NOTE

Beyond Pinups: Workplace Restrictions on the Private Consumption of Pornography

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I. Introduction

For more than a decade, sexual harassment in the workplace has been recognized as discrimination within the meaning of Title VII of the Civil Rights Act of 1964.[1] Conduct which has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" is a violation of Title VII.[2] Although sexually harassing conduct in public workplaces invariably takes the form of words or pictures, until recently, such conduct has not been viewed by either the courts or commentators as raising First Amendment concerns.[3] "If ever words have been understood as acts, it has been when they are sexual harassment. . . . [S]exual harassment has never been imagined to raise expressive concerns, although all sexual harassment is words, pictures, meaningful acts and gestures."[4] It became an issue of First Amendment speech, however, when women asserted that pornography in the public workplace constituted sexual harassment in employment.[5]

While sexually derogatory comments and acts directed towards women have repeatedly been found to be a sufficient basis for a hostile work environment claim,[6] pornography depicting the same degra-

1. 42 U.S.C. § 2000(e)-(e-17) (1988).

2. 29 C.F.R. § 1604.11(a)(3) (1994).

3. CATHARINE A. MACKINNON, ONLY WORDS 45 (1993). *But cf.* Doe v. University of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989) (holding that the University of Michigan's policy against discriminatory harassment of students was invalid because it covered "verbal conduct" protected as speech under the First Amendment).

4. MACKINNON, *supra* note 3, at 45.

5. *Id.* at 52.

6. *See, e.g.*, Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988) (verbal abuse and offensive touching sufficient to constitute hostile work environment for female traffic controllers on a road construction site); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) (extremely vulgar and offensive epithets directed at plaintiff, as well as a work environment full of

dation has been defended as protected expression.[7] In *Robinson v. Jacksonville Shipyards, Inc.*,[8] the employer argued that the posting of demeaning and objectifying photographs constituted protected "speech," and therefore prohibiting such material as a remedy for a hostile work environment exceeded the court's authority.[9] "Suddenly, because [the *Robinson* plaintiff's] sexual harassment complaint centered on pornography, her sexual harassment claim invoked the First Amendment, at least so far as relief was concerned."[10]

While pornography in the public workplace has begun to raise First Amendment concerns, most commentary and jurisprudence have focused on the restriction of verbal speech or the posting of sexually explicit material in the workplace.[11] Arguments have been made that such conduct in the workplace may be constitutionally restricted.[12] This Note advocates the extension of those arguments to workplace regulations that prohibit the private reading and consensual sharing of sexually explicit material. It proposes that the government as employer may restrict even private consumption of pornography for the purpose of ridding the workplace of discrimination. The recent deci-

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sexual slur, insult, and innuendo, sufficient to sustain claim of sexual harassment); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (sexual inquiries and vulgarities combined with requests for sexual favors constitute hostile environment); Zabkowicz v. West Bend Co., 589 F. Supp. 780 (E.D. Wis. 1984), *aff'd in part and rev'd in part on other grounds*, 789 F.2d 540 (7th Cir. 1986) (verbal sexual abuse, posting of offensive drawings, and indecent exposure constitute hostile environment).

7. *See infra* notes 8-9, 64 and accompanying text.

8. 760 F. Supp. 1486 (M.D. Fla. 1991).

9. *Id.* at 1486. In *Robinson*, the employer argued that the First Amendment prohibited any injunctive relief requiring the implementation of a sexual harassment policy which prohibited sexually-oriented material in the shipyard. The court, however, did not find this argument persuasive. As is discussed in greater detail in subsequent sections of this Note, the *Robinson* court found that the First Amendment did not prohibit such injunctive relief because, inter alia: (1) the Shipyard did not seek to express itself through the sexually-oriented pictures or verbal harassment; (2) such verbal conduct and pictures were discriminatory conduct constituting a hostile work environment and were therefore unprotected; (3) the regulation of such material is nothing more than a valid time, place, and manner regulation; (4) female workers in the shipyard were a captive audience to the speech; and (5) even if protected, the compelling governmental interest in workplace equality justified a sufficiently narrow regulation. *Id.* at 1434-36.

10. MACKINNON, *supra* note 3, at 53.

11. *See, e.g.*, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Rabidue v. Osceloa Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991); Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

12. *See infra* notes 167-204 and accompanying text.

sion in *Johnson v. County of Los Angeles Fire Department*,[13] which struck down a sexual harassment policy prohibiting private consumption of pornography in county firehouses, will provide the basis for discussion.

Part II of this Note reviews the basic tenets of First Amendment jurisprudence, and discusses the implications of workplace restrictions generally and sexual harassment policies in particular. Part III analyzes the *Johnson* decision in light of these tenets. Finally, Part IV proposes that private consumption of pornography can be constitutionally restricted to further the government's compelling interest in eradicating workplace discrimination.[14]

II. The First Amendment: Restrictions on Speech in the Workplace

A. The Foundation of the First Amendment

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[15] This prohibition is considered "the matrix, the indispensable condition, of nearly every other form of

13. 865 F. Supp. 1430 (C.D. Cal. 1994).

