradition of male dominance. No women occupied, or had ever occupied, positions of power at JSI. In such an atmosphere, sexual joking, profanity, and numerous photographs of nude women sharpened the tendencies of the dominant group (men) to categorize workers along gender lines. The photographs reinforced the differences between males and females in terms of sexual attributes, and encouraged workers to evaluate females primarily in terms of their conformity to stereotyped visions of femaleness. Femaleness at JSI meant sexual attractiveness, availability, a preoccupation with sex, and a predisposition towards submissiveness. Under Fiske's analysis, a woman worker at JSI would be likely to experience the resulting atmosphere as hostile to her because of her sex.

The study of stereotyping, and a judicial view of stereotyping as discrimination, are not new with *Robinson*.¹⁶⁹ In *Price Waterhouse v.*

167. *Robinson*, 760 F. Supp. at 1503-05.

168. *See id.* Fiske testified that studies show that photographs of nude women encourage a male population to view and interact with women co-workers as if they are sex objects. One study randomly assigned male college students as subjects who viewed either a non-violent but pornographic film or a film without pornographic content. Those who viewed the pornographic film later remembered little about the female interviewer except for her physical attributes, while those who viewed the neutral film remembered more about the interview itself. In addition, the female interviewers could reliably distinguish which males had seen which film from the conduct of the males during the interview. *Id.* at 1503-04 (citing Mohr & Zanna, *Treating Women as Sex Objects: Look to the (Gender Schematic) Male Who Has Viewed Pornography*, 16 PERSP. & SOC. PSYCH. BULL. 296 (1990)).

169. *See* Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 487-503 (1990); Taub, *supra* note 157, at 349-61. Both of these articles collect and discuss a significant body of social science data on stereotyping. Radford examines the prevalence of sex stereotyping in the workplace, argues that sex stereotyping constitutes a harmful ingredient in any employment setting, and suggests that under Title VII employers should be held "accountable for allowing deeply embedded stereotypes to taint their decision-making processes." Radford, *supra*, at 476. Taub proposes stereotyping per se as a fourth concept of discrimination. Taub, *supra* note 157.

Hopkins,¹⁷⁰ the American Psychological Association filed an amicus curiae brief with the Supreme Court outlining the extent and quality of sex stereotyping research and the general acceptance of the research in the scientific community. Five decades of research in the area, 12,689 articles on human sex differences in fifteen years, and three hundred articles on sex stereotyping in thirteen years have yielded "an internally valid pattern of consistent, mutually confirmatory findings."¹⁷¹

The Supreme Court put its imprimatur on the concept of stereotyping as impermissible sex discrimination in *Hopkins*. *Hopkins* held that the employer had the burden of proving by a preponderance of the evidence that it did not base its denial of the employee's promotion on impermissible bias reflected by stereotypical thinking about female employees. The stereotyping in *Hopkins* was not about characterizing women as sex objects, but about characterizing women as unsuited for partnership because they were either "too feminine" or "too masculine."¹⁷² *Hopkins* recognized the double bind placed on women in such situations, and reiterated that Title VII forbids employers from considering gender in employment decisions. The causal connection between the stereotyping and the decision not to promote Hopkins was obvious to Justice Brennan, who wrote, "It takes no special training to discern sex stereotyping" in some of the defendant's remarks.¹⁷³

Hopkins is only the latest of cases showing courts' understanding of stereotyping as an evil targeted by Title VII. In *Dothard v. Rawlinson*,¹⁷⁴ the Supreme Court summarized and endorsed the common theme in lower courts' rulings: "[T]he federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual

170. 490 U.S. 228 (1989).

171. Amicus Curiae Brief of American Psychological Association for Respondent, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167).

172. Sociological studies on stereotyping indicate that stereotypes of men and women in the workplace lead to perceptions that management and leadership are "men's work," that "masculine" traits are more positive and connected with success and power than "feminine" traits, and that women who exhibit masculine traits are deviant. Radford, *supra* note 169, at 494-96.

173. *Hopkins*, 490 U.S. at 256. Although Brennan accepted the district court's reliance on Dr. Fiske's testimony on sex stereotyping and declined "to adopt the dissent's dismissive attitude toward Dr. Fiske's field of study and toward her own professional integrity," *id.* at 255, he considered the testimony "merely icing on Hopkin's cake," *id.* at 256. Brennan believed that it did not require expertise in psychology to know that partners' remarks that Hopkins needed a course at charm school and that she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry," *id.* at 235, were based on the employee's sex and not her interpersonal skills. *Id.*

174. 433 U.S. 321 (1977).

woman or man on the basis of stereotyped characterizations of the sexes.”¹⁷⁵ In *Los Angeles Department of Water & Power v. Manhart*,¹⁷⁶ the Court noted that “[i]t is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”¹⁷⁷ “In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and woman resulting from sex stereotypes.”¹⁷⁸ The courts of appeals have consistently found that sex-stereotyped assertions about employees given as reasons for discharge constitute Title VII violations.¹⁷⁹ In addition, the Supreme Court has not hesitated to strike down differential treatment of the sexes under Equal Protection claims on the theory that “the role-typing society has long imposed” is inconsistent with contemporary reality.¹⁸⁰ The Supreme Court, in other words, has had no problem with the concept of stereotyping, and has applied it in both statutory and constitutional spheres.¹⁸¹

Courts have determined, then, that gender stereotyping that dichotomizes character traits and categorically attributes traits to individuals on the basis of gender is detrimental and discriminatory in the workplace when it affects a promotion or discharge. This rationale should also permit the determination that stereotyping is discriminatory when it affects the workplace environment—a “condition” of employment. If stereotyped attitudes can demonstrably influence employment decisions and prevent the promotion or hiring of women, it follows that stereotyped attitudes can also work a more subtle form

175. *Id.* at 333.

176. 435 U.S. 702 (1978).

177. *Id.* at 707.

178. *Id.* at 707 n.13 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

179. See, e.g., *Fields v. Clark Univ.*, 817 F.2d 931 (1st Cir. 1987) (pervasive sexist attitude of male members of sociology department was direct evidence of discrimination against female teacher they did not tenure); *Fadhl v. City & County of San Francisco*, 741 F.2d 1163, 1165 (9th Cir. 1984) (sex-stereotyped statements by police officers that plaintiff was “too much like a woman,” “very ladylike . . . which . . . may cause problems,” and could become “feminine again” after work, supported finding that sex was factor in termination); *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (refusal to hire a woman because of sex stereotyped views of woman’s physical abilities violates Title VII).

180. Taub, *supra* note 157, at 409-10 (citing and discussing the willingness of the Court to identify stereotypical motivation in equal protection cases: *Califano v. Westcott*, 443 U.S. 76 (1979); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977); *Califano v. Webster*, 430 U.S. 343 (1977); and *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

181. For a more extensive development of the Court’s acceptance of the concept of stereotyping, see Taub, *supra* note 157, at 405-17.

of discrimination through the work environment.¹⁸²

This analysis assumes, of course, that *sex-object* stereotyping—a categorization that emphasizes sexual attributes—discriminates against women. It could be argued that a co-worker's appraisal of a woman as a sex object has little to do with her ability to perform her job. If the co-worker has no power over the woman's promotions and benefits, and does not manifest his attitudes by any overt advances, in what way does even a pervasive workplace attitude that women belong in the bedroom (and not in the shipyard) actually discriminate against women? While the harm caused by some types of stereotyping are obvious—say, prohibiting women from performing certain jobs in the shipyard because of a stereotyped notion that women can't be trusted with sharp instruments—what's wrong, legally, with stereotyping women as sex objects?¹⁸³

According to Fiske, studies show that an atmosphere that encourages the stereotyping of women as sex objects affects women's ability to do their jobs.¹⁸⁴ The stereotyping overwhelms a view of a woman as a capable, committed worker, and in effect blots out all other characteristics. This phenomenon, known as "sex-role spillover," leads to the evaluation of women employees by co-workers on the basis of their worth as sexual objects rather than as workers.¹⁸⁵ Although this phenomenon works to women's detriment in almost any job, it is an even greater problem for women in traditionally male-dominated trades, where male workers view the skills necessary to be a good plumber or welder as utterly inconsistent with the attributes of female sexuality.

Sex-object stereotyping forces women to monitor or alter their behavior either to conform to the stereotyping (in an effort to be accepted on some level), or to make clear that they are rejecting sex-object status (in an effort to avoid unwanted sexual advances).¹⁸⁶ The resulting anxiety, emotional upset, and expended effort which women

182. Justice O'Connor, concurring in *Hopkins*, noted that although sex-stereotyped "stray remarks" cannot justify a burden shift to the employer to prove legitimate hiring criteria, they may be probative of sexual harassment, *Hopkins*, 490 U.S. at 277 (O'Connor, J., concurring) (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)), indicating an openness to considering stereotyping as impermissible when it contributes to a sexually harassing work environment as well as when it affects a hiring decision.

183. See Browne, *supra* note 67, at 491 n.60. "Suffice it to say that it is far from clear that sexuality implies a lack of respect. Put another way, there is no necessary contradiction in viewing one's colleague (or even one's subordinate) as an attractive sexual being and a competent co-worker." *Id.*

184. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1504-05 (M.D. Fla. 1991).

185. *Id.* at 1503.

186. *Id.* at 1505.

otherwise could direct toward job performance is the sex-based burden borne by women and not by men.¹⁸⁷ This burden constitutes the employment barrier and the discrimination. Its effects on women are manifested in reduced job satisfaction, an increased chance of quitting or being fired, and deterrence from seeking promotions or transfers.¹⁸⁸

In sum, the Fiske evidence showed that environmental stimuli exacerbate the stereotyping of one group of workers by another when the ratio of the stereotyped group to the dominant group is uneven, and when the marginalized group members hold no positions of power or history of belonging. When environmental stimuli are sexual, the stereotyping is along gender lines and focuses on sexual attributes. While male sexuality is not viewed, stereotypically, as an indication of employee incompetence, female sexuality often is, especially in a traditionally male trade. Thus the presence of nude pinups not only subjects women to the pressures of either conforming to or contradicting the sex-object stereotyping to get along with their co-workers, but acts as a constant reminder that their essential natures are viewed as antithetical to the skills necessary on the job.¹⁸⁹

The *Robinson* court's finding that the pinups at JSI created a hostile environment for women flowed directly from the court's acceptance of the evidence presented by Fiske. The studies on stereotyping provided the court with a wealth of empirical data that applied specif-

187. Men, as a group, are not affected by a sexualized workplace. Research shows that most men report that they would be flattered if they were sexually approached in the workplace by a woman. *Id.*; see also Abrams, *supra* note 50, at 1204-05 (discussing women's distinctive responses to sexual behavior on the job). Abrams notes the tendency of women, because they generally occupy the lower rungs of most workplace hierarchies, to view their position in the workplace as marginal or precarious. They are thus likely to construe stereotypical views of women as serious judgments about their competence on the job. In addition, women's greater social and physical vulnerability to sexual coercion leads women as a group to hold more restrictive views about the types of situations in which sexual conduct is appropriate. Thus women react differently than do men to the appearance of sexuality in an unexpected context or in a setting of ostensible equality. *Id.*

188. *Robinson*, 760 F. Supp. at 1503.

189. Stereotyping women as sex objects not only burdens women in the workplace, but effectively operates to keep women out of the workplace, thus frustrating the purpose of Title VII. The persistence of and role played by male workplace norms in maintaining job-related sex segregation is discussed in Abrams, *supra* note 50, at 1189-1209; Arriola, *supra* note 65, at 58-65; Schultz, *supra* note 65. Schultz challenges the present judicial framework that assumes that women bring to the labor market fixed preferences for traditional or nontraditional jobs. "Women in female jobs understand that they will be likely to experience harassment if they attempt to cross the gender divide. . . . Harassment is also driving the small number of women in nontraditional jobs away." *Id.* at 1834 (footnotes omitted). Although Fiske's studies did not document this phenomenon, the *Robinson* opinion remarked upon it. "A pre-existing atmosphere that deters women from entering . . . a profession or job is no less destructive to and offensive to workplace equality than a sign declaring 'Men Only.'" *Robinson*, 760 F. Supp. at 1526 (quoting Abrams, *supra* note 50, at 1212 n.118).

ically to the impact of sexual images on women *within the workplace*—but only within workplaces where men predominate, numerically, hierarchically, and historically. Accordingly, the threshold issue in any hostile environment claim based on sexual photographs should be whether the factors that escalate the stereotyping of women are present. Specifically, are women in the minority in the workplace, job, or industry? Do they hold positions of authority or power? Has the workplace been traditionally dominated by males or viewed as a male province? Is the job considered “men’s work”? If so, the workplace pinups can be presumed to exacerbate the tendencies—already extant in such environments, as documented by numerous studies—to impermissibly stereotype women as sex objects.¹⁹⁰

B. *Objections to the Robinson Analysis*

Many commentators take issue with the theory that sexually explicit photographs of women in subordinate positions harm women. Some feminists argue that pornography enhances women’s sexual autonomy by making sex open to public examination and debate. Pornography advocates sexual adventure, and sex for pleasure only, which women may experience as legitimizing their own sexual desires. Pornographic images may include elements of play and fantasy, express a defiant snub at an uptight culture, celebrate lesbian sexuality, serve as an aphrodisiac, or provide a thrill, safe and contained within the boundaries of a photograph. Anticensorship feminists counsel against equating sex with the degradation of women and male arousal with violence.¹⁹¹

The *Robinson* parallel to this critique of pornography is twofold. First, some fear that the very idea that the law must protect women

190. It is important to keep in mind that under *Robinson* the evaluation of whether a pattern of male dominance exists in a workplace is separate from the question of whether the prevalence of the photographs in the workplace—or other harassing conduct—rises to a level “sufficiently pervasive” to affect an employment condition. A judge may find, under the *Robinson* analysis, that sexual pinups would support a finding of potential hostile environment sexual harassment due to the showing of male dominance in the workplace, but that the pinup displays were so few and far between that a hostile environment did not in fact result. Conversely, a judge might find that an extensive number of sexually oriented photographs were displayed throughout a workplace, but that due to the lack of a showing of male dominance, the photos by themselves do not support a claim.

191. See WOMEN AGAINST CENSORSHIP, *supra* note 25, especially Sara Diamond, *Pornography: Image and Reality*, at 40; Ann Snitow, *Retrenchment versus Transformation: The Politics of the Antipornography Movement*, at 107; Lisa Duggan et al., *False Promises: Feminist Antipornography Legislation in the U.S.*, at 130; see also Paula Webster, *Pornography and Pleasure*, 12 HERESIES 49 (1981) (arguing that the campaign against pornography created a new feminist orthodoxy that reflected Victorian ideology).

from sexual "vulgarity" sets women back, not forward.¹⁹² Accepting the premise of a special female vulnerability to sex in the workplace might shift the focus of discrimination policies to sexual differences and away from the goal of equality. Second, the *Robinson* holding could lead to a sanitization of the workplace, which both men and woman would find oppressive.¹⁹³ Was Title VII meant to mandate a pristine, characterless working environment?

1. PROTECTIVE POLICIES?

Certainly, judicial determination that women need policies to protect their sexual vulnerabilities has resulted in "accommodations" that turn out to ingrain rather than rout inequality in the workplace. It is difficult to explain that an atmosphere perfectly acceptable to a man discriminates against women without further stereotyping women and encouraging exclusionary or paternalistic policies.

A pair of cases illustrate the problem. *Dothard v. Rawlinson*¹⁹⁴ upheld Alabama prison officials' refusal to hire female prison guards in male maximum security prisons, because prisoners were more likely to attack women guards. The Court assumed women's sexual vulnerability without addressing the conditions that created it. *Dothard* thus reinforced rather than redressed sexual inequality by excluding women from the higher-paying position of maximum security guard. More recently, in *Torres v. Wisconsin Department of Health and Social Services*,¹⁹⁵ the Court of Appeal for the Seventh Circuit upheld defendant's maintenance of an all-female staff of prison guards on the justification that it was required for the rehabilitation of sexually abused female inmates. The prison had deliberately designed this sex-conscious policy to redress the sexual domination of male guards over female inmates. However, the court failed to ground its acceptance of this sex-conscious policy in the relative social conditions of women and men. Instead, it articulated a "totality of

192. See WOMEN AGAINST CENSORSHIP, *supra* note 25, especially Lynn King, *Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?*, at 79; Anna Gronau, *Women and Images: Toward a Feminist Analysis of Censorship*, at 91; see also Browne, *supra* note 67, at 488 (arguing that the assumption that women may be more offended by pornography than men is just the sort of stereotype Title VII was intended to erase); *The War on Nudity: The Great Pinup Controversy*, PLAYBOY, July 1991, at 41 ("Do women need protection from images of sex? The judge thought so. Ironically, it was this kind of patronizing attitude that inspired the feminist revolution in the first place.").

193. See *The War on Nudity: The Great Pinup Controversy*, *supra* note 192, at 41. "[M]en personalize a cold steel environment with sexual images. Women such as Robinson sterilize. . . . Are [the photographs] the moral equivalent of a burning cross? Only in the fevered imagination of feminist crusaders." *Id.*

194. 433 U.S. 321 (1977).

195. 859 F.2d 1523 (7th Cir. 1988).

the circumstances" test for determining the legitimacy of a "bona fide occupational qualification" ("BFOQ"),¹⁹⁶ held that sex as a BFOQ need not be based on objective evidence but could be justified by "commonsense understanding";¹⁹⁷ and encouraged judicial deference to the "reasoned decision[s]" of employers.¹⁹⁸ The *Torres* court thus expanded the discretion of employers to implement gender discriminatory policies—those that exclude women, as well as those that address vulnerabilities.¹⁹⁹

Both *Dothard* and *Torres* viewed women's sexual vulnerability as a sex difference, and therefore a justification for gender discrimination, rather than recognizing it as a result of gender inequality. Neither court pushed beyond a notion of difference to an examination of the power relations that reinforce women's subordination and produce the vulnerability.

Robinson, unlike *Dothard* and *Torres*, is responsive to the concern over protective policies. Judge Melton's opinion clearly recognized that the harm suffered by women workers at JSI from the pinup posters grew out of a social context already operating to put women in a particularly vulnerable position. The opinion acknowledged that sexual images do not automatically or necessarily stereotype women to their detriment if the effects of the stereotype-priming by the pictures is nullified by an equal power dynamic between men and women in the workplace. It is, after all, the stereotyping that is impermissible, not the sexual images.

In addition, the opinion emphasizes that the point of eradicating sexually hostile work environments is not to "protect" women from exposure to vulgarity, but rather, consonant with the purpose of Title VII, to eliminate factors that inhibit women from *entering* a particular work environment or profession. "Only those women who are willing to and can accept the level of abuse inherent in a given workplace . . . will apply to and continue to work there. It is absurd to believe that Title VII opened the doors of such places in form and closed them in

196. Title VII permits sex-based discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000(e) (1982).

197. *Torres*, 859 F.2d at 1581.

198. *Id.* at 1532.

199. See Recent Cases, *Bona Fide Occupational Qualification Defense—Necessity of Sex Discriminatory Policy Should Be Evaluated According to a Totality of the Circumstances Test*, 102 HARV. L. REV. 2048 (1989) (arguing that *Torres* expands the ability of employers to implement sex-conscious policies without expressly limiting that power to uses that redress gender inequality, and that courts should examine gender socialization and sexual domination when examining the legitimacy of a BFOQ, rather than examining whether a classification unjustifiably distinguishes between the sexes given a "pre-existing assumption of equality").

substance.”²⁰⁰ The *Robinson* injunction does protect women, but it protects them from the type of exclusion that the protective regulation in *Dothard* permitted and reinforced.

2. BIG SISTER IN THE WORKPLACE?

Robinson's injunction prohibiting sexual photographs in the workplace also engenders fears of overbearing, intrusive regulations.²⁰¹ Those who hold this view seem to accept that an employer may have a legitimate interest in what employees say on the job, but that the state does not.²⁰² However, even conceding that the state has an appropriate interest in regulating some speech in the workplace, should the state's interest extend to more “personal” brands of speech such as pinup posters?²⁰³ Won't cases such as *Robinson* eliminate from the workplace not only expression proven to be discriminatory, but all even arguably sexual expression?

200. *Robinson*, 760 F. Supp. at 1526.

201. See *Talking Dirty*, NEW REPUBLIC, Nov. 4, 1991, at 7 (contending that the hostile environment test that finds “pinup calendars, most well-intentioned compliments, and even some gross remarks” to be discrimination is “scary” and “perverse”); see also Browne, *supra* note 67, at 501-09. Browne argues that the application of hostile environment sexual harassment law has an “extraordinary chilling effect on speech.” *Id.* at 508. As an example of this extraordinary chill, Browne points out that sound legal advice in “today's legal climate” would encourage employers to refrain from off-color, racial, or ethnic jokes, and to prevent employees from making “arguably” offensive comments. *Id.*

202. If, as this Comment argues, the fight over the JSI sexual harassment policy is more about the employer's assertion of plenary control in the workplace than about general free speech values, the state may be a more benign regulator than the employer. After all, the state's powers to regulate only come to bear under a Title VII action when an aggrieved employee has proven her case.

203. Disagreement as to whether pinups are purely “personal” expression is at the crux of the debate. Speech *protesting* sexual harassment has been held to be speech of a personal, rather than public nature. See *Deremo v. Watkins*, 939 F.2d 908 (11th Cir. 1991) (holding that letters seeking compensation for promise to remain silent regarding alleged sexual harassment were not speech regarding a public issue and were not protected by the First Amendment); *Callaway v. Hafeman*, 832 F.2d 414 (7th Cir. 1987) (holding that sexual harassment complaint was speech of personal, not public nature and thus not protected by the First Amendment). No court has yet passed on whether speech constituting sexual harassment has any public/political speech value, although *Hudnut* assumed that pornography, to the extent that it expresses a particular view of women, does have such value. See *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (stating that pornography fosters bigotry and that bigotry “influence[s] the culture and shape[s] our socialization”), *aff'd*, 475 U.S. 1001 (1986). Playboy Magazine considered the pinups at JSI to be expressions of “the robust community values of the shipyard.” *The War on Nudity: The Great Pinup Controversy*, *supra* note 192, at 41. As Fischl points out, under *Connick*, public employees enjoy constitutional protection only for public/political speech, while under the NLRA, private sector employees enjoy statutory protection only for speech regarding personal/employment issues. Fischl, *supra* note 108, at 740. Were it not for Title VII, then, sexually harassing photographs, if viewed as political statements about women as a class, could be protected in government workplaces, but not in the private sector under the NLRA.

The civil libertarian nightmare of the sterile, impersonal workplace is unrealistic. *Robinson's* facts and limited holding deny the prospects of oppressive state-regulated workplace decor. The *Robinson* analysis, based as it was on empirical studies of workplace behavior and effects, applies only in a limited set of workplaces. Where the potentially detrimental impact of sexually explicit photographs is counterbalanced by an atmosphere where women enjoy relatively equal status with their male counterparts, the foundation for the hostile environment action is considerably weakened. *Robinson* is likely to apply only in traditionally male-dominated trades, or in workplaces where the sexes are segregated by job. These are precisely the workplaces where Title VII has had little to no effect, and where the need for an innovative approach to eradicating workplace norms that perpetuate male domination and sex segregation is greatest.

Moreover, whether an environment is hostile still depends on a determination that the complained of images rise to a level "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment.'" ²⁰⁴ Isolated instances of less than politically correct visuals in the workplace will not qualify as "sufficiently pervasive." Finally, the *Robinson* analysis tests a workplace's hostility both subjectively and objectively. ²⁰⁵ A plaintiff must prove not only that she was affected by the hostile environment, but that a reasonable woman would also find the environment hostile. ²⁰⁶ The hypersensitive woman will not be vindicated, and defendants need not conform their workplaces to idiosyncratic tastes.

C. *Implications for Sexual Harassment Analysis*

Fiske's testimony on stereotyping and women's reactions to sex in the workplace, and *Robinson's* limiting of its analysis to workplaces

204. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)), *quoted in Robinson*, 760 F. Supp. at 1523.

205. *Robinson*, 760 F. Supp. at 1524.

206. Courts have recently begun to couch their objective testing of a sexually harassing hostile environment in terms of the "reasonable woman," recognizing that a court's supposedly neutral analysis may in fact contain a hidden male perspective. *See, e.g., Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the perspective of a reasonable woman because "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women"); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (11th Cir. 1990) (holding that harassment must detrimentally affect a reasonable person of the same sex and in the same position as the victim); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (adopting reasonable woman standard for case involving male harassment of a female because men and women are "vulnerable in different ways and offended by different behavior"). For a discussion of the reasonableness standard in hostile work environment cases, see Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

with an established pattern of male dominance, explain both why and when pinup posters can be characterized as discrimination under Title VII. Significantly, the opinion achieves this by tapping into two different presumptions underlying sex discrimination analysis: the dominance theory, and the equality principle.

Sex discrimination law under Title VII is grounded on the equality principle—the supposition that men and women are similarly situated for purposes of employment, and therefore must be treated exactly the same.²⁰⁷ Dominance theorists, who recognize differences between the sexes and attribute those differences to women's traditionally inferior social status, have launched a powerful critique of the equality principle as the point of departure in sex discrimination analysis.²⁰⁸ These scholars point out that the equality view confuses formal with substantive equality, and ignores the social consequences of sex-linked traits and experiences.²⁰⁹ A supposition that the sexes are "equal," many theorists argue, has led to a judicial expectation that women accommodate to male-dominated institutions, rather than the reverse.²¹⁰ The equality principle is of little help, therefore, in exposing the structural male bias that has created the workplace as we know it.²¹¹

The equality principle's assumption that the sexes are similarly situated has obvious problems for a generalized hostile environment sexual harassment claim: if men and women are similarly situated with regard to sex in the workplace, then any sexual expression that is not specifically hostile and directed at a particular woman should have an equal impact on all workers, which is to say, no impact at all. Of course, individually, men may be equally offended by materials of a sexual nature in the workplace; individually, some women may not experience offense from sexually oriented photos. So if a man and a woman react differently to the same workplace stimuli, their reactions must be idiosyncratic, rather than sex-based. Sexually explicit photographs in the workplace, then, though they may offend some women, cannot be sex discrimination under the equality principle analysis.²¹²

207. See Abrams, *supra* note 50, at 1186.

208. See MacKinnon, *supra* note 22; MACKINNON, *supra* note 33.

209. See Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1755 (1991).

210. *Id.*

211. See Abrams, *supra* note 50.

212. Under the equality principle rationale, sexually explicit photographs in the workplace, if found to affect a term, condition, or privilege of employment, could be sex discrimination only if an employer prohibited the posting of photographs portraying one sex while allowing the posting of photographs of the other sex. In fact, the plaintiff in *Robinson* presented evidence showing that JSI employees displayed only pictures of nude women. One employee

Liberal feminists defend this analysis by arguing that a focus on women's differences—especially their sexual vulnerabilities—brands women with stereotypes that hinder, rather than facilitate, equality.²¹³ *EEOC v. Sears, Roebuck & Co.*²¹⁴ illustrates the potential harm of “enshrining gender stereotypes at the core of Title VII.”²¹⁵ Sears, charged with discriminating against women, successfully argued that women were underrepresented in high-paying sales positions because men's and women's work interests and aspirations regarding work were different. Women, experts testified, were not interested in the competitive, high-powered, high-risk commission jobs. The court's acceptance of this argument, according to one writer, pits “gender discrimination plaintiffs against stereotypes in a battle the stereotypes are designed to win.”²¹⁶

In *Robinson*, where women's reactions to sexually explicit imagery are concerned, the divergence between the liberal feminist equality view and the more radical assumptions of dominance theorists takes on an added dimension. Liberals argue that the radical feminist analysis of pornography as domination ignores the power that women have to define themselves and create their own images as skilled and professional women.²¹⁷ They argue that women have an interest equal to their male counterparts in controlling and expressing their own sexuality, untethered by state-imposed policies. Dominance theorists respond that “sexuality itself is a social construct.”²¹⁸

New feminist scholarship has emerged that proposes frameworks for analyzing sex discrimination which reconcile the limits of the equality principal with the realities of women's experiences in the workplace.²¹⁹ Kathryn Abrams, for example, has proposed an

stated that if he encountered a calendar with a picture of a nude man he would “probably throw such a calendar in the trash.” *Robinson*, 760 F. Supp. at 1494. Another employee stated that if any vendor distributed a calendar of nude men, “he would think the ‘son of a bitch’ was ‘queer.’” *Id.*

213. See Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

214. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

215. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). Williams contends that “[i]nstitutionalizing a correlation between gender and sex necessarily reinforces gender stereotypes and the oppressive gender system as a whole.” *Id.* at 802.

216. *Id.*

217. See WOMEN AGAINST CENSORSHIP, *supra* note 25.

218. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 198 (1989).

219. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (developing “positionality” as a stance toward knowledge from which a number of “apparently inconsistent feminist ‘truths’ make sense”); Ruth Colker, *Feminist Consciousness and the State: A Basis for Cautious Optimism*, 90 COLUM. L. REV. 1146 (1990) (suggesting an approach that focuses on women's well-being rather than women's subordination); Ruth

approach that combines elements from both equality and dominance theories, suggesting that there is no need for one comprehensive principle of antidiscrimination law.²²⁰ Drawing upon various legal frameworks, she argues, better "reflects a society in which women are both juridically, aspirationally equal and shaped by distinctive experiences and norms that many social institutions devalue or dismiss."²²¹

Robinson both draws upon and contributes to these efforts of scholars to reconcile the equality principal and dominance theory. It does so by requiring a concrete showing of male dominance, within the environment in question, before allowing a presumption that sexual photographs affect women differently than men. The opinion's emphasis on this inquiry into whether a pattern of male dominance exists in the workplace, job, or industry gives credence to a wide range of women's attitudes toward sex and sexuality, but also recognizes that women's social position relative to men affects their reactions to and attitudes about sex—at least within the workplace. By stressing the male dominance factors, *Robinson* avoids the assumption that Playboy pinups will harass every woman in all workplaces, and that all women need protection from sexual expression. At the same time, it does not disregard the powerful impact on women of an environment that combines male power with a constant reinforcement of women as primarily sexual beings.

The impact of male dominance, with its concomitant power to create the workplace environment in its own image and define that environment as neutral, must not be lost in the discussion of how and whether women react to sex, sexual expression, and sexual imagery. A comparison to employer speech in the labor context is again apt.

Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (arguing that courts should analyze equal protection cases from an antisubordination perspective); Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT L. REV. 1043, 1059 (1987) (suggesting that although theories of sex discrimination, gender oppression, and sexual subordination often clash, they are potentially complementary, and that "in making claims on behalf of women, we need to use the full arsenal of feminist legal theory"); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) (proposing that courts replace the judicial model of equality as assimilation by women to male structures with a model of equality as acceptance); Diana Majury, *Strategizing in Equality*, in *AT THE BOUNDARIES OF LAW* 321 (M.A. Fineman & N.S. Thomadsen eds., 1991) (describing an inequality-based strategy to reconcile the equal treatment model and women's difference models); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990) (suggesting that a promising response to the "difference dilemma" is an analysis that asks whether "legal recognition of gender distinction is likely to reduce or reinforce gender disparities in power, status, and economic security," an approach that demands feminists acknowledge both distinctiveness and commonality between the sexes).

220. Abrams, *supra* note 50, at 1191-97.

221. *Id.* at 1192.

As *NLRB v. Gissel Packing Co.*²²² pointed out, a speech about the evils of unionization has a vastly different impact when given by an employer to workers before a union vote, than when delivered by a political candidate to voters before a senatorial election. Because of the power dynamic at play between speaker and listener, workers hear a threat, whereas voters hear a platform. Likewise, a sexual photograph has a different impact on a woman who is secure, powerful, and accepted in her workplace than it does upon a woman at the low end of the hierarchical totem pole, or a female pioneer in a traditionally male-dominated field, or a woman who is a gender rarity in her job or work environment. It is for these women that it is essential to push beyond formal equality and fully realize the potential of Title VII. It is for these women that the *Robinson* opinion holds such promise.

VI. CONCLUSION

A decision in the *Robinson* appeal that workplace expression in violation of Title VII nevertheless enjoys First Amendment protection would have significant—and detrimental—implications for the future of sexual harassment law, and for women in male-dominated workplaces. It would unnecessarily upset the balance of rights and obligations between employers and employees established by Title VII. An employer's assertion of First Amendment rights in a sexual harassment case—whether mounted in its own behalf or on behalf of its employees—reduces to little more than an assertion of employer control over what employees may say in the workplace. Why should employees' statutory rights to a harassment-free work environment be subordinated to employers' rights to impose whatever speech policies they want in the workplace?

If upheld, *Robinson* will set important precedent not only by stopping short the First Amendment defense in sexual harassment cases, but by providing an analysis for hostile environment sex discrimination with the potential to transform workplace norms, especially in traditionally male-dominated trades. *Robinson*, properly read, provides an evidentiary link—sex-role stereotyping—between sexual photographs and the finding of a hostile environment. That link does not exist every time a salacious photograph appears in a workplace, but depends instead upon an evaluation of the photographs within the particular workplace context. When 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

222. 395 U.S. 575 (1969).

occupation reveals a pattern of male dominance, courts may infer that pinup posters and the like stereotype woman as sex objects. Because such stereotyping burdens women and not men, it creates a hostile environment for women within the meaning of Title VII, and the photos that create the discriminatory environment may be eliminated from the workplace.

Fears that the *Robinson* holding rests on a dangerous characterization of women as in need of protection from sexually explicit material are unfounded. *Robinson* is particularly sensitive to opening workplaces and jobs to women, not closing them. *Robinson* rests its finding of discrimination not on women's differences, but on women's lack of power within a particular social context. Likewise, civil libertarian fears that *Robinson* will allow courts to dictate workplace decor and decorum are misplaced. The *Robinson* holding is limited and contextually based. Moreover, the fear of the sterile, colorless workplace is eclipsed by the concern of women that the employment doors opened formally by Title VII may now be slammed shut by a view of sex discrimination that ignores the experiences of women in the workplace, and by a First Amendment edict that favors majoritarian tastes and attitudes that keep women out of traditionally male workplaces.

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