When Sexual Harassment is Protected Speech: Hostile Environment Sexual Harassment Policy in the University

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"A campus is a terrible place to correct people's thinking."[1]

I. Introduction

Freedom of expression and the right to equal opportunity often conflict. There may be no place where the conflict is more immediate and more wrenching than in our colleges and universities. In this article I will discuss the conflicts of interest in freedom of expression and freedom from gender discrimination. This battle rages in the misunderstood realm of sexual harassment, particularly in what is called hostile environment sexual harassment. Some refuse to see any form of sexual harassment as gender discrimination; they see all sexual harassment claims as inappropriate prudery or as paternalism toward women. Some see these claims as a coercive outcome of "political correctness." They argue that the threat of hostile environment sexual harassment lawsuits censors speech and chills the educational climate. Properly understood, hostile environment sexual harassment is a real form of gender discrimination that hinders women from competing on a level playing field with men. The law, however, is as misunderstood as its target.

Colleges and universities set their own policies dealing with hostile environment sexual harrassment. Although these policies aim to rid the campus of gender discrimination, they fail to understand the constitutional protection of free speech. If it is to be consistent with that understanding, the law must allow much of what causes hostile environments for women to go unrestricted. In doing so, the law fails to meet the constitutionally-supported goals of equal opportunity and freedom from discrimination. I shall argue, that under the proper understanding of the First Amendment, hostile environment sexual harassment law would come closer to achieving the goals of both the First and Fourteenth Amendments by fostering the speech of oppressed classes as well as those in the dominant majority, and thus helping to overcome the legacy of inequality and discrimination against women that still affects them today. In light of this conflict between current First Amendment doctrine and equality, I shall argue that colleges and universities have a special responsibility to support the expression of those who would end discrimination and to criticize and remove support from those who would continue it.

II. Sexual Harassment Law

In the midst of a persuasive and increasingly militant Civil Rights Movement, the U.S. Congress passed the Civil Rights Act of 1964. Title VII of this act prohibits employers from discriminating on the basis of race, color, sex, religion, or national origin

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and established the Equal Employment Opportunity Commission (EEOC) to formulate policies for governmental enforcement of Title VII. Title IX of the Elementary/Secondary Education Act of 1972 similarly prohibits educational institutions receiving federal funding from discriminating. This law is enforced by the Office of Civil Rights of the Department of Education.[2] Colleges and universities, however, have been slow to develop sexual harassment policies. Many are only now doing so, using EEOC policy as their guideline.

The EEOC recognized sexual harassment as one of the main forms of gender discrimination in employment. EEOC policy describes two kinds of sexual harassment for which employers may be found liable: "quid pro quo" and "hostile environment." An employer commits an act of sexual harassment if he or she makes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when the submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment."[3] Quid pro quo sexual harassment occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment or educational decisions affecting the individual," while hostile environment sexual harassment occurs when "such conduct has the purpose or effect of unreasonably interfering with an individual's work or educational performance or creating an intimidating, hostile, or offensive environment for working or learning."[4] As courts have interpreted the law, a showing of sexual harassment of either form must pass the "disparate treatment" test: a plaintiff must show that she or he is being treated differently in employment because of her or his race, color, sex, religion, national origin, disability, or veteran status.[5]

While quid pro quo sexual harassment has rarely been challenged, legal scholars and lay persons challenge hostile environment sexual harassment law on the ground that it contradicts freedom of speech as outlined in the First Amendment of the Constitution and interpreted by current First Amendment Doctrine.[6] Scholars argue that the Supreme Court showed some support for hostile environment law in *Meritor Savings Bank v. Vinson*,[7] a case that upheld the successful lawsuit of Michelle Vinson, a teller-trainee at the Meritor Savings Bank in Virginia. She complained that her supervisor made her work environment intolerable through such actions as repeated demands for sex, forced intercourse, and fondling her in public. In its decision the Court said that hostile environment sexual harassment must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[8] Since the behavior by the employer in this case included an action as violent as rape, the holding does not decide when speech alone would be actionable as hostile environment sexual harassment.[9] The Supreme Court has yet to hear such a case, though a Federal District Court case, *Robinson v. Jacksonville Shipyards, Inc.*[10] turned on expression alone. In *Jacksonville Shipyards*, Lois Robinson, one of only a few female welders in the shipyards, sued on grounds that her fellow workers created a hostile environment through their display of pinups, sexual innuendo, sexual jokes, and various other demeaning remarks and gestures towards her. She won her case. Thus, employers and educational institutions have sought to meet the implied stricter standard by prohibiting not only quid pro quo sexual harassment speech, but also speech that creates a hostile environment. But this is not settled law. Nor, to judge from the discussions I hear in the hallways, are people clear about what constitutes sexual harassment. The question arises: What is hostile environment sexual harassment and does it place restrictions on speech that conflict with the First Amendment protections of free speech? Further issues arise in educational contexts: How does Title IX protection differ from Title VII regulation of the workplace? How are the different relations between and among faculty, students, and non-faculty employees of a university regulated by Title IX with respect to hostile environment sexual harassment?

My own interest in this question stems from a personal experience of attempting to implement the sexual harassment policy of the college at which I taught, and subsequently being sued by those who were accused of sexual harassment for violating their rights to free expression. This article will attempt to sort out the issues of free speech, sexual harassment, and First Amendment protections on college and university campuses, using my experience as an illustrative case study.

III. Case Study: Alpha Tau Omega v. Occidental College

In early November 1992, the Alpha Tau Omega (ATO) Fraternity of Occidental College published an internal newsletter that mysteriously leaked to the college at large. The newsletter invited the brothers to a party and urged them to bring their friends, whom the newsletter referred to as "buddies and slutties." It also included a violent, misogynistic poem that depicted, in a humorous tone, a woman being violently raped. When the newsletter became public, a group of faculty, staff, and students called Advocates Working Against Sexual Harassment (hereafter, "the Advocates") decided to file a formal complaint of sexual harassment against the fraternity for this and a series of similar incidents over the previous few years. While some of these incidents had been "investigated" by the Greek Review Board — an internal policing body made up solely of fraternity and sorority members and administrators of the college — the perpetrators were punished with no more than a stern letter, which was ineffective in stopping the behavior. Though the Advocates thought that the newsletter itself was degrading and potentially threatening, the college sexual harassment policy would not allow for this one

incident to constitute harassment. Since we alleged "hostile environment" and not "quid pro quo" sexual harassment, we needed to establish a pattern of such behavior to constitute harassment. The Advocates also cited several other incidents in the complaint: a similar newsletter from the previous year, an incident of indecent exposure by several members of the fraternity on campus, an incident in which one woman was followed, threatened, and ultimately had the vehicle that she used for her on-campus job defaced by misogynistic graffiti. While some of the Advocates had secondhand knowledge of fraternity members having committed rapes in the fraternity house, none of the victims were willing to come forward. Consequently, these charges could not be included in the complaint. The Advocates felt that the pattern of incidents outlined in the charges against the fraternity evidenced a prolonged climate of hostility and disrespect for all women on campus. We felt that it was our duty as Advocates to take action.

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Upon hearing of the complaint, the fraternity brothers staged one of their semi-annual "runs." It consisted of some of the brothers and their friends from the football team, marching over to a sorority house in a drunken state chanting misogynistic songs similar to the one in the newsletter, and exposing themselves in front of the house before returning to their fraternity house. Subsequently, the fraternity "scribe" published the original poem in another newsletter which also listed the names of the student Advocates, other well-known feminist students, and described their complaint as a "witch hunt." This newsletter was (again under mysterious circumstances) left on tables in the college library, addressed: "Attention ATOs and whoever else finds this letter." The Advocates included these incidents in our list of charges in an attempt to bolster evidence for the pattern of behavior required by the sexual harassment policy.

The complaint against the fraternity differed from other sexual harassment complaints that had been heard at the college in several ways. First, both the complainants and the accused were groups of persons. Past complaints had always pitted one individual against another. Second, not all of the complainants had witnessed the incidents cited in the complaint. Their charge was based on a pattern of harassment and intimidation of women on the campus as well as the creation of a hostile environment on campus for all women. Third, the complainants charged the fraternity as a whole, even though some of the individual members were not present for any of the incidents, and only passively received the newsletters. Fourth, all of the accused were students, but the complainants were made up of both students and faculty members. None of these factors appeared to preclude a complaint under the policy, however. All of the parties, however, felt uncertain about what would result from a hearing.

At Occidental College, the sexual harassment policy in place during the 1992-93 school year provided that an associate dean would be the investigating officer in such complaints. The investigating officer would interview both sides in the dispute and decide when and how to bring the complaint to a hearing. The dean of the college was to be the adjudicating officer should a formal hearing be held. By the time the complaint in this situation was filed and both sides were interviewed, there was only a week left before final exams for the fall term. The associate dean, consequently, decided to wait until students returned in January to hold the hearing. Unknown to the dean and the Advocates, a new law would become effective on January 1, 1993, SB 1115, in California that would affect the complaint. This law, SB 1115, revised chapter six of the California Education Code to decree that students at public and private (except religious) colleges and universities in California would have the same rights to free speech that would apply to someone on a street corner. The law states in summary, "It is the intent of the Legislature that a student shall have the same right to exercise his or her right to free speech on campus as he or she enjoys when off campus."[11] This meant that colleges and universities could no longer regulate speech on grounds that they are a "limited public forum" in which speech may be restricted by content.[12] The statute specifically excluded sexually harassing speech, or speech that was otherwise allowed to be restricted by the U.S. Constitution. The legislative history of this bill showed that it was sponsored by the conservative minority in the California House, that it was aimed at curtailing speech codes and "political correctness" on campuses, and it had won unanimous approval by the Legislature. The code provided for both injunctive relief and attorney's fees. Therefore, if the fraternity brought suit against the college and won, the college would have to drop all attempts to punish the behavior and would have to pay their legal fees as well.

A group of ATO members ultimately became the plaintiffs in a suit against the four professors among the Advocates, the college, the president and trustees of the college, and one student. In effect, the charges accused the defendants of violating free speech[13] and defamation, and sought both injunctive relief and attorney's fees.

The lawsuit presented some practical as well as moral difficulties for a small liberal arts college with a tightly strained budget. The sexual harassment policy was relatively new, but was carefully constructed and seemed fair. It represented the college's nationally recognized emphasis on diversity and equal opportunity. Yet, if the president and the other defendants were to go to trial to defend their sexual harassment policy, they would open the college, and potentially the individual professors, to great legal expenses that they could not possibly recoup. While the law provides attorney's fees for the plaintiffs should they win, it does not provide the same for defendants. A counter-suit was not a feasible option. With the existence of an untested statute, there was little chance for the defendants to successfully argue that the suit was a mere nuisance suit, even if that were the true intent of the plaintiffs. Furthermore, civil trials such as these were taking approximately five years to come to an overburdened court docket, thus subjecting the college to a protracted and expensive battle. While feminist legal scholars who were contacted by the Advocates believed that we had a good case, the college's own conservative legal firm advised them that we could easily lose. Hence, the college decided to settle the case out of court, and the defendants reluctantly agreed. Since the law has not been challenged and it is very expensive for any college or university to do so, it is likely that this case or similar ones will plague colleges and universities in California for some time to come.[14]

This case raises several important issues for colleges and universities who are trying in good faith to erase the effects of historical discrimination against minorities and women. First, should they attempt to carve out a notion of speech that could be prohibited or sanctioned? Are there reasonable constitutional grounds on which it can be argued that racist or sexist speech, however narrowly defined, can be limited? If so, what is the properly narrow definition of such speech and what are the grounds on which the limits are justified? If there are not grounds legally to prohibit some forms of discriminatory speech, how ought colleges and universities respond? In order to answer these questions we need to explore sexual harassment and the constitutional guarantee of freedom of expression.

IV. The Nature of Sexual Harassment

To understand the nature of sexual harassment, it is necessary first to understand the nature of oppression, especially the oppression of women. Oppression is a socially located, institutionally manufactured system of harms against persons whose group status is independent of the harm they suffer.[15] It is socially located in the sense that the conditions for oppression exist within particular societies. Oppression of any particular group is not necessary or universal, and the group features of the oppressed in one society may be similar in all other respects to oppressors in another. In this context, the term an "institutionally manufactured system of harms" means that oppression consists of a large number of smaller harms that come about through small and large inequalities in the legal, social, and linguistic norms of the society. Oppression, to borrow Marilyn Frye's perspicuous metaphor, is a cage for the oppressed where each of the bars on the cage is some obstacle to social, political, or moral equality that by itself would constitute only a minor barrier. Altogether the bars create an inescapable cage. The oppressive harms need not disqualify the oppressed groups from citizenship, but they must significantly lower the life prospects of the minority groups in the society. Finally, oppression is a group phenomenon where the group identity constitutes a significant portion of the self identity of most of its members, and that identity is independent of the harms they suffer as a group. Women are an oppressed group in nearly every society. They suffer from harms great and small in comparison to otherwise equally situated men: unequal pay for equal work, denigration of their traditional work, unequal and greater share of the total work of society, more menial and tedious work, sexual objectification, sexual violence, unequal political and corporate power, and unequal access to military and police power.

Women have fought long and hard to force society to recognize the severity and pervasiveness of gender discrimination, but it is still difficult to get many people to take it seriously. The legislative history of Title VII reveals that it is a mere stroke of irony that included "sex" among its protected classes.[16] Sexual harassment is often the subject of tittering and jokes among people who think the problem is that women cannot take a joke, have delicate sensibilities, and cannot fit into the normal work environment that includes a "normal, healthy sexual banter." Women entering the workplace in large numbers has, according to some men, ruined it for them. It has chilled and impersonalized the climate of the workplace, making work a far less socially fulfilling experience for them. Similar remarks are heard about the classroom. Chester Finn laments that before the advent of political correctness, "the campus was a sanctuary in which knowledge and truth might be pursued — and imparted — with impunity, no matter how unpopular, distasteful, or politically heterodox the process might sometimes be."[17] Finn asserts that academics have enjoyed "almost untrammeled freedom of thought and expression for three and a half centuries,"[18] forgetting that Jews, blacks, and women (among others) found their freedom of thought and expression on university campuses quite trammeled.

As a class, women do not complain about sexual banter because it is "off color" or rude. They complain because it both reveals and reinforces the position of women as the subservient sex and as the sex objects of men. Women complain because it is difficult to believe that one's colleagues, professors, or supervisors are taking one seriously as a fellow worker or student when

they discuss women as "cunts," "bitches," "whores," or sexual conquests. Additionally, women complain when their fellow workers or professors prefer office decorating schemes which portray women as sex objects for use by men. Even if the colleague, professor, or supervisor otherwise treats her fairly, a woman in this position is burdened with well-founded anxiety and feelings of inferiority that are neither fair nor conducive to optimal work.

Sexual harassment involves three basic kinds of wrongs which can be accomplished by other means as well. The three wrongs are coercion, harassment, and domination. In quid pro quo sexual harassment, the perpetrator coerces, or attempts to coerce, the victim into having sex.[19] Coercion, however, is rarely involved in hostile environment sexual harassment. In these cases, the perpetrator commits the wrong of harassment when the behavior would constitute legal harassment per se.[20] The perpetrator uses sexual propositions, sexual innuendo, jokes, catcalls, and the like instead of coercion. The perpetrator commits the wrong of domination by sending one of two messages: that man is superior by virtue of his sex and woman is a sex object for man (the sexual message), or that woman is not welcome in "his" workplace or campus department because of her sex (the hostility message).[21] To send a message, the perpetrator need not intend that the message be interpreted by the woman as domination. However, the message will be interpreted as domination if, in the full social context of the behavior, it is reasonable to do so. Because oppression is an institutional phenomenon, messages can be sent to oppressed groups through words and actions that have conventional or stereotypical meanings of hostility and contempt. Furthermore, these messages are sent to all the members of the group, not just the one to whom the message is explicitly directed. Thus, when someone commits the domination wrong of sexual harassment it harms all women. This group harm makes the domination wrong of sexual harassment, unlike the other two wrongs, sui generis.[22] At times all three wrongs are present, but sometimes only one or two may surface. It is possible, though rare, for a woman to sexually harass a man by means of talk or other expressions of sex.[23] A woman, however, cannot easily send the domination message to a man because her actions rarely send the message that he is a mere sex object or that he is not welcome.[24] Attempts to send such messages are more likely to backfire. It is also clear that men of certain minorities could be dominated, as well as harassed, by means of sex because of cultural stereotypes about their sexual nature.

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In the ATO case, the newsletters and other fraternity behaviors sent the sexual message and the hostility message. For example, the fraternity probably committed simple harassment in the case of the student who was confronted, followed, and whose vehicle was defaced. But the most pervasive and harmful effect of their behavior was the domination wrong. The Advocates held that the fraternity members were intimidating, denigrating, and degrading all women by their speech and actions by sending both the sexual and hostility messages. This analysis leads to the questionable claim that students were dominating faculty. Still, I think a good case can be made that domination was going on: The fraternity was sending the message that women are sexual objects and inferior to men, so this applies to all women, regardless of their status in the College. Because the claim that women are inferior and sex objects is still prevalent in many corners of society, this is a conveyable message. Furthermore, fraternities are well-connected and quite powerful on college campuses.[25] The faculty were not dominating the fraternity members in any sense. The faculty members together with several students were following a reasonable interpretation of a well-accepted policy that applied equally to students, faculty, and staff. The faculty members were not using their positions as teachers to dominate students as none of the fraternity members were students of any of the faculty Advocates.

Sexual harassment is about domination and harassment, not a kind of "mere offense" like witnessing someone doing something obscene or scatological in nature. Rather, sexual harassment is what Joel Feinberg terms a "profound offense," much like racial epithets.[26] Profound offenses are not mere nuisances that are harmful only when one is forced to witness them; they "would continue to rankle even when unwitnessed, and they would thus be offensive even when they are not, strictly speaking, nuisances at all."[27] Unlike mere nuisances, profound offenses are "deep, profound, shattering, [and] serious . . . ."[28] They offend our minds not merely our senses or lower sensibilities, and they are experienced as impersonal at least in part. By "impersonal" he means that profound offenses outrage the victim even if he or she does not witness them because they are "a shocking affront to his or her deepest moral sensibilities."[29] However, using the notion of social group from my analysis of oppression a deeper understanding of "impersonal" can be developed. Profound offenses denigrate or degrade the group with which one self-identifies, and thus harm every member of that group. If sexual harassment were about sex or women's squeamishness to "normal, healthy, sexual banter," then it would be right to classify sexual harassment as a mere offense. In those cases in which the wrong of sexual harassment is domination, in which the message sent by the behavior is

hostility and contempt for all women, sexual harassment is a profound offense.

Gender discrimination harms women in ways very similar to the harms of racial discrimination. Mari Matsuda, in "Public Response to Racist Speech: Considering the Victim's Story,"[30] argues that racist speech is approximately in the middle of a continuum of racial discrimination harms. Among the harms to direct victims are "fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[31] Victims are restricted in their personal freedom. Non-targeted groups, then, tend to distance themselves, making it more difficult "to achieve a sense of common humanity" among members of different racial groups. Racism forces "well-meaning dominant-group members to use kid-glove care in dealing with outsiders."[32] No matter how we resist it, she argues, it implants a racist message in all peoples' minds by forcing us to categorize by race and make at least an initial judgment using a racial stereotype. Even the most well-meaning anti-racists of all races find themselves waging an inner struggle against invasive stereotypes. Likewise, gender discrimination exists in a variety of forms ranging from less serious forms, such as stereotypes, to violence and rape. Sexual harassment also comes in many forms. Hostile environment sexual harassment that sends the domination message is the one that I claim is the most like racist speech. It makes women afraid for their jobs, their safety, and even their lives. It perpetuates dangerous and harmful stereotypes and sends the messages of hostility, inferiority, and degradation. As racist speech pits persons of different races against each other, sexual harassment pits men against women, making it more difficult for them to achieve a sense of common humanity within or between racial groups. Many race theory scholars note that racist speech denigrates the humanity of racial minorities by picking out their race as the fundamentally important moral fact about them. Sexual harassment picks out women's sexual nature, specifically their nature as the objects of men's desires, as the salient fact about them in contexts in which their skill, their intelligence, and their ability to do the job ought to be the only relevant issues.[33] In these ways, racism and sexism are impersonal, and thus profound offenses.

Feinberg notes that religious persons are profoundly offended by sacrilege, as nationalistic persons by flag burnings, as Jewish residents from Skokie by Nazi marchers, and as African-Americans are profoundly offended by cross burnings.[34] This is because the "profoundly offended states of mind in the two kinds of examples may *feel* very much alike."[35] I agree with those who think that religious sacrilege is doubly protected by the Constitution. Also, the recent Supreme Court ruling in *Texas v. Johnson*,[36] which I would also agree with, clearly protects burning the flag as a means of political expression. In order to argue that, unlike sacrilege and flag-burning, hostile environment sexual harassment through expression alone may be restricted, these cases must be distinguished. These kinds of cases show that it is simply wrongheaded to look only at the way that an individual victim of profound offense feels because of the offense. Such a subjective criterion is too arbitrary and connected to individuals' personal histories to make reasonable law since the law must give fair notice of what is prohibited. The ground of the distinction lies in the objective fact of oppression. Only those groups who are oppressed can suffer from the harm of domination I have explored above. It is only possible to send the message that they are unwelcome, unequal, and worthy of contempt because of their group membership to an oppressed group. I prefer to call the domination form of hostile environment sexual harassment gender discrimination, or "gender dissing" for short, so as not to confuse profound offense with mere offense.

While sexual harassment law focuses on the harms done to individuals by individuals, this does not adequately address the harm that is done generally by gender dissing. Anita Superson has suggested that we define sexual harassment objectively, without reference to the attitudes of either direct recipients or perpetrators.[37] She argues that the determining factor is "whether the behavior is an instance of a practice that expresses and perpetuates the attitude that the victim and members of her sex are inferior because of their sex."[38] This definition captures the idea that the inherent wrong with sexual harassment is that it is really gender dissing. Since a charge of sexual harassment would not be based on a feeling or an intention, it clearly distinguishes sexual harassment from mere offense. Further, the wrong of sexual harassment is relativized to a social, historical context in which it is possible to "express and perpetuate the attitude" that one sex is inferior. Because it is not now possible to send that message with respect to men, for example, this sort of wrong could not be done to men. If it becomes impossible to send that message about women, then sexual harassment will be obsolete with respect to women as well. Also, the objective definition would allow us to distinguish this sort of profound offense from religious sacrilege or flag-burning. Superson's objective definition of sexual harassment would classify the ATO case as hostile environment sexual harassment. There would be no problem with the perpetrators or victims being groups. The only issue is whether the behavior is part of a practice that expresses and perpetuates the attitude that women are inferior because of their sex. The repeated nature of the events and the fact that they emanated from a fraternity, a group exclusively constituted of men, shows that the behavior is a practice. The misogyny and the degradation of the terms used to refer to women express the attitudes that women are the inferior sex. While men are their "buddies," (i.e., their friends), women are their "slutties," (i.e., their degraded sexual objects).

While the objective definition properly returns sexual harassment to its roots in discrimination law, it poses two first amendment difficulties. First, suppose the behavior in question is the following statement in a classroom or faculty meeting: "Women on average have lower spatial and mathematical abilities, and thus should not be accorded affirmative action in hiring in departments of mathematics, natural science, and engineering." While this statement is surely based on tenuous research and questionable inferential reasoning, it is a paradigm example of protected speech that would express and perpetuate "the attitude that the victim and members of her sex are inferior because of their sex."[39] While clearly harmful, it is the sort of speech that needs to be heard and that people need to be allowed to make because it has such important implications for academic freedom, social policy formation, and fostering willing compliance with it. Thus, Superson's definition is too broad to be consistent with the goals of the First Amendment. Second, there is a legal difficulty with recognizing the domination harm of sexual harassment. Domination, under my description, is quite similar to what has been called "group defamation." In *Beauharnais v. Illinois*,[40] the Supreme Court upheld a law that prohibited some forms of group defamation. A later case, *New York Times v. Sullivan*,[41] narrowed the definition of actionable defamation in a way that legal scholars agree effectively overturned *Beauharnais*, and disallows action against group defamation.

Nonetheless, I want to argue that the objective definition offers a legitimate interpretation of a sexually harassing hostile environment. It best captures the spirit of Title VII of the Civil Rights Act and Title IX of the Elementary/Secondary Education Act as they apply to "sex" (read: gender). For non-expressive conduct, such as the indecent exposure aspect of the ATOs behavior, the objective definition would be consistent with the Constitution. With expression, though, the definition must be narrowed. To see how much narrowing needs to be done, we must turn to the Constitution and First Amendment doctrine.

V. Protected Speech and Equal Protection

Among other freedoms it grants, the First Amendment prohibits governmental interference with freedom of expression. It states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[42] The interpretation of the First Amendment in scholarship and case law, known as "First Amendment doctrine," extends and clarifies these few words. First Amendment doctrine is broader than a literal reading; neither Congress *nor any state* may violate these freedoms and speech includes *other forms of expression*. It is also narrower in allowing certain kinds of speech restrictions. Commercial speech may be limited to protect consumers from fraud and false advertising and to protect firms from unfair competition, private citizens can successfully sue for libel, the state may punish treasonous statements, and states and localities may outlaw expression that disturbs the peace (i.e., "fighting words") provided that this is done in a content-neutral way. States may also place "time, place, and manner" restrictions on speech.

There are two ways to justify rights. They may be intrinsically valuable or instrumentally valuable for some social or political purpose. First Amendment scholars have justified broad free speech rights both ways. Because most would grant at least some of the above restrictions on free speech in a civil society, the restrictions are to be considered intrinsically valuable even if they do not trump all other individual rights and social goals. Thus, we need to specify the balancing procedure for free speech.

Further, it seems clear that we should not treat all speech equally. The balancing procedure needs to classify speech by its value and the value of the opposing interest. First Amendment doctrine accords political speech, speech that is intended to express and taken as expressing a view on a political or social policy matter, the highest value. The best defense of free speech lies in its instrumental values, as seen from the perspective of a social contractarian moral theory (though I believe that nothing turns on how, precisely, the value of free speech is justified). The ability to express one's views makes it more likely that a social agreement can be forged that all will accept, while being prohibited from expressing certain views would surely lead to some believing that their view has not been taken into account. In a democracy it is necessary that everyone feels free to express political views and that anyone could come to have a following for her view if only she is persuasive enough. Speech criticizing existing government policies gets very high instrumental value on these grounds. Additionally, there are the Millian arguments for free speech on the grounds that the only access to the truth is through airing diverse ideas in free and open debate.[43] Thus, the freedom of political expression is instrumentally very important as a means to political stability and truth.

Furthermore, freedom of expression allows persons to alter their government when it fails to embody the will of the people; states that have lost the consent of the governed are most likely to restrict political expression. One might also argue that personhood itself is at stake in political expression, because if one may not express deeply held political views she is denied the respect accorded to equal members of the contract. I take political expression to be a basic moral value, and therefore rightly a part of the First Amendment of the Constitution. However, these arguments do not show that political speech must be free at all times and places with respect to all content. The state may place

reasonable restrictions on the time, place, or manner of the expression if these restrictions genuinely do not eliminate one's ability to express one's views. For example, one need not have the right to break into my bedroom in order to express one's political view. On the other hand, it would be too much restriction not to allow one to air one's views in some manner in the same town that I live, no matter how offensive my neighbors and I find the speech. Localities must allow even abhorrent political speech some of the time.

The First Amendment is not intended to protect batterers.

The arguments which show that political expression is a fundamental moral right also show that the state ought to respect the principle of content-neutrality with respect to the restrictions that it does place on political speech. If the state does not respect content-neutrality, then it burdens some political views more than others. This could rob some persons of the right to air their views in public, and sacrifice some of the instrumental values of political speech. Therefore, the time, place, and manner restrictions that may be placed on speech must apply to all speech. For instance, pro-choice and pro-life activists alike must be required to file for a permit to march through the streets.

The Court traditionally views political speech as a fundamental right, and therefore applies strict judicial scrutiny to laws restricting it. This means that any law that places blanket restrictions on political expression must be justified by a compelling state interest, and the only such interest that has withstood strict scrutiny is the interest in preventing "immediate, irreversible, and serious harm to the nation."[44] It is beyond the scope of this article to justify this degree of severity in the judicial review of laws restricting freedom of expression, but I think it is justifiable in light of our political traditions. One apparent blanket restriction of expression has been to outlaw the use of "fighting words," which are words that tend to cause an immediate breach of the peace.[45] The fighting words doctrine, however, is content-neutral in that it restricts *any* such words, whether coming from the political right, left, center, religious, or anti-religious perspective. *R.A.V. v. St. Paul*, recently tested the principle of content-neutrality.[46] The Court struck down a local law in St. Paul, Minnesota which prohibited certain kinds of hate expression. The complainant in the case was convicted for burning a cross on the lawn of an African-American family. The ordinance outlawed hate expression and specified burning crosses as an example of hate expression, due to its historical message of hatred, inferiority, and its historically credible threat of violence.

Justice Scalia, writing for the majority, argued that the state has no legitimate interest in judging a political message by its content. He stated that "the only interest distinctively served" by the St. Paul ordinance "is that of displaying the city council's special hostility towards the particular biases thus singled out."[47] Because this is not a compelling state interest, the majority reasoned that it was not enough to warrant restriction of expression. *R.A.V.* shows that current First Amendment doctrine will not allow content-based restrictions on speech. Justice Scalia's reasoning is wrong on two counts. First, cross burning represents political expression of a lower value than civilly intended and delivered speech acts. Second, there is a much stronger state interest in restricting hate messages like cross burnings than is specifically endorsed by the Constitution. I shall return to these points as the argument develops. Justice Scalia argues valid points on some issues. The Constitution will not allow a racist message to be censored purely on the ground of the propositional content of the message. The First Amendment has never considered a whole category of speech, *because of its content*, to be unacceptable as false or immoral. First Amendment doctrine is unlikely to change in this regard. Some have argued that it *should* be unacceptable and that we have a moral obligation to change it.[48] But it would be extremely difficult to draw a line between the kind of racist speech that is morally wrong and clearly false and that which is either arguable or should be discussed. Kingsley Browne makes this argument persuasively.[49] If it is acceptable to argue that race does not correlate in any regular way with intelligence, nor would there be any moral significance if it did, then the negation of that sentence must also be allowed. Clearly, some false and morally objectionable speech must be allowed in calm and civil social policy debates. Therefore, we have to allow persons to say, at least in a calm and civil manner, false and morally objectionable racist things. Wrongness in itself cannot justify ruling out speech. The case for outlawing racist speech will have to rest on the harmfulness of the manner of the speech, not its falsehood. We must weigh the harm against any value the speech may have. The value of the expression may be limited, however, by the manner in which it is delivered.

Charles Lawrence argues that restrictions on the use of racial epithets in face-to-face encounters should be allowed by a properly conceived first amendment doctrine for two reasons.[50] First, he points out the great harm that racist epithets cause — like slaps in the face to the victim, provoking rage, not thought or reasoned argument.[51] The First Amendment is not intended to protect batterers. This is not a strong argument, however, against protecting a form of speech, as Feinberg points out that religious persons might feel similarly slapped by seriously sacrilegious speech.[52] The subjective feelings of the listeners cannot be the test of what speech is protected and what is not.

Lawrence's second argument is more persuasive. He asserts

that allowing racial insults thwarts the instrumental purpose of fostering more speech and thus more political debate.[53] Racial epithets are preemptive because the victim often is so stunned that he cannot respond, or is precluded from doing so by his subordinated status created by the racial epithets. Andrew Altman makes an interesting observation about racial epithets that may explain why they differ from ordinary political speech with equivalent propositional content, and how a response for a victim of racism or sexism could be precluded due to their subordinated status.[54] People use epithets partly for their perlocutionary[55] effect on the hearer, but mainly for what Altman terms "treating someone as a moral subordinate," which issues from a illocutionary force.[56] While perlocutionary acts are doings in linguistic form, illocutionary force comes from linguistic meaning. As perlocutionary acts are conventional acts that are not necessarily related to the propositional content of the words through which they are performed, the illocutionary force of a word or phrase is a conventionally constructed meaning that is not equivalent to the literal propositional content of the phrase. The illocutionary force of a racist or sexist epithet is conventionally created subordination, unlike the naturally subordinating force of genocide or enslavement. Altman argues that moral subordination, not the dissemination of ideas, is the principal purpose of racial epithets and slurs. The same cannot be said of civilly presented hate speech or insults that do not attack the identifying feature of an oppressed class. When someone claims that "[y]ou are contemptible for being a homosexual," she is not, *in making the claim,* treating you as a moral subordinate, though her claim would indicate that she would like to do so.[57] If she calls you a "fag" she is treating you, through her word, as a moral subordinate. If an insult attacks an individual for some feature that is unrelated to any oppressed group identity, there is no conventional meaning in that insult that issues from stereotypes or other aspects of oppression. If someone says, "You are a slob," she is indicating contempt for your appearance, but not treating you as a moral subordinate because, conventionally, slobs are not moral subordinates. To treat someone as a moral subordinate is to deny that person the possibility of entering into a debate about her status. This observation confirms Lawrence's view that racial epithets are not constitutionally valuable political speech. Racial epithets tend to preclude political speech by the listeners, and thus instrumental value of racial epithets is very low; a discussion that begins with a white man calling a black man a "nigger" will not lead to a civil discussion of the merits of racial segregation as a social policy. To engage in political debate one must treat the others in the debate as moral equals. Furthermore, the Constitution does not open the moral status of women and minorities to debate. One can argue about what equality means and how best to manage differences, but to treat others as moral subordinates is not engaging in political debate. This means that face-to-face racial epithets should not be in the same category as political speech. Because the purpose of an epithet is to degrade or suggest unworthiness of moral standing, the only valuable use would be disquotational. This might occur in the statement of an ordinance or policy that prohibits the use of racial epithets, or in a class discussing race issues. Now we can see how Scalia is wrong on the first point. Cross burnings, like racial epithets, are to be accorded less instrumental and intrinsic value than ordinary political speech. Although they convey a message, they are conventional ways to treat black persons as moral subordinates.

Some gender slurs treat women as moral subordinates (the words listed in section IV, for example). These words suggest that women are to be equated with their sexual anatomy, or that their role and function in life is to be the sexual servants of men. Lawrence and Altman justify a limited hostile environment sexual harassment restriction on speech. However, many cases of hostile environment sexual harassment, including the ATO case, do not involve these words. But if, like cross burnings, the behavior is conventionally loaded with oppressive illocutionary force so that it amounts to treating women as moral subordinates, then it could be proscribed, even if it is expression.

Because the First Amendment right to free speech is not absolute, one might ask if there are other constitutionally guaranteed rights or additional values represented in the Constitution that conflict with some forms of free speech. Richard Delgado, Charles Lawrence, and others present arguments in favor of restrictions on free speech from this constitutional perspective. Delgado expands the list of constitutional interests that might support restrictions on racist speech.[58] He argues that the Constitution stands firmly against the denigration of humanity and privacy inherent in racist speech.[59] Racist speech is inconsistent with constitutional principles of universal suffrage, prohibition of cruel and unusual punishment, protection against unreasonable search, and abolition of slavery.[60] These values are endorsed in the Constitution, but are they inconsistent with all racist speech? Racist speech is cruel, but it is not punished by the government. Nor can it be plausibly construed as an unreasonable search nor even a re-institution of slavery. Finally, racist speech can only be truly inconsistent with universal suffrage if it is used to pass legislation that denies suffrage to racial minorities. That means, however, that the legislation, not the speech that supports it, is unconstitutional. While racist speech harms persons by degrading them and suggesting that they are the subjects of these violations of constitutional rights, the speech itself does not violate those rights. Still, Delgado succeeds in showing that the Constitution endorses the goals of ensuring equality and ending the legacy of racial discrimination.

Lawrence focuses on the equal protection clause of the Fourteenth Amendment, and its use in *Brown v. Board of Educa-*

tion of Topeka.[61] In his view, *Brown* commits us to some regulation of speech. It articulates a principle that is central to understanding the equal protection clause; the meaning of racial segregation is to create a superior and an inferior caste. Because "*Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys,"[62] Lawrence argues that there is precedent for regulating content of racist speech. One argument against this reading of *Brown* is that it confuses conduct and speech. *Brown* strikes down laws that segregate. Thus, one may propose or discuss such a law, but the state may not enforce it. Another objection to Lawrence's reading of *Brown* is that it precludes the government, not private individuals, from segregating by race. The Civil Rights Act of 1964 proscribes some racist speech, for instance, signs belonging to private individuals saying "Coloreds" and "Whites." The forms of precluded speech fall under the categories of commercial or government speech, but not political speech. Lawrence's point is that these forms of racist speech are harmful and are outlawed by the Civil Rights Act because they send the message of inferiority and degradation. Thus, he argues, the Act outlaws *the messages* themselves, which are clearly political messages.

These arguments do not justify outlawing *any* forms of racist or sexist political speech. These considerations justify a different reading of the First Amendment. Under current First Amendment doctrine no types of messages can be singled out as especially unworthy. Nothing could be more clearly a message of degradation and inferiority than the burning cross in the *R.A.V.*[63] case, yet the Court struck down the ordinance because it was not content-neutral. The second way Scalia's reasoning is flawed is evinced by his false claim that the state has no particular interest in prohibiting the message of cross burnings other than an arbitrary whim of the local government. As Delgado and Lawrence remind us, fighting discrimination and ensuring equal protection of the law are constitutionally sanctioned interests.

The following procedure balances free speech concerns against equal protection concerns. It must first be considered whether the expressive conduct conveys a political message. If not, then it may be restricted for important state interests. If it does convey a political message, then strict judicial scrutiny should be applied if the message involves racial epithets that stifle further expression by treating someone as a moral subordinate. If it is conventionally loaded speech-precluding speech, then it calls for less than strict scrutiny. Still, the state may only preclude the speech if a strong state interest in doing so exists. In the case of expressions that conventionally treat persons as moral subordinates, the strong constitutional interest in equal protection overwhelms the small instrumental or intrinsic value of such expression. In the case of sacrilegious messages or flag burnings, there are strong constitutional interests in *allowing expression* of these messages. The First Amendment requires the state to take no interest in religious matters, including anti-religious messages.[64] One of the most important instrumental purposes of speech is criticizing the government — the intended message of flag burning. Thus, *Texas v. Johnson*[65] and *R.A.V. v. City of St. Paul*[66] need not stand or fall together.

A summary of this section is helpful. The First Amendment protects all private political speech from blanket suppression, unless it is deemed to cause immediate, irreversible, and serious harm to the nation. The high instrumental and intrinsic value of political speech justifies these protections. Some restrictions on the time, place, and manner of the expression, however, are allowable — provided that they are content-neutral restrictions and that they do not amount to blanket restrictions on any political view. Furthermore, fighting words may be restricted as long as the law is content-neutral. Finally, the narrow category of racial and gender epithets, along with expressive conduct that has the same illocutionary effect of treating persons as moral subordinates, ought to fall outside First Amendment protections. That exclusion, however, is not consistent with current First Amendment doctrine.

Under current First Amendment doctrine, the *ATO* case would likely result in a loss for the Advocates. Given the balancing procedure outlined in this article, though, the Advocates have a better case. The newsletters included a gender slur, which would fall outside of protected expression. They also included a misogynistic poem. This raises the possibility that there is a conceivable artistic value in the poem that would override the state's interest in prohibiting expression. While it is not clear that the poem is a conventional way of treating women as moral subordinates, it is possible to make an argument to that effect. The other events in the complaint would not fall under First Amendment protections because they are either like racial epithets (in the case of the misogynistic graffiti) or like cross burnings (in the case of the chanting men exposing themselves at the sorority house).

VI. Conclusion: College Campuses, Hostile Environments, and Extralegal Solutions to Gender and Race Discrimination

One further point to consider in favor of using hostile environment sexual harassment law to reduce gender dissing on campuses remains. Colleges and universities are special environments for several reasons. First, they are places where speech and other forms of expression, including political speech, are routinely judged, graded, excluded, and encouraged according to its content. That is, as Cass Sunstein argues, their whole purpose.[67] Academic life subjects the speech of both faculty and students to constant review and discipline. Schools regularly penalize bad speech with dismissal or disapproval. If they did not, they would not be doing their jobs. No academic standards would exist. Furthermore, if professors lost their right to control speech in the

classroom, classes could become chaotic jumbles of non sequiturs and disruptive emotional outpourings. Clearly this sort of control must be seen as a reasonable time, place, and manner restriction. Teachers must have the right to disallow irrelevant speech and disapprove of badly argued speech. Contrary to California State Congressman Bill Leonard's view, campuses are great places for correcting people's thinking, and that is why people support them. This need to control speech for the sake of orderly classes, however, does not extend beyond the classroom or faculty office. What about extracurricular behavior, as in the case of the ATOs? Second, one might argue that because colleges and universities nurture our young people and reach them at a formative stage in moral development, they have a special responsibility to encourage the values of equality and freedom from discrimination. Schools have the opportunity to instill values and shape the development of society. Nevertheless, the competing values of freedom of speech and equality are at issue. Clearly, state supported colleges and universities should not sponsor racism and sexism. Just as clearly, they ought not to stand for thwarting political speech. The special responsibility argument holds the value of speech as high as that of equality, especially given the traditional argument for academic freedom. But colleges and universities ought to recognize an even greater special responsibility because women and minorities were excluded from even de jure equal opportunity in the academy for so long, further exacerbating social and political inequality. The argument does not suggest that colleges and universities should thwart speech, but rather that they should enforce equality and support speech that promotes equality. Third, college and university campuses often serve as the homes of the young people who attend them. Not only do they provide place for people to eat, play, study, make friends, and recreate, but they also provide places for people to discuss serious social and political matters. No one who lives there can easily escape the campus either to avoid a hostile environment or to propound one's political views. This suggests that the campus can require a high degree of civility in expression, but that it cannot thwart political expression.

[B]ecause colleges and universities nurture our young people and reach them at a formative stage in moral development, they have a special responsibility to encourage the values of equality and freedom from discrimination. Schools have the opportunity to instill values and shape the development of society.

Colleges and universities have a special ability, and therefore special responsibility, to help eradicate sexual and racial discrimination and its effects on the victims. Though current First Amendment doctrine prohibits colleges and universities from punishing much dangerous and harmful racist and sexist speech, they have the vast resources needed to support speech. When the *ATO* case was beginning to look like a loss for the Advocates, the college was asked for support in fighting against sexism through funds for speakers and rape crisis services, more female security officers, women's self defense courses, and a re-appraisal of the role of fraternities in the college. Ultimately, a clear statement of disapproval from the administration was sought. For example, the administration was asked to cancel classes for a day and support a teach-in on racism and sexism. One of the most important steps that colleges and universities can take is to remove all support for fraternities permanently. They have shown by their history of misogyny and bigotry that they are not an institution to be supported by equality-seeking social institutions. There is much that colleges and universities could do to stop supporting sexism and racism and to begin supporting the speech of those who seek equality without violating students' legal or moral rights.

To conclude, professors and persons committed to equality ought to take action if our colleges and universities fail to do the right thing. Women need an anti-defamation league that responds quickly to hate speech. We need to respond to acts of gender dissing with legal harassment of our own. I do not mean to equate the two; there is no equivalently harmful expression that we can mount against examples like the ATO brothers precisely because of the systematic nature of the oppression of women. We must, however, raise the ante for them to continue their misogynistic campaign. We must do what we can to make it more painful for them to gender diss. This will make college and university administrations unhappy as the level of rhetoric and consequent violence rises on their campuses. Trying to bring about change for a better future, Martin Luther King, Jr. argued that tension in the midst of injustice is positive.

> Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analy-

> sis and objective appraisal, so must we see the need for nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.[68]

While the inevitable tension is not as good as peace with honor for both sides, it is better than peace with gender dissing.

Notes

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1. Linda Seebach, *Putting Teeth in the First Amendment*, DAILY NEWS, Jan. 21, 1993, at 19.
2. ELSA KIRCHER COLE, SEXUAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM (1990).
3. 29 C.F.R. 1604.11 (1991).
4. Barbara T. Lindemann & Kenneth D. Sulzer, Sexual Harassment: Definitions and Legal Issues for Faculty Advocates, Oct. 1992 (unpublished document on file with author).
5. *See* Teamsters v. United States, 431 U.S. 324, 335 (1977).
6. CATHERINE MACKINNON, ONLY WORDS 49-55 (1993) (pointing out that these free speech objections to sexual harassment only arose recently); *see also* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 481-550 (1991).
7. *See, e.g.*, Cass R. Sunstein, *Liberalism, Speech Codes, and Related Problems*, 1993 ACADEME 14-25; Anita M. Superson, *A Feminist Definition of Sexual Harassment*, 24 J. OF SOC. PHIL., 46-64 (1993); Browne, *supra* note 6.
8. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (*quoting* Henson v. Dundee 682 F.2d 897, 904 (11th Cir., 1982)).
9. Browne, *supra* note 6 at 482. The author has pointed out that there is little constitutional difference between a case of pure speech and one in which speech is a part of the alleged offense. The question in either case is whether speech of this sort may be restricted. If not, then speech cannot form even part of the case.
10. Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 (M.D. Fla. 1991).
11. CAL. EDUC. CODE § 1363 (West 1992).
12. There is a real question whether this law would withstand constitutional challenge because it appears to violate the property rights of private colleges and universities. For the purposes of this article, I will assume that the law would be upheld.
13. The new California law in effect made a statutory right to free speech for students; it would not make sense to say that one individual (or group of individuals) violated the constitutional right of free speech of another, because the Constitution requires that "Congress shall make no law . . . ." U.S. CONST. amend. I.
14. A similar case occurred at about the same time regarding a newspaper column in the California State University at Northridge newspaper. The column was derogatory toward gays and lesbians. The university was forced by financial considerations to back down there as well. It is also possible that other states or the U.S. Congress could pass similar laws; a bill similar to Chapter 1363 was introduced at the federal level during the 102d Congress by Rep. Henry J. Hyde (R-Ill), called the Collegiate Speech Protection Act of 1991, though it never made it out of committee. I owe the reference to this bill to a memo written by Albert Rodriguez and Wayne Flick of Latham & Watkins, Attorneys at Law, Jan. 18, 1993.
15. *See also* Ann E. Cudd, *Enforced Pregnancy, Rape, and the Image of Woman*, 60 PHIL. STUDIES 47, 47-59 (1990); MARILYN FRYE, *Oppression, in* THE POLITICS OF REALITY; ESSAYS IN FEMINIST THEORY, 1, 1-16 (1983); Marilyn Friedman & Larry May, *Harming Women as a Group*, 2 SOC. THEORY & PRAC. 208-234 (1985).
16. *See* DEBORAH L. RHODE, JUSTICE AND GENDER 57(1989). Congressman Howard Smith of Virginia only proposed including sex as a ploy to defeat the entire Civil Rights Act, reasoning that surely it would be ridiculous to think that women ought to be granted any more civil rights, and that it might therefore cause some Congressmen to vote against the entire Act.
17. Chester E. Finn, *The Campus: An Island of Repression in a Sea of Freedom, in* TODAY'S MORAL ISSUES, 109, 110 (Daniel Bonevac ed., 1992).
18. Id. at 111.
19. Because quid pro quo sexual harassment is not my subject I will not address arguments suggesting that it is really a fair trade rather than a form of coercion. *See* Michael Bayles, *Coercive Offers and Public Benefits*, 60 PERSONALIST 139-44. *But see* Nancy Tuana, *Sexual Harassment: Offers and Coercion*, 19 JOURNAL OF SOCIAL PHILOSOPHY 30-42 (Summer 1988); John C. Hughes & Larry May, *Sexual Harassment*, 6 SOCIAL THEORY AND PRACTICE 249-280 (Fall 1980).
20. *See* Browne, *supra* note 6 ("[C]onventional definition of 'harassment' . . . generally connotes a pattern of conduct aimed at a particular person and intended to annoy.").
21. *Id.* at 491.

22. This point responds to an objection first raised by Richard Cole that sexual harassment law is redundant with other laws that protect persons from defamation, coercion, and harassment. My response is that the domination harm is a completely new harm in some forms of sexual harassment.
23. In a recent case in California, Sabino Gutierrez, a man, successfully sued Maria Martinez, his female supervisor, for repeated unwelcome sexual propositions. *See Man Wins $1 Million Sex Harassment Suit,* N.Y. TIMES, May 21, 1993, at A15.
24. Perhaps in woman-dominated professions it would be possible to send the message to men that they are not welcome. This is also difficult to do, however, because men have normally been accorded more status than women in these professions (i.e., the male principal of the elementary school, the male head librarian, the male head chef or waiter in the finer restaurants). Furthermore, being welcome in a woman-dominated profession is a dubious honor for many men.
25. In the same year as the complaint, faculty-initiated discussion of discontinuing College support of fraternities and sororities was immediately stonewalled by the Director of Annual Giving, who argued that fraternity alumni donate indispensable funds to the College. The fraternity men had more power than the faculty advocates in setting fraternity policy.
26. JOEL FEINBERG, OFFENSE TO OTHERS 51 (1985).
27. *Id.*
28. *Id.* at 58.
29. *Id.* at 59.
30. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story, in* WORDS THAT WOUND 17, 23 (1993).
31. *Id.* at 24.
32. *Id.* at 25.
33. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, in* WORDS THAT WOUND (1993). Richard Delgado may disagree with my claim that sexual harassment is as profoundly harmful as racist speech. He appears to endorse the following example of a "mere insult": "[You are] a God damned woman [and] a God damned liar." RESTATEMENT OF (SECOND) OF TORTS § 46 (1965). To distinguish racist speech from mere insult, Delgado claims that "racial insults are different qualitatively because they conjure up the entire history of racial discrimination in this country." Delgado, *id.* at 100. I agree with his criterion for profound harm that there be an entire history of severe discrimination against a group. The history of discrimination against women is also severe and longstanding.
34. FEINBERG, *supra* note 26, at 53.
35. *Id.*
36. Texas v. Johnson, 491 U.S. 397 (1989).
37. Superson, *supra* note 7, at 46.
38. *Id.* at 58.
39. *See id.*
40. Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).
41. New York Times v. Sullivan, 376 U.S. 254, 270; *see also* Browne, *supra* note 6, at 526.
42. U.S. CONST. amend. I.
43. JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport, ed. Hackett Publishing 1978) (1984).
44. JEFFRIE G. MURPHY & JULES L. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 89 (1984).
45. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
46. R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S. Ct. 2538 (1992).
47. *Id.* at ___, 2550; *see also* Linda Greenhouse, *The Court's 2 Visions of Free Speech,* N.Y. TIMES, June 24, 1992, at A13.
48. Matsuda, *supra* note 30, at 35.
49. Browne, *supra* note 6, at 85.
50. Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus, in* WORDS THAT WOUND (1993).
51. *Id.* at 67.
52. *See* FEINBERG, *supra* note 26.
53. Lawrence, *supra* note 50, at 71.
54. Andrew Altman, *Liberalism and Campus Hate Speech: A Philosophical Examination,* 103 ETHICS 302 (1993).
55. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 98 (1962). *See also* JOHN SEARLE, SPEECH ACTS 31 (1969).
56. *Id.* at 110.
57. *Id.* at 311.
58. Delgado, *supra* note 33.
59. *Id.*, at 94.
60. *Id.*, at 94.
61. Lawrence, *supra* note 50, at 59.
62. *Id.*, at 59 (emphasis in original).
63. R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S. Ct. 2538 (1992).
64. U.S. CONST. amend. I.
65. Texas v. Johnson, 491 U.S. 397, 397 (1989).
66. *R.A.V.*, ___ U.S. at ___, 112 S. Ct. at 2538.
67. Sunstein, *supra* note 7, at 20-21.
68. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 81 (1964).