14. For the purposes of this Note, I use the definition of pornography used by Andrea Dworkin and Catharine MacKinnon—the "graphic sexually explicit subordination of women" through either pictures or words. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). This definition was included in a proposed Indianapolis ordinance that attempted to define pornography as a civil rights violation. *Id.* The full definition includes "the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission, servility or display; or (vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual." *Id.* at 324.

In fact, a similar definition was incorporated into a court-mandated sexual harassment policy prohibiting the "reading or otherwise publicizing in the work environment materials that are in any way sexually revealing, sexually suggestive, sexually demeaning or pornographic" and used as an example of "sexually suggestive" a picture "depict[ing] a person . . . who is not fully clothed . . . and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body." *Robinson*, 760 F. Supp. at 1542. By either definition, *Playboy* magazine would be considered pornographic.

15. U.S. CONST. amend. I.

freedom,"[16] and Americans have come to treasure this guarantee as an absolute right of citizenship. Indeed, Justice Black supported the idea of freedom of speech as an absolute right,[17] but it has never gained acceptance from a majority of the United States Supreme Court. As an absolute right, freedom of speech would not be subject to balancing,[18] but the Court has consistently employed a balancing approach in evaluating the constitutionality of some restrictions on speech. The Court has explained:

> [W]e reject the view that freedom of speech . . . as protected by the First and Fourteenth Amendments, [is] "absolute[ ]" . . . . [T]his Court has consistently recognized [that] constitutionally protected freedom of speech is narrower than an unlimited license to talk. . . . [C]ertain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection.[19]

The Court has developed several tests to evaluate restrictions on speech. The overbreadth doctrine prohibits regulations permissibly suppressing some speech from encompassing other speech that is constitutionally protected. It seeks to ensure that statutes are drafted as narrowly as possible. A law that "does not aim specifically at evils within the allowable area of [government] control but, . . . sweeps within its ambit other [protected expression]" will be struck down as overly broad.[20] Even if the state is pursuing an otherwise permissible end, the statute must not abridge more speech than is necessary to accomplish the objective.[21]

In addition, the Court will examine a regulation to determine if it is content neutral. Content neutral is defined as "justified without reference to the content of the regulated speech"[22] and reflects the belief "that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[23]

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16. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

17. Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (dissenting opinion).

18. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7, at 942 (4th ed. 1991). A balancing approach requires that the free speech value be weighed against the government's justification for the regulation. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 792 (2d ed. 1988).

19. *Konigsberg*, 366 U.S. at 49-50 (citations omitted).

20. Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (holding that a statute which prevented all picketing was void on its face because it also banned peaceful picketing protected by the First Amendment).

21. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

22. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

23. Texas v. Johnson, 491 U.S. 397, 414 (1989).

As one commentator has explained, "a regulation of speech based on its content or its communicative impact is unconstitutional unless it falls within one of a limited number of exceptions to the rule that government may not prohibit speech because it does not like the message."[24] For example, a regulation that allowed public discussion in general but specifically prohibited public discussion of all religious matters would violate the requirement of content neutrality. Under the categorical balancing approach, however, even content regulation has been allowed in circumstances such as the advocacy of unlawful conduct,[25] libel,[26] obscenity,[27] and "fighting words."[28]

Finally, and perhaps most importantly, the regulation must be viewpoint neutral; that is, it must not differentiate between points of view on a particular subject. For example, a regulation that granted a public park use permit to a Catholic organization but denied one to a group of Jehovah's Witnesses would violate viewpoint neutrality.[29] Viewpoint discrimination is "censorship in its purest form," and regulations found to discriminate on that basis are traditionally subjected to the highest level of scrutiny.[30]

These tests were developed in the context of the government as lawmaker. They are also considered, however, when courts examine regulations promulgated by the government as employer in restricting a public employee's speech in the workplace.

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24. Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003, 1007 (1993).

25. Brandenburg v. Ohio, 395 U.S. 444 (1969).

26. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

27. Miller v. California, 413 U.S. 15 (1973).

28. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

29. Gerard, *supra* note 24, at 1008. In R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), the Court struck down a city ordinance which prohibited the display of a symbol "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. In the majority opinion, Justice Scalia struck down the ordinance in part because he found that it was not viewpoint neutral:

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

Id. at 391.

30. TRIBE, *supra* note 18, § 12-3, at 800 (citing Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting)).

B. Restrictions on Speech in the Public Workplace

Under some circumstances, the workplace speech of public employees may be restricted more than other speech.[31] Indeed, despite requirements of content and viewpoint neutrality, when the government is the employer, workplace restrictions on speech have been upheld.[32]

Clearly, there is a difference between government as lawmaker and government as employer. As employer, the government may be able to enforce restrictions on speech in the workplace that Congress could not impose on the general citizenry without violating the First Amendment.[33] In *Pickering v. Board of Education*[34] the Court noted, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[35] Nonetheless, the Court has refused to carve out a categorical exception to the First Amendment which would permit unfettered regulation of workplace speech when the government is the employer.[36]

Public employees do not relinquish their First Amendment right to comment on matters of public interest by virtue of government employment.[37] The Court has employed a balancing test to determine when the "interests of the [employee], as a citizen, in commenting upon matters of public concern [outweigh] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[38] If the employee's speech relates to a matter of public concern, a court must balance the employee's free speech rights against the government-employer's interest in workplace efficiency. If, however, the "employee['s] expression cannot be fairly considered as relating to any matter of political, social, or other con-

31. Private employers may regulate employee speech because doing so implicates no "state action" to trigger the protections of the First Amendment. "[I]t is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." Hudgens v. NLRB, 424 U.S. 507, 513 (1976).

32. *See infra* note 50 and accompanying text. *See also* Arnett v. Kennedy, 416 U.S. 134 (1974) (upholding the dismissal of an employee for false accusations of bribery against coworkers); Parker v. Levy, 417 U.S. 733 (1974) (upholding the court martial of an officer who advised troops to disobey an order to report for combat duty).

33. Waters v. Churchill, 114 S. Ct. 1878, 1886, 1888 (1994); *see also* Gerard, *supra* note 24, at 1034.

34. 391 U.S. 563 (1968).

35. *Id.* at 568.

36. Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1820-21 (1992).

37. *Pickering*, 391 U.S. at 568.

38. *Id.*

cern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[39] Restated, if a public employee's speech does not relate to a matter of public concern, the employer has considerable latitude to implement workplace restrictions on such speech.[40] Absent extraordinary circumstances, if an employee is speaking on matters of a personal nature, a "federal court is not the appropriate forum in which to review the wisdom of a personnel decision."[41]

The threshold question is whether the speech relates to a matter of public concern.[42] A "matter of public concern" has been interpreted to mean an "expression relat[ing] to some issue of interest beyond the employee's bureaucratic niche."[43] The determination must be made in light of the content, form, and context of the expression.[44] For example, a public letter written by a teacher criticizing a tax increase proposed by the school board,[45] and a remark made by an employee indicating that she hoped the next attempt on the President's life would be successful[46] were both found to be matters of public concern.[47] An office questionnaire concerning office policies and morale within a district attorney's office, however, was found *not* to be a matter of public concern.[48]

If a public employee's speech is found to be a matter of public concern, the court must evaluate the government's interest in an efficient workplace to determine the constitutionality of the restriction.[49]

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39. Connick v. Myers, 461 U.S. 138, 146 (1983).

40. *Id.*

41. *Id.* at 147.

42. Rankin v. McPherson, 483 U.S. 378, 384 (1987) (quoting *Connick*, 461 U.S. at 146).

43. National Treasury Employees Union v. United States, 990 F.2d 1271, 1273 (D.C. Cir. 1993), *aff'd in part and rev'd in part*, 115 S. Ct. 1003 (1995).

44. *Connick*, 461 U.S. at 147-48.

45. *Pickering*, 391 U.S. at 569-70.

46. *Rankin*, 483 U.S. at 386-87.

47. *See also* Beckwith v. Daytona Beach Shores, 58 F.3d 1554 (11th Cir. 1995) (finding that statements regarding fire and rescue services made by an employee of the fire department during a city council meeting were matters of public concern); Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988) (finding that public statements by a university athletic director regarding violations of athletic rules were matters of public concern).

48. *Connick*, 461 U.S. at 148; *see also* Murray v. Gardner, 741 F.2d 434, 438 (1984), *cert. denied*, 470 U.S. 1050 (1985) (holding that an FBI agent's complaints about the Agency's furlough program were not matters of public concern because they "would [not] enrich the public's store of knowledge on the operation of the FBI").

49. *Connick*, 461 U.S. at 146. In making this determination, "pertinent considerations [include] whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loy-

Consistent with First Amendment principles, however, restrictions on speech in the workplace may take many forms once the employer's interest in an efficient workplace outweighs the employee's interest in free speech. Some restrictions may be aimed at employee safety and productivity, while others may work to promote morale.[50] Restrictions on speech that are aimed at reducing sexual harassment, however, present a difficult question.

C. Sexual Harassment: The Hostile Work Environment

Sexual harassment falls into two categories, only one of which has First Amendment implications. The first, quid pro quo harassment, consists of demands for sexual favors in return for job benefits.[51] Such "speech" is effectively extortion, and therefore does not enjoy First Amendment protection.[52] Similarly, physical conduct lacking any significant speech component is also unprotected,[53] as is physical conduct that conveys a message but may itself constitute a crime.[54]

The second category, hostile work environment harassment, occurs when "sexual antagonism [is] so pervasive that it alters the 'terms and conditions of employment' within the meaning of the statute."[55] It is a violation of Title VII if the sexual harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[56] Consistent with this definition, an abusive or hostile working environment may exist before the abuse is severe enough to drive the employee from the job,[57] and the harassing conduct need not be psychologically injurious

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alty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388 (citing *Pickering*, 391 U.S. at 570-73).

50. *See, e.g.*, Bryson v. City of Waycross, 888 F.2d 1562, 1567 (11th Cir. 1989) (holding that efficient police operations and employee morale outweighed employee's First Amendment interest in criticizing his superior); McMullen v. Carson, 568 F. Supp. 937, 944 (M.D. Fla. 1983) (stating that "internal discipline and strong morale in a law enforcement agency is essential for the efficient operation of that agency"), *aff'd*, 754 F.2d 936 (11th Cir. 1985).

51. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986).

52. Gerard, *supra* note 24, at 1006.

53. Bohen v. City of E. Chicago, 799 F.2d 1180 (7th Cir. 1986) (employee awoke from a nap to discover a supervisor's hand on her crotch, and was ordered to leave the door open when using the bathroom); Mitchell v. OsAir, 629 F. Supp. 636 (N.D. Ohio 1986) (supervisor urinated in front of the employee).

54. Arcara v. Cloud Books, Inc., 478 U.S. 697, 706-07 (1986) (free speech not implicated in closing a bookstore where customers engaged in illegal sexual activity).

55. Gerard, *supra* note 24, at 1005; *see also Meritor*, 477 U.S. at 65.

56. *Meritor*, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

57. *See id.* at 64.

to the plaintiff to be actionable.[58] Infrequent, isolated insults, however, generally do not create an abusive or hostile working environment.[59]

Unlawful harassment can also be established by demonstrating that the challenged behavior is "disproportionately more offensive or demeaning to one sex."[60] Such conduct "creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment."[61] Whether the environment has risen to such a level is measured from the perspective of a reasonable person of the victim's gender,[62] and must be determined by looking at all the circumstances.[63]

This category potentially raises First Amendment concerns because regulations aimed at preventing a hostile work environment may attempt to regulate noncriminal speech that reflects an idea or a viewpoint. This intersection between an employer's responsibility to eliminate a hostile work environment and an employee's First Amendment guarantee of free speech was the central issue litigated in *Johnson v. County of Los Angeles Fire Department.*[64]

III. The Court's Decision in *Johnson v. County of Los Angeles Fire Department*

A. Factual Background[65]

In July 1992, the County of Los Angeles Fire Department promulgated a written policy to battle sexual harassment in the department. The policy prohibited sexually-oriented magazines in all work locations, including dormitories, rest rooms, and lockers, even though the physical layout of the firehouse is such that it is possible for firefighters to read material either in their private bunks or in the relaxation area without exposing the contents to an unwitting on-

58. Harris v. Forklift Sys. Inc., 114 S. Ct. 367 (1993).

59. *See, e.g., Meritor*, 427 U.S. at 67.

60. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991).

61. *Id.* at 1523.

62. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

63. *Harris*, 114 S. Ct. at 371.

64. 865 F. Supp. 1430 (C.D. Cal. 1994).

65. This factual outline is summarized from the published opinion, Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1434-35 (C.D. Cal. 1994).

looker.[66] The plaintiff, a male firefighter who had been with the Los Angeles County Fire Department for some twenty-seven years, filed an action under 42 U.S.C. § 1983. He alleged that the policy violated his right to free speech under the First and Fourteenth Amendments to the United States Constitution. He sought a declaratory judgment that the policy, as applied to the private possession, reading, and consensual sharing of *Playboy* in the firehouse, was unconstitutional.

Several female employees testified at trial that they found the presence of magazines with nude pictures to be offensive and degrading, and that the lewd comments and gestures the men made while reading the magazines offended them. Two other female firefighters, however, testified that they were not offended. The drafter of the policy testified that one of her primary reasons for including the clause banning the reading of sexually-oriented magazines was her "fear that individuals reading such magazines would develop negative feelings toward their female coworkers."[67]

Against this factual background, the *Johnson* court analyzed the constitutionality of the policy by applying the *Pickering-Connick-Rankin* balancing test developed to evaluate restrictions on the speech of government employees.[68]

B. The *Pickering-Connick-Rankin* Balancing Test

The court recognized that the threshold question in the *Pickering-Connick-Rankin* balancing test is whether the restricted speech relates to a matter of public concern.[69] If the speech component is a matter of public concern, the court must balance the interest of the plaintiff in exercising his right to free expression against the interest of the government employer in maintaining efficient operations. If the speech is not a matter of public concern, however, the employer has considerable latitude to establish restrictive policies.[70]

In its decision, the *Johnson* court followed a broad interpretation of what constitutes a matter of public concern. Stating that the maga-

66. Section III.C of the policy stated, in pertinent part: "The following types of sexual material are prohibited in all work locations, including dormitories, rest rooms and lockers: . . . Sexually-oriented magazines, particularly those containing nude pictures, such as *Playboy*, *Penthouse* and *Playgirl*." *Johnson*, 865 F. Supp. at 1434.

67. *Id.* at 1435.

68. *Id.*

69. *Johnson*, 865 F. Supp at 1435 (citing Pickering v. Board of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983); Rankin v. McPherson, 483 U.S. 378 (1987)).

70. *Id.* (citing *Connick*, 461 U.S. at 142); *see also supra* notes 39-41 and accompanying text.

zine "contains articles relating to politics, sports, arts and entertainment . . . [and] contains stories by prominent authors and interviews with public figures," the court held that *Playboy* "amply satisfies the . . . standard that it relate to 'any matter' of concern to the community."[71]

The court's characterization of *Playboy* as a matter of public concern is questionable for two reasons. First, as one commentator has suggested, the proper focus for the court's analysis should have been whether the *plaintiff's* speech was a matter of public concern. That is, the court should have examined the plaintiff's actions of private consumption and consensual sharing for its public concern component, and should not have focused on whether *Playboy* contained material that is a matter of public concern.[72] In the context of public employment, speech which does not have social or political change as its goal is afforded less protection.[73] Furthermore, speech by public employees that addresses individual personnel disputes or grievances, and which does not seek to inform the public of information necessary for the "public's evaluation of the performance of government agencies," is not a matter of public concern.[74] Matters of public concern have traditionally been restricted to information that is needed by the public to make "informed decisions about the operation of their government."[75] In *Pickering*, the employee's comments regarding the proposed tax increase were "vital to informed decision-making by the electorate" over the expenditure of funds by a public agency.[76] In *Beckwith v. Daytona Beach Shores*, the firefighter's public comments addressed the city's delivery of basic fire and rescue services,[77] and in *Hall v. Ford*, the employee's speech covered rule violations useful to the public in evaluating whether the university was mismanaging the athletic program.[78] The *Johnson* court itself cited cases in support of

71. *Id.* at 1436.

72. Margo L. Ely, *Plaintiff Improperly Stripped of Right to Read Playboy, Court Rules*, CHI. DAILY L. BULL., Feb. 13, 1995, at 6.

73. Callaway v. Hafeman, 832 F.2d 414, 416 (7th Cir. 1987) (reaffirming the principle that speech on public issues occupies the "highest rung of hierarchy of First Amendment values") (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)); *see also Connick*, 461 U.S. at 145.

74. Hall v. Ford, 856 F.2d 255, 259 (D.C. Cir. 1988) (citing McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983).

75. *Id. But see* National Treasury Employees Union v. United States, 115 S. Ct. 1003 (1995) (holding that speeches given by government employees outside the workplace on topics unrelated to their employment were matters of public concern).

76. Pickering v. Board of Educ., 391 U.S. 563, 572 (1968).

77. Beckwith v. Daytona Beach Shores, 58 F.3d 1554, 1564 (11th Cir. 1995).

78. Hall v. Ford, 856 F.2d 255, 259 (D.C. Cir. 1988).

its own public concern argument that involved speech classified as a matter of public concern precisely because it conveyed information necessary to evaluate the performance of government.[79] In contrast, because an FBI agent's comments regarding the agency's furlough program did not contribute to the public's knowledge regarding the workings of the agency, it was not a matter of public concern.[80] Furthermore, at least one court has considered whether the employee's speech was "specifically and purposefully directed to the public" in deciding the issue of public concern.[81] The plaintiff in *Johnson* expressed no such goal for his private consumption of pornography at work. His speech made no contribution to the public's knowledge of the workings of the fire department, nor did he direct his speech at the general public, and therefore it should neither be classified nor protected as a matter of public concern.

Second, even if the *Johnson* court's public concern analysis was properly focused on *Playboy*, *Waters v. Churchill*[82] holds that an employee may be discharged for speech that is disruptive or is not a matter of public concern even if that speech includes statements that are nondisruptive and addresses matters of public concern.[83] Even if the articles contained in *Playboy* somehow satisfy the public concern criteria, the nude photographs included within its pages surely do not. Following *Waters*, the fact that the non-public-concern pornography is surrounded by material that may be eligible for heightened protection does not mean that the entire magazine cannot be constitutionally restricted in the workplace.

79. Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1436 (C.D. Cal. 1994) (citing Gillette v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989) (finding that comments regarding the wisdom of agency procedures is a matter of public concern); Hyland v. Wonder, 972 F.2d 1129, 1137-38 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2337 (1993) (holding that a memorandum exposing agency abuses, inefficiency, and incompetence was a matter of public concern because "[s]uch issues are of vital interest to citizens in evaluating the performance of the government")).

80. Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985).

81. *McKinley*, 705 F.2d at 1115. *But see Gillette*, 886 F.2d at 1197 (stating that the fact that the speech was not directed to the public at large was not critical to the inquiry of whether the speech involved a matter of public concern).

82. 114 S. Ct. 1878 (1994).

83. *Id.* at 1891 (upholding the discharge of an employee based on disruptive statements even though they were but a portion of a conversation that may have included matters of public concern). Arguably, the legitimacy that the articles in a magazine such as *Playboy* give to pornography makes *Playboy* even more insidious, and ultimately more effective in communicating its message of inequality, than hard-core magazines that make no attempt to appeal to a more sophisticated audience.

Having determined, however, that the restricted speech was a matter of public concern, the *Johnson* court weighed the plaintiff's First Amendment rights against the County of Los Angeles' interest in an efficient operation. In measuring the plaintiff's First Amendment rights, the court factored in the time, place, and manner of the restriction, as well as whether it was a content-based regulation.[84]

The court found the policy a particularly onerous time, place, and manner limitation because it prohibited reading during otherwise unrestricted time.[85] The *Johnson* court stated that "an employee's right to freedom of expression is entitled to a great degree of weight when the speech occurs during the employee's free hours."[86] The issue as framed by the court was whether the reading interfered with official duties, not whether the firefighters were being paid by the County while reading.[87] The court concluded that the policy was particularly limiting because the plaintiff worked long shifts and the firehouse effectively became the plaintiff's home, and "because it leaves open no opportunity for plaintiff's reading of *Playboy* at any point while plaintiff is on duty."[88]

The court then evaluated whether the policy was a content-based restriction on speech. In doing so, the court noted that the policy banned magazines which were "sexually oriented, especially those including nude pictures," and did not apply to other types of magazines which have a different orientation.[89] Reflecting the opinion that harassment law in general is content-based because it suppresses some kinds of speech and not others,[90] the court found that the policy was "undoubtedly content-based," and rejected the County's argument that the policy was content-neutral because it regulated "secondary effects."[91]

To assess the government's interest in an efficient operation, the court evaluated the County's evidence of disruption in the workplace

84. *Johnson*, 865 F. Supp. at 1437-38.

85. *Id.* at 1438. For an argument that the policy is a valid time, place, and manner restriction, *see infra* notes 220-241 and accompanying text.

86. *Johnson*, 865 F. Supp. at 1437 (citing Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989) (police officers disciplined for owning video store with pornographic videos)); *see also* Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) (police officer disciplined for blackface performance).

87. *Johnson*, 865 F. Supp. at 1438 n.2.

88. *Id.* at 1438.

89. *Id.* at 1436.

90. Volokh, *supra* note 36, at 1826.

91. *Johnson*, 865 F. Supp. at 1437. For an argument that the policy does not offend the requirement of content neutrality, *see infra* notes 220-231 and accompanying text.

and required that the County bear the burden of justifying the policy on legitimate grounds.[92] The court summarized the governmental interest as the eradication of sexual harassment in the workplace, and required that the County's evidence of disruption in the workplace be sufficient to prove that the policy furthered this compelling interest. Alleging the need to prevent sexual harassment would not be enough, the court required the County to show that real, not imagined, disruption had been threatened.[93] Ultimately, the court concluded that the government had not met its burden.[94]

The County's evidence of disruption fell into three categories. First, the County presented evidence that female firefighters were offended by the presence of *Playboy*. The court, however, stated that the testimony was insufficient to establish that *Playboy* is offensive. Though the women testified that they were "offended by seeing pictures of nude women inside and on the cover of certain magazines,"[95] the court concluded that the women really meant that they were offended because they believed the male firefighters might be forming degrading and abusive thoughts towards them.[96] The court rejected this argument, saying that Title VII protects individuals from hostile and abusive conduct, and because thoughts are neither comments nor actions, they are outside the scope of Title VII.[97]

Second, the County presented testimony from several women that they were uncomfortable with such magazines in the workplace, that the magazines made them feel unwelcome at work, and that the presence of the magazine interfered with their ability to do their job.[98] Unlike the *Robinson* court, which found that pornography may make women feel unwelcome in the workplace and thereby create unlawful harassment,[99] the *Johnson* court did not find the women's testimony of exclusion persuasive. The women also disliked the lewd comments men made while reading the magazines, and they were offended by "graphic sexually explicit nude photographs on the cover."[100] The court responded that because *Playboy* has no nudity on the cover the question is whether "mere exposure to the cover of *Playboy* directly

92. *Johnson*, 865 F. Supp. at 1436. *See infra* notes 93-111 and accompanying text.
93. *Johnson*, 865 F. Supp. at 1439 (citing McKinley v. City of Eloy, 705 F.2d 1110, 1115 (9th Cir. 1983)).
94. *Id.* at 1442.
95. *Id.* at 1439.
96. *Id.*
97. *Id.* at 1440.
98. *Johnson*, 865 F. Supp. at 1439.
99. *See supra* notes 60-61 and accompanying text.
100. *Johnson*, 865 F. Supp. at 1439 n.4.

contributes to a sexually harassing atmosphere."[101] Again, the court reasoned that the women were really complaining about the comments and gestures made by the male firefighters while reading the magazine. As the plaintiff did not seek to make comments, display pictures, nor read magazines with nudity on the cover, the court concluded that the conduct the women complained about was effectively regulated by other provisions of the County's policy.[102]

Finally, the County argued that the magazine influenced the way male firefighters treat female firefighters. A County expert testified that the reading of the magazine may result in "sex-role stereotyping" by the men that results in unequal treatment or sexual harassment.[103] The court rejected both the testimony and the rationale. Questioning whether or not the elimination of stereotyping was a permissible objective, the court found that the County did not carry its burden of showing that reading *Playboy* actually leads to sex-role stereotyping. It rejected the testimony of the County's expert, saying the studies on which his testimony was based were inconclusive and factually dissimilar to the case before them.[104] The court relied instead on the testimony of the plaintiff's expert that the "connection between *Playboy* and 'sexual stereotyping' is not a scientific probability, much less a scientific certainty."[105] The court also found that the County was attempting to alter the reader's viewpoint through regulation, and that this was particularly offensive to the First Amendment. "[The County] may not proscribe the communication of 'sex-role stereotyping' simply because [it] disagree[s] with the message."[106]

Beyond the questionable substitution of the court's beliefs for the women's testimony, the *Johnson* court should have been more deferential to the County's evidence of disruption. The *Johnson* court's requirement that the County show that pornography in the workplace caused "real" disruption is contrary to the Supreme Court's holding that "substantial weight [is given] to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern."[107] *Waters* again draws the distinction between the government as employer and the government as sovereign, and notes that the Court has been deferential to predictions of harm

101. *Id.* at 1440.
102. *Id.*
103. *Id.* at 1441.
104. *Id.*
105. *Johnson*, 865 F. Supp. at 1442.
106. *Id.* at 1441.
107. Waters v. Churchill, 114 S. Ct. 1878, 1887 (1994).

when the government is acting as employer.[108] Indeed, the harm may be only speculative, and may not threaten present interference with the agency's operation.[109] While the Court recognized that in some instances a substantial showing of likely disruption would be required, it nonetheless urged a deferential approach in reviewing a government employer's predictions of harm.[110] Even if the *Johnson* court's characterization of *Playboy* as a matter of public concern is correct, the County's evidence that *some* women found it offensive, that *some* women felt that the presence of pornography interfered with their ability to do their job, and that *some* experts believe that sex-role stereotyping induced by pornography results in sexual harassment, should have been sufficient to satisfy the deferential standard urged in *Waters*, and establish that the disharmony among coworkers created by the presence of pornography compromised workplace efficiency.

In summary, the *Johnson* court upheld the plaintiff's First Amendment claim because it found that the County had not overcome the constitutional barrier to content-based restrictions on speech, and because the County failed to establish that sexually explicit material in the workplace compromised workplace efficiency by contributing directly to a sexually harassing environment.[111] The court, however, also noted:

> A different case would be before the Court if the defendants had presented persuasive evidence establishing that the mere sight of a *Playboy* magazine pose[d] a direct offense to women. If defendants had presented evidence that the sight of the *Playboy* logo causes a shock to women as, for example, the sight of a swastika may cause to a Jewish person or a racial epithet may pose to an African American, defendants would have taken the first step in showing that the quiet reading of *Playboy* contributes to a sexually harassing atmosphere.[112]

The *Johnson* court, however, failed to include the harm of pornography in its evaluation of the County's evidence and, ultimately, in its own constitutional balance. Arguably, this harm constitutes the kind of "direct offense" required by the *Johnson* court to justify regulation. When this harm *is* included, several arguments suggest that pornography may be restricted both outside and inside the workplace.

108. *Id.*
109. *Id.*
110. *Id.*
111. *Johnson*, 865 F. Supp. at 1442.
112. *Id.* at 1440 n.7.

IV. Arguments for the Constitutionality of Restrictions on Pornography

The *Johnson* court indicated that if the County had established that the "mere sight of a *Playboy* magazine poses a direct offense to women," they would have balanced this interest against that of the plaintiff.[113] Relying on the absence of testimony that women found the sight of a *Playboy* cover to be offensive, the court found that the County failed to meet its burden of demonstrating that mere exposure to the cover directly contributed to a sexually harassing atmosphere.[114] This approach, however, fails to take into account that the existence of pornography itself, both in society and in the workplace, inflicts harm on women.

This Part addresses the effect of this harm in determining the constitutionality of the regulation. Section IV(A) summarizes the harms inflicted on women by pornography. Section IV(B) outlines several arguments suggesting that at least some pornography may be constitutionally restricted even outside the workplace, and extends the arguments to the restriction on private consumption at issue in *Johnson.* Section IV(C) suggests three interpretations supporting the constitutionality of the County's restriction on sexually explicit material in the workplace.

A. Harm of Pornography

The word pornography is derived from the ancient Greek words *porne* and *graphos.* While *graphos* refers to writing, etching or drawing, *porne* means whore. As Andrea Dworkin explains, pornography is "writing about whores."[115] Pornography "does not mean 'writing about sex' or 'depictions of the erotic' or 'depictions of sexual acts' or 'depictions of nude bodies' or 'sexual representations' or any other such euphemism. It means the graphic depiction of women as vile whores."[116]

The harm inflicted on women by this graphic depiction can be summarized into five categories: 1) the causal connection between pornography and increased violence against women; 2) the direct impact that pornography has on women; 3) the harm pornography inflicts on women who are pictured in the pornography; 4) the reinforcement and promotion of attitudes toward women that contrib-

113. *Id.*
114. *Id.* at 1440.
115. ANDREA DWORKIN, PORNOGRAPHY—MEN POSSESSING WOMEN 199-200 (1981).
116. *Id.* at 200.

ute to women's inequality in society; and 5) the harm perpetuated by sexual stereotypes is reinforced by pornography, especially in the workplace.

1. *Causal Connection Between Pornography and Increased Violence Against Women*

Though subject to some debate, there are numerous studies linking the viewing of pornography, especially violent pornography, to sexual violence against women.[117] Problems of multiple causation and the difficulty of proving "conclusively" that such a causal link exists may suggest that the downside risk of chilling pornography's speech is simply too great. There will always be the question of how much "proof" of how much "harm" is required before speech can be restricted, but the identification of harm itself may not require such conclusive proof.[118] The Attorney General's Commission on Pornography addressed the problem of multiple causation and the difficulty of establishing proof by recognizing that few causal links are ever proven conclusively.[119] The Commission rejected the notion that a causal link must be proved "conclusively" before a harm could be identified.[120] It proceeded on the premise that a factor was a cause of the consequences if the elimination of that factor, while everything else stayed constant, would lessen the incidence of the consequences.[121]

Using the Commission's standard, numerous studies support a causal link between viewing pornography and violence against women. The Commission itself found that "the clinical and experimental evidence supports the conclusion that there is a causal relationship

117. For an extensive compilation of recent experimental research on pornography, see Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 52-53 nn.116-17 (1985). Note that the *Johnson* court found that the County had failed to establish a causal link between reading *Playboy* and the poor treatment of female firefighters. *Johnson*, 865 F. Supp. at 1442.

118. In a recent decision upholding restrictions on lawyer advertising, the Court noted that the government must demonstrate real harm to justify a restriction on commercial speech. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2377 (1995) (citations omitted). The Court found, however, that is was enough that the regulation "targets a concrete, nonspeculative harm." *Id.* at 2378. In rejecting the dissent's criticism that the study supporting the evidence of harm was flawed, the Court noted that it had previously upheld restrictions on the exercise of free speech based on "simple common sense," even under a strict scrutiny standard. *Id.* (citations omitted).

119. 1 ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 307 (1986) [hereinafter FINAL REPORT].

120. *Id.*

121. *Id.* at 310.

between exposure to sexually violent materials and an increase in aggressive behavior directed towards women . . . [and to] antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence."[122] Other studies suggest that exposure to violent pornography increases a normal man's "immediately subsequent willingness to aggress against women," and "significantly increases attitudinal measures known to correlate with rape . . . such as hostility toward women."[123]

Though less conclusive, there is also evidence that exposure to nonviolent pornography that depicts degradation, domination, subordination, or humiliation produces a similar result.[124] Significantly, the Commission found that "forms of degradation represent the largely predominant proportion of commercially available pornography" and that it "constitutes somewhere between the predominant and the overwhelming portion of what is currently standard fare heterosexual pornography."[125] Long-term exposure to nonviolent pornography containing such degradation may make men view women as more "worthless, trivial, non-human, and object-like,"[126] and some women report that nonviolent but degrading pornography is even more upsetting than violent pornography because its objectification of women perpetuates a social structure of gender inequality.[127]

The personal experiences of the victims of pornography help establish the causal link as well. An ex-prostitute testified that "[m]en witness . . . the abuse of women in pornography constantly and if they can't engage in that behavior with their wives, girl friends or children, they force a whore to do it."[128] Women speak of the link between their husband or boyfriend's use of pornography and their forced par-

122. *Id.* at 325-26.

123. MacKinnon, *supra* note 117, at 53-54.

124. FINAL REPORT, *supra* note 119, at 332. The FINAL REPORT recognized that "there is less evidence causally linking the material with sexual aggression, . . . [but t]he absence of evidence should by no means be taken to deny the existence of the causal link." *Id.* at 332. It concluded that "substantial exposure to materials of this type bears some causal relationship to the level of sexual violence, sexual coercion, or unwanted sexual aggression in the population so exposed." *Id.* at 333-34.

125. *Id.* at 331-32, 334-35.

126. MacKinnon, *supra* note 117, at 54.

127. Note, *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 HARV. L. REV. 1075, 1078 (1993).

128. *Id.* at 57 (quoting a woman who testified at hearings on an antipornography ordinance proposed in Minneapolis). Transcripts of these hearings are on file with the Harvard Civil Rights-Civil Liberties Law Review, and are titled *Public Hearings on Ordinances to Add Pornography as Discrimination Against Women*, Committee on Government Operations, City Council, Minneapolis, Minn. (Dec. 12-13, 1983).

ticipation in sex acts.[129] When asked if they had ever been subjected to sex acts they did not want to engage in, and which they knew came from pornography, ten percent of all women, and twenty-four percent of married women, said yes.[130] Men may use pornographic material "to strongly encourage, or coerce, [women] into engaging in sexual practices in which they do not choose to engage."[131]

2. Direct Impact of Pornography on Women

> Pornography has a direct and harmful impact on women as well: Although much has been written and debated about the effects that pornography has upon men's attitudes and behavior, precious little mention has been made in the legal literature about pornography's direct impact on women. Nonetheless, evidence available from women's own accounts of their experiences with pornography indicate that pornography has a direct impact on women, apart from the attitudinal changes it may cause in men.[132]

While some women assert that they find pornography "a source of liberation and pleasure,"[133] for many others it instills fear and humiliation.[134] Furthermore, women identify with the subjects used to make the pornography more frequently than men.[135] Pornography is particularly devastating to victims of rape and child abuse, because it "validates and celebrates the criminal behavior of which they have been victims."[136] Finally, pornography directly harms women through its depiction of them as sexual objects, thereby defining women's role in society.[137] Pornography in the workplace clarifies that their role is not at work.[138]

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129. MacKinnon, *supra* note 117, at 56.

130. DIANA E.H. RUSSELL, RAPE IