

UC Berkeley

Working Papers

Title

Sexual Harassment and the First Amendment

Permalink

<https://escholarship.org/uc/item/3wm307xp>

Author

Post, Robert

Publication Date

2000-12-31

SEXUAL HARASSMENT AND THE FIRST AMENDMENT

Robert Post

E-mail: postr@mail.law.berkeley.edu

Working Paper 2000-13

***Working Papers* published by the Institute of Governmental Studies provide quick dissemination of draft reports and papers, preliminary analysis, and papers with a limited audience. The objective is to assist authors in refining their ideas by circulating results and to stimulate discussion about public policy. *Working Papers* are reproduced unedited directly from the author's page.**

SEXUAL HARASSMENT AND THE FIRST AMENDMENT

Robert Post

There is growing apprehension of possible tensions between the First Amendment and Title VII's prohibition of sexual harassment.¹ Often claims of sexual harassment in the workplace depend entirely upon communicative behavior, and it is uncertain how such claims ought analytically to be reconciled with a jurisprudence that protects freedom of speech.

The issue was the subject of a panel discussion at the 1998 annual meeting of the American Association of Law Schools. Eugene Volokh, a noted scholar in the area, argued that Title VII's ban on sexual harassment imposed repressive legal regulation upon expression that would otherwise plainly merit constitutional protection, like Goya's

¹See, e.g., Williams v. New York City Police Department, 1997 U.S. Dist. LEXIS 13429 (S.D.N.Y. September 5, 1997); DeAngelis v. El Paso Mun. Police Officers Ass'n., 51 F.3d 591 (5th Cir.), cert. denied, 116 S.Ct. 475 (1995). For recent articles on the subject, see Kingsley R. Browne, "Title VII as Censorship: Hostile-Environment Harassment and the First Amendment," 52 Ohio St. L.J. 481 (1991); Deborah Epstein, "Can a 'Dumb Ass Woman' Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech," 84 Geo. L. J. 399 (1996); Cynthia Estlund, "Freedom of Speech in the Workplace and the Problem of Discriminatory Harassment," 75 Tex. L. Rev. 687 (1997); Richard H. Fallon, Jr., "Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark," 1994 Sup. Ct. Rev. 1; Suzanne Sangree, "Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight," 47 Rutgers L. Rev. 461 (1995); Nadine Strossen, "Regulating Workplace Sexual Harassment and Upholding the First Amendment - Avoiding a Collision," 37 Vill. L. Rev. 757 (1992); Eugene Volokh, "Freedom of Speech and Workplace Harassment," 39 UCLA L. Rev. 1791 (1992). There is even a web site on the subject. See <http://www.law.ucla.edu/faculty/volokh/harass/>.

painting *Naked Maja*.² He concluded his remarks with the passionate plea that the constitutionality of such regulation be determined not merely by characterization, by tententiously reclassifying as conduct that which would otherwise plainly be deemed protected speech.

Catharine MacKinnon, who was also on the panel, responded to Volokh that discriminatory acts, even if perpetrated through speech, had not heretofore been deemed protected by the First Amendment. She offered the example of the sign: "No Blacks Need Apply."³ She concluded with an equally passionate plea that constitutional analysis of such discrimination not be pre-empted by mere characterization, by tententiously reclassifying as protected speech that which would otherwise plainly be deemed discriminatory action.

MacKinnon did remark, however, that she agreed with Volokh that the characterization of speech ought to be consistent. Whereas Volokh regarded pornographic speech as meriting First Amendment safeguards both inside and outside the workplace, MacKinnon condemned such speech as "discrimination on the basis of sex" in both venues.⁴

² See Eugene Volokh, "What Speech Does 'Hostile Work Environment' Harassment Law Restrict?" 85 Georgetown L. J. 627, 642 (1997).

³ See Catharine A. MacKinnon, Only Words 12-13 (Harvard University Press 1993). See also Charles A. Sullivan, "Accounting for *Price Waterhouse*: Proving Disparate Treatment Under Title VII," 56 Brooklyn L. Rev. 1107, 1122 n.64 (1991).

⁴ See Catharine A. MacKinnon and Andrea Dworkin, eds., In Harm's Way: The Pornography Civil Rights Hearings 41 (Harvard University Press 1997) (Testimony of Catharine A. MacKinnon). See also Catharine A. MacKinnon, Only Words 33 (Harvard University Press 1993); Catharine A.

MacKinnon thus argued that the existing law of sexual harassment required the rejection of Judge Easterbrook's decision in American Booksellers Ass'n v. Hudnut⁵ that struck down legal controls over non-obscene but pornographic books and movies.

I reproduce this fascinating exchange to illustrate the importance of characterization in First Amendment jurisprudence. It may always be asked whether human action should constitute speech for purposes of the First Amendment, yet our doctrinal and theoretical tools for analyzing this question remain surprisingly crude and undeveloped.⁶ The problem is especially acute when we seek to determine the application of the First Amendment to areas like sexual harassment that, as Fred Schauer points out in this volume, have never before been subject to constitutional oversight.

In this brief paper, I shall offer a few preliminary observations about the question of constitutional characterization. I shall stake out a position that differs from the one premise upon which commentators as diverse and as eminent as Catharine MacKinnon and Eugene Volokh agree, which is that the constitutional characterization of speech ought to be consistent. I shall argue, to the contrary,

MacKinnon, "Pornography Left and Right," 30 Harv. Civ. Rts- Civ. Lib. L. Rev. 143, 167 (1995).

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

⁶ See Robert Post, "Recuperating First Amendment Doctrine," 47 Stan. L. Rev. 1249, 1250-60, 1273-77 (1995) ("Recuperating").

that the process of constitutional characterization that underlies First Amendment analysis is always deeply dependent upon social context, so that the very same communication may merit constitutional protection in one context, but not in another.

The commonly held view that identical communication must receive identical constitutional characterization ultimately rests on the notion that constitutional value extends to communication, abstractly considered, rather than to the social matrix within which communication is embedded. I have argued elsewhere that this view is fundamentally misguided.⁷ Consider, for example, the sentence: "Support Bill Clinton." If written on a political sign in front of a house, the sentence would undoubtedly be seen as speech within the shelter of the First Amendment, but, if carved into the vinyl of a bus seat, the sentence would be deemed merely a constitutionally unprotected act of vandalism.⁸ The constitutional characterization of the sentence is clearly both determinative and context-dependent. To usefully understand the debate between Volokh and MacKinnon, therefore, we must begin to explore a jurisprudence that will illuminate this influential, but analytically undeveloped terrain of constitutional characterization.

⁷ See *id.*

⁸ For a discussion of this and other similar examples, see *id.* at 1252-54.

I.

Let us use the term "communication" to refer to the general processes by which meaning is expressed and apprehended in social life. Understood in this way, of course, communication is everywhere. The clothes I wear, my posture at a meeting, my choice of wine for dinner, all convey meaning and are instances of communication. We could in fact go so far as to say that all human action conveys intention and (therefore) meaning, and is for this reason also communicative. In this broad sense, communication can be seen as the essence of human sociality.

It is thus implausible to imagine a coherent First Amendment jurisprudence consistently regarding all communication in the same way, because no account of the First Amendment could possibly be broad enough to encompass all human action. Not surprisingly, therefore, our First Amendment does not attempt to embrace all communication.⁹ In fact the First Amendment does not even attempt to protect all "communication" that occurs through the explicit use of words and language.¹⁰ Consider, for example, the question of professional malpractice. Professional malpractice,

⁹ The opposite conclusion would require First Amendment supervision of virtually every restriction of human action, and that in turn would either impossibly entangle government regulation in constitutional oversight or else dilute the substance of the Amendment so disproportionately as to make it meaningless as a restriction on government regulation. Dividing human action between "protected speech" and "unprotected behavior," even though both are equally communicative, is thus a necessary First Amendment strategy.

¹⁰ This point is illustrated by the example in text of the sentence "Support Bill Clinton" carved into a bus seat. For other examples, see *id.*

whether by lawyers or doctors, often occurs through language, both spoken and written. A lawyer can author a negligent opinion, costing her client millions of dollars; a doctor can offer reckless advice, endangering the life of his patient. In analyzing these questions, we do not bring First Amendment analysis to bear. We do not say that "[t]he First Amendment recognizes no such thing as a 'false' idea"¹¹ in the context of professional/client relationships, nor do we impose severe restraints on content based regulation of such relationships. If we were to extend the usual panoply of First Amendment protections to the law of professional malpractice, that law would cease to be recognizable.

This is because what we recognize as distinctive First Amendment protections presuppose a certain picture of social reality. They imagine that speaker and audience are mutually independent, so that an audience is capable autonomously of assessing the worth of a speaker's expression. Paradigmatic of this independence is the relationship which the First Amendment postulates between the New York Times and its readers. This relationship is understood as embodying a domain of public discourse in which democratic citizens collectively use communication to determine their common fate.¹² Within public discourse, the

¹¹ Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988).

¹² See, e.g., Robert Post, "Equality and Autonomy in First Amendment Jurisprudence," 95 Michigan Law Review 1517 (1997) ("Equality").

First Amendment postulates that speakers and audiences will be independent because public discourse is viewed as the core of the democratic enterprise of autonomous self-government.¹³ Autonomy is postulated because it is seen as inherent in and necessary for the democratic enterprise.¹⁴ Traditional First Amendment doctrine thus embodies a fundamentally political function, for it enables the First Amendment to serve as "the guardian of our democracy."¹⁵

We can thus explain the failure to apply ordinary First Amendment doctrine to communications between professionals and clients on the grounds that we do not view such communications as within the domain of public discourse.¹⁶ But this conclusion is inseparable from the fact that we do not deem the professional/client relationship as one of arm's length independence, analogous to that which the First Amendment postulates between The New York Times and its readers. To the contrary, we typically characterize clients as dependent upon the superior expertise of professionals,

¹³ Robert Post, "Between Democracy and Community: The Legal Constitution of Social Form," NOMOS XXXV ("Democratic Community") 163-90 (1993).

¹⁴ See Robert Post, "Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse," 64 Colorado Law Review 1109 (1993).

¹⁵ Brown v. Harlage, 456 U.S. 45, . 59 (1982). On the relationship between the rule that "[t]he First Amendment recognizes no such thing as a 'false' idea" and public discourse, see Robert Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell," 103 Harv. L. Rev. 601, 626-66 (1990) ("Constitutional Concept"). On the relationship between the First Amendment's disfavoring of content-based regulation and public discourse, see Robert C. Post, "Racist Speech, Democracy, and the First Amendment," 32 Wm. & My. L. Rev. 267, 290-93 (1990) ("Racist Speech"); Post, "Recuperating," supra note 6, at 1277-79.

¹⁶ See Robert Post, "Subsidized Speech," 106 Yale Law Journal 151, 174 (1996).

and we use the law to protect the legitimate reliance interests of clients. This legal function is plainly incompatible with traditional First Amendment protections for public discourse, which are precisely designed to safeguard the independence of communicative exchange from legal imposition of pre-existing conceptions of appropriate and inappropriate uses of communicative power.

First Amendment protections of public discourse and legal regulation of professional malpractice thus each presuppose a distinct image of the legal subject. The former imagines speakers and their audiences as autonomous and self-determining; the latter imagines clients as disempowered and dependent upon professionals. Both these images are of course ascriptive. In the messy complexity of the real world, readers will in fact be more or less dependent upon The York Times (and accordingly suffer more or less damage required by the presuppositions of the First Amendment to be legally disregarded); and clients will be more or less dependent upon professionals (and accordingly suffer more or less the damage attributed to them by legal regulations of malpractice). In both cases, however, the variegations of the actual world will be transmuted within legal doctrine into an ideal image of social relationships so that the law can be arranged to facilitate the performance of specific social functions.

We might call this simplification "legal ascription." The process of legal ascription is well illustrated by the case of Winter v. G.P. Putnam's Sons,¹⁷ in which plaintiffs alleged that they were critically injured when they hunted and cooked wild mushrooms in reliance upon *The Encyclopedia of Mushrooms*. Plaintiffs claimed that the *Encyclopedia* contained inaccurate information regarding deadly species of mushrooms, and they argued that the *Encyclopedia's* publisher should therefore be liable under theories of strict product liability and negligence. The Ninth Circuit unanimously held that the First Amendment precluded such liability. The Court explained that any such legal control would interfere with "the unfettered exchange of ideas"¹⁸ which the Constitution protects.

This image of an "unfettered exchange of ideas" is familiar because it invokes the full independent dialogue that we ascribe to participants in public discourse. But the plaintiffs in Winter were precisely alleging that this independence did not apply to them. Their argument was that the law ought to recognize and protect the relationship of dependence that actually characterized their reliance upon a publication like the *Encyclopedia* that purported accurately to compile and present factual information. Plaintiffs cited cases in which courts characterized aeronautical charts as products and crafted legal rules so as to protect

¹⁷ 938 F.2d 1033 (9th Cir. 1991).

¹⁸ *Id.* at 1035.

the dependence of pilots upon such charts, even though the charts were explicitly and essentially acts of communication.¹⁹

In effect, then, Winter rejected plaintiffs' argument by analogizing *The Encyclopedia of Mushrooms* to The New York Times rather than to an aeronautical chart. Regardless of whether one believes that Winter reached the correct or incorrect conclusion on this question, the deeper point is that Winter would have to presuppose some image of the social relationship between the *Encyclopedia* and its audience no matter which way it decided the case. If Winter imagined that readers of the *Encyclopedia* were (or ought to be) engaged in an independent exchange of ideas, and hence autonomous participants in public discourse, it would apply, as it did, ordinary rules of First Amendment doctrine designed to safeguard this independence. But if it imagined that readers were (or ought to be) dependent upon the *Encyclopedia*, it would apply the doctrines of product liability law designed to protect the relevant reliance interests. Either way, Winter would have to engage in the process of legal ascription.

Winter illustrates why MacKinnon and Volokh cannot be correct to contend that the law ought consistently to characterize communication. What underlies the

¹⁹ See, e.g., Brocklesby v. United States, 767 F.2d 1288, 1294-95 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); Salomey v. Jeppesen & Co., 707 F.2d 671, 676-77 (2d Cir. 1983); Aetna Casualty & Surety Co. v. Jeppesen & Co., 642 F.2d 339, 342-43 (9th Cir. 1981).

constitutional characterization of communication is instead social context, which is to say the image of legal subjects that the law projects into particular social circumstances. This projection always implicitly embodies a fundamentally normative account of pertinent social relationships, and this account will drive the constitutional characterization of the relevant communication.

There are no clear guidelines for this task of constitutional characterization. The text of the First Amendment will not help a court determine the proper understanding of the relationship between *The Encyclopedia of Mushrooms* and its readers. Neither will the intent of the Framers. Although we do have a strong democratic tradition that implicitly defines the boundaries of the domain of public discourse,²⁰ this tradition will not be of much assistance in a fine-grained and marginal case like Winter. And yet, as Winter also illustrates, all First Amendment reasoning follows from antecedent acts of characterization, so that, however methodologically difficult the task, the process of ascription cannot be evaded.

In recent years, the difficulties of this process have been compounded. First Amendment doctrine was originally articulated through a series of cases that involved the

²⁰ See Jürgen Habermas, The Structural Transformation of the Public Spher: An Inquiry into a Category of Bourgeois Society (Thomas Burger, trans. MIT Press 1991); Post, "Constitutional Concept," supra note 15, at 667-84.

regulation of speech located unambiguously within the domain of public discourse. First Amendment doctrine accordingly developed to meet the functional requirements of that domain. But as the Supreme Court began to understand itself as protecting "speech" abstractly considered,²¹ litigants responded by pressing claims for the constitutional protection of communication plainly outside of public discourse.

This is the dynamic that underlies recent arguments to extend constitutional protections to speech within the workplace prohibited by Title VII as sexually harassing. While such arguments make the fact of constitutional characterization more visible, they also more sharply expose the formidable methodological inadequacy that envelops our understanding of that fact. That is why the debate between *Volokh* and *MacKinnon* both makes the necessity of constitutional characterization manifest and also presupposes that identical communication receive identical constitutional characterization. To move beyond the *MacKinnon/Volokh* debate, we must engage the shapeless but fundamental issues involving the constitutional construction of social space.

II.

Those who most forcefully challenge the constitutionality of Title VII harassment law have sometimes

²¹ See Post, "Recuperating," *supra* note 6.

assumed that First Amendment doctrines fashioned for the protection of public discourse unproblematically apply to the workplace.²² They have thus brought to bear standard First Amendment rules forbidding vague laws, laws regulating offensive speech, or laws discriminating on the basis of content.²³ But if the analysis of Part I of this Essay is correct, these doctrines carry within them a certain picture of independent legal subjects, and the constitutionally prior question is whether this picture has application to the domains regulated by Title VII.

The question is complicated because the process of constitutional characterization does not reduce to a dichotomous opposition between speech and non-speech, between, so to speak, public discourse and aeronautical charts. The Constitution can instead assign various social functions to social space, and it can therefore establish various First Amendment "doctrines" designed to fulfill these different functions. The constitutional construction of legal subjectivity is thus a complex, multi-dimensional process.

The implication of this analysis is that our fundamental inquiry ought to be how the subjectivity of workers in the workplace should constitutionally be conceived. That inquiry does not begin with a clean slate,

²² See, e.g., Browne, *supra* note 1.

²³ For an excellent discussion of why these standards might not apply to the workplace, see Fallon, *supra* note 1.

for Title VII itself carries within it presuppositions about how workers ought legally to be regarded. The most precise statement of the First Amendment question, therefore, is how the statutory construction of subjectivity ought to be regarded by the Constitution.

It is not possible in a short essay like this to aspire comprehensively to settle this question, but only to advance a few preliminary thoughts. I have in other work identified three prominent and distinct forms of legal subjectivity. Each of these forms of subjectivity corresponds to a particular social practice that carries within it a distinctive social function. Without in the least claiming that these forms of social practice are exhaustive, my suggestion is that they might offer a useful place to begin thinking about the relationship between Title VII and First Amendment law.

One kind of social practice that is conspicuous in our constitutional law is that of management.²⁴ If the state creates organizations to accomplish legitimate goals, the First Amendment will accept the state's figuration of persons within the resulting managerial domains as objects whose speech can be regulated so long as it is instrumentally rational to do so.²⁵ Thus the speech of soldiers can be regulated so long as it is necessary for the

²⁴ See Robert Post, Constitutional Domains: Democracy, Community, Management 4-6 (Harvard University Press 1995).

²⁵ See *id.*, at 199-267.

successful functioning of the military; the speech of students within state schools can be regulated so long as it is necessary for the attainment of education objectives; and so on.

Sexual harassment law, however, is neither defined nor applied in this instrumental way. It is true that the Supreme Court has observed that sexually harassing speech "can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."²⁶ But the Court has also explicitly said that the prohibitions of Title VII are not circumscribed by such managerial considerations. At the heart of Title VII lies instead a strong commitment to a "broad rule of workplace equality"²⁷ that is conceptually independent of the question of whether the instrumental functioning of the workplace has been impaired.²⁸

Sexual harassment law understands itself as prohibiting "a hostile or abusive work environment,"²⁹ which it defines in moral terms that circle around notions of "intimidation,

²⁶ Harris Forklift Systems, Inc., 510 U.S. 17, 22 (1993).

²⁷ *Id.*

²⁸ I am not now referring to the regulation of hate speech within public universities, which in my judgment must be analyzed on a managerial model. State universities ought to be able to restrict speech as necessary in order to achieve the goal of education. Conversely, they ought not to be able to regulate speech in ways that are contrary to that goal. At the heart of the recent controversy over the regulation of hate speech within state universities, therefore, lies the deeper constitutional issue of the nature of public higher education. See Post, "Racist Speech," *supra* note 15, at 317-25.

²⁹ Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986).

ridicule, and insult.”³⁰ Recognizable in this aspiration is the legal creation of what I have elsewhere called the social structure of “community,”³¹ in which persons are regarded as constituted by their reciprocal socialization into social norms of respect. Those aspects of sexual harassment law that are constitutionally controversial, that do not involve explicit discrimination or outright *quid pro quo* arrangements, prohibit speech that is “both objectively and subjectively offensive,”³² and that therefore injures women by violating the community norms that constitute their dignity. Title VII both imagines a moral community of a particular kind and also figures workers as persons fully embedded within that moral community. Sexual harassment law imposes liability when violations of the norms of this community are so severe and asymmetrical as to constitute “*discrimin[ation]* . . . because of . . . sex.”³³

Analytically, therefore, Title VII imposes two distinct norms, corresponding to the values of equality and of respect.³⁴ Title VII’s enforcement of an antidiscrimination

³⁰ Id. at 65.

³¹ Post, Constitutional Domains, supra note 24, at 3-4.

³² Faragher v. City of Boca Raton, 118 S.Ct. _____, _____ (1998).

³³ Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998, 1002 (1998). Title VII does not merely impose “a general civility code,” *id.*, because violations of civility are by themselves insufficient to justify liability. The violations must also amount to discrimination.

³⁴ Title’s VII’s enforcement of the equality norm can sometimes assume managerial aspects, see Robert Post, “Legal Concepts and Applied Social Research Concepts: Translation Problems,” in J. Saks and C.H. Baron eds., The Use/Nonuse/Misuse of Applied Social Research in the Courts (Cambridge, Mass. 1980), but this phenomenon is largely irrelevant to the present discussion.

norm of equality does not, so far as I am aware, raise First Amendment questions, perhaps because employment decisions involving hiring, firing, and workplace advancement, although meaningful and communicative, are uncontroversially characterized as actions rather than as speech. But matters are different with regard to sexual harassment law's implementation of norms of respect.

With respect to such norms, Title VII is analogous to the so-called "dignitary torts" that impose liability for defamation, invasion of privacy, or intentional infliction of emotional distress.³⁵ Although at one time the abusive communication regulated by these torts was classified as conduct, as "aggression and personal assault,"³⁶ rather than as speech, this characterization was reversed by New York Times v. Sullivan³⁷ and its progeny, which sharply restricted the enforcement of these torts within public discourse.

The theory of these cases was that public discourse ought to correspond to a third form of social practice, which I have elsewhere called "democracy,"³⁸ the purpose of which is to establish a domain within which autonomous

³⁵ See Post, Constitutional Domains, supra note 24, at 51-67, 127-33.

³⁶ Time, Inc. v. Hill, 385 U.S. 374, 412 (1967) (Fortas, J., dissenting). See Post, Constitutional Domains, supra note 24, at 313 & n. 117.

³⁷ 376 U.S. 254 (1964).

³⁸ Id. at 6-10. On the interrelationship between democracy, community, and management, see id. at 13-15.

citizens can choose the nature of the moral community they will inhabit. Because dignitary torts construct persons as normalized agents, as constitutively embedded within a moral self-discipline that distinguishes acceptable from unacceptable behavior, they regulate according to a form of legal subjectivity that is inconsistent with the autonomous citizenship required by democracy within public discourse.

Sexual harassment law, like the dignitary torts, figures workers as normalized agents. Those who contend that the First Amendment circumscribes sexual harassment law must thus ultimately defend the proposition that normalized agency is not, from a constitutional point of view, an entirely acceptable characterization of workers, because the American workplace should instead be seen as a site of autonomous political self-construction, somewhat analogous to public discourse.³⁹

³⁹ There are of course other First Amendment ways to analyze the issue, but I will not pursue them in detail in this essay. Some First Amendment scholars, for example, might ask whether speech prohibited by Title VII served the constitutional value of "autonomy." Yet in the context of abusive speech the concept of autonomy provides little useful guidance, because the autonomy of the speaker must be set against the autonomy of the victim. Within the context of public discourse, the First Amendment has been interpreted to protect the speaker rather than the victim, because within public discourse the social function of democracy has been understood constitutionally to trump that of community. But speech within the workplace is plainly not equivalent to public discourse.

Another line of analysis might be to ask whether speech prohibited by Title VII serves the marketplace of ideas. The telos of the marketplace of ideas is truth, and while this has always been an excellent description of the function of the academic community, its application to other areas of social life is somewhat more problematic. Because the marketplace of ideas is a cognitively based theory, its strict application would extend constitutional protection to speech censored because of its content, but not to speech censored merely because of the manner of its expression. It follows that that the theory would forbid Title VII from prohibiting a workplace festooned with "civil" banners proclaiming "Women are below average workers," but it would not forbid Title VII's prohibitions against vulgar and insulting epithets and other abusive locutions. While this distinction

There is much to recommend this position. Most persons spend large portions of their lives within the workplace, and in this country the ideal of industrial democracy has deep roots. First Amendment limits on Title VII's prohibitions on sexual harassment can thus be defended by invoking the workplace "as a kind of laboratory of diversity in which the laws of democratic engagement can be learned and practiced."⁴⁰ Although it is not plausible to imagine that speech within the workplace is flatly equivalent to public discourse, for employees are far too interdependent and vulnerable,⁴¹ it is nevertheless possible to conceive the workplace as "a 'satellite domain' of public discourse,"⁴² in which the balance between normalized and autonomous agency is struck rather differently than in ordinary First Amendment jurisprudence.

This suggests that the current debate over the application of the First Amendment to sexual harassment law must ultimately revolve around disagreements concerning how the social practice of the workplace ought constitutionally to be characterized. The fundamental issue is whether the workplace should be viewed as a site of community, in which

certainly works at obvious cross-purposes with the central thrust of Title VII, it would nevertheless be constitutionally defensible so long as one were willing to contend that the discovery of truth was the central constitutional value of the workplace. I myself find this contention highly questionable.

⁴⁰ Estlund, *supra* note 1, at 694.

⁴¹ Post, "Racist Speech," *supra* note 15, at 289. On constructing the boundaries of public discourse, see Post, "Constitutional Concept," *supra* note 15, at 667-84.

⁴² Estlund, *supra* note 1, at 693.

social norms can be fully and unproblematically enforced and harassing speech accordingly characterized as "abusive conduct," or whether the workplace should instead be viewed as an arena of political self-constitution, in which the reach of community norms is circumscribed by the value of autonomy and harassing speech is correspondingly rehabilitated as First Amendment expression.

The issue is made particularly difficult because of the very prominence of the workplace in the lives of most persons. This prominence accentuates the importance of protecting workers from oppressive regulation. But it also has other, contrary implications. As Frank Michelman has observed, democracy is "a demanding normative idea, an idea with content."⁴³ Democracy is accordingly itself a community norm that, like all community norms, must be reproduced by means of socialization and institutionalization.⁴⁴ The very prominence of the workplace makes it a prime location for the transmission and instauration of norms prerequisite for the practice of democracy, including the norms of civility and equality enforced by Title VII.⁴⁵ Our inquiry, then, can be reframed

⁴³ Frank Michelman, "Brennan and Democracy," 87 Calif. L. Rev. 399, 419 (1998).

⁴⁴ Robert Post, "Democracy, Popular Sovereignty, and Judicial Review," 87 Calif. L. Rev. 429, 441 (1998).

⁴⁵ Democracy, as I have had occasion to point out elsewhere, has the paradoxical property of suspending, in the name of autonomy, legal enforcement of the very norms necessary for the practice of democratic legitimacy. See, e.g., Robert Post, Constitutional Domains, supra note 24, at 189-96.

as an exploration of the extent to which the workplace ought to be conceived as a place for the reproduction of democratic values, and the extent to which it ought to be seen as a site for the enactment of those values. The tension evident in the current debate over the relationship of the First Amendment to sexual harassment law is a measure of the inconsistency between these two aspirations.

III.

Although this is not the venue to resolve such a profound conflict, it might nevertheless be appropriate to raise two further questions concerning the constitutional implications of using the First Amendment to protect individual autonomy within the workplace. The first concerns the relationship between constitutional values and private power. First Amendment doctrine normally imagines the state acting upon citizens by exercising direct legal control over speech. It prosecutes persons for their expression, or it makes them liable in tort, or it enjoins them. My discussion so far has followed this convention, for I have been writing as if Title VII directly regulates worker's speech. But of course this is not accurate.

Title VII imposes liability upon employers, who are then expected to meet their legal obligations by using their private power to control workers' speech.⁴⁶ Thus Title VII itself figures the workplace as a site in which workers are

⁴⁶ See Burlington Industries, Inc. v. Ellerth, 118 S.Ct. ____ (1998).

subject to the massive and comprehensive exercise of private power. In such circumstances, we must inquire into the meaning of constitutionally envisioning workers as either normalized agents or as autonomous citizens. In the face of such overwhelming private mastery, what difference might constitutional characterization actually make? Workers will in any event remain bound by the largely unregulated instrumental rationality of employers.

First Amendment doctrine usually ignores such imbalances of private power. So, for example, American Booksellers Ass'n v. Hudnut⁴⁷ essentially held that private imbalances of sexual power were insufficient to override the First Amendment's presumption that persons within public discourse were to be regarded as autonomous. The justification for this strong presumption was that remedying such imbalances in the ways required by the Indianapolis anti-pornography law would impose legal controls inconsistent with the autonomy required for democratic self-constitution.⁴⁸

Although Hudnut's conclusion represents mainstream First Amendment jurisprudence, we must nevertheless distinguish between deliberate indifference to imbalances of private power within public discourse, and such indifference within the context of the workplace. Public discourse is

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

⁴⁸ For a discussion, see Post, *supra* note 14, at 1128-33; Post, "Constitutional Concept," *supra* note 15, at 626-46; Post, "Equality," *supra* note 12.

the arena in which our collective democratic will is constructed, so the denial of autonomy amounts *pro tanto* to a denial of the scope of democratic self-determination. By contrast, not only are imbalances private power far more salient within the workplace, but speech within the workplace bears a much more attenuated connection to the construction of a democratic will. Those who wish to project the constitutional value of democratic autonomy into the workplace will thus have to face the formidable intellectual task of theorizing exactly how this value ought to intersect with the exercise of private power. I suspect, for example, that when carefully examined this value may prove to have implications that go beyond workers' speech and affect the actual distribution of power in the workplace. To hold that Title VII is limited by the First Amendment may therefore be to imply that other forms of industrial democracy are also constitutionally required.

The second issue I wish to raise concerns the relationship between the constitutional value of democratic autonomy and that of equality. It should be remembered that Title VII enforces norms of civility in order to realize the legislatively more fundamental antidiscrimination norm of equality. Although the question of how this norm ought to relate to the enactment of democratic autonomy has been much bruited within recent academic literature, courts have consistently held that within public discourse the

antidiscrimination norm of equality should be subordinated to the value of democratic autonomy. I have argued elsewhere that this subordination ought to be understood as ultimately founded upon a practical, rather than theoretical, judgment.⁴⁹ The considerations pertinent to this judgment, however, seem to me significantly different in the workplace than in public discourse.

First, workplace speech is by hypothesis distinct from public discourse, and it therefore presents the value of democracy in a less urgent form. The deeper and as yet unanalyzed question is of course exactly how the value of democracy is thought constitutionally to be present in workplace speech. But so long as some distinction exists between workplace speech and public discourse, it is clear that the constitutional value of democratic autonomy will have less constitutional force in the former.

Second, the value of equality presents stronger constitutional claims within the context of the workplace than within the context of public discourse. Constitutional protections for autonomy ultimately stem from a commitment to democratic legitimacy. Yet autonomy is only a necessary, not a sufficient, condition for such legitimacy. A stable democratic state may well also require widespread access to other fundamental social goods, most particularly those associated with work. Certainly a society with modern expectations would face a crisis of democratic confidence if

⁴⁹ See Post, "Racist Speech," *supra* note 15, at 302-17.

the kinds of male dominance that Title VII is designed to check were effectively to exclude women from the workforce. In the context of Title VII, therefore, equality has roots in the same constitutional value of democratic legitimacy as does democratic autonomy.

Third, if the state were to censor public discourse in the name of equality, those censored would be excluded *pro tanto* from the process of collective democratic will-formation. Within public discourse, therefore, equality and democratic autonomy stand in a zero-sum relation, so that legislation to advance equality by censoring speech necessarily delimits democratic autonomy. But because workplace speech is by hypothesis distinct from public discourse, censorship of workplace speech in the name of equality does not necessarily subtract from the process of collective democratic will-formation, and, in fact, it may positively promote the underlying value of democratic legitimacy. Equality and democratic autonomy in the workplace thus do not stand in the same zero-sum relationship as they do within public discourse.

It follows from these considerations that even if the value of democratic autonomy were to be imported into the workplace, the relationship between democratic autonomy and equality must be worked through in ways that are entirely distinct from the relationship between these two values that has emerged from received First Amendment doctrine, which

has developed largely within the context of public discourse.

III.

The implication of these brief remarks is that the emerging debate about the role of the First Amendment in Title VII sexual harassment litigation holds the potential for useful and illuminating inquiry into a number of significant questions. The constitutional nature of the American workplace has long been a topic requiring more attention than it has received. The relationship of constitutional values to private power has traditionally been deeply undertheorized. And, finally, the subtle and myriad ways in which the values of autonomy and equality intertwine, reinforce and repel each other within our constitutional jurisprudence needs far more penetrating explication than it has so far received. This essay is directed toward placing these issues at the center of what will hopefully become a constructive dialogue about the relationship between sexual harassment law and the First Amendment, a dialogue that has to date unfortunately displayed a discouraging tendency to turn unproductive and formal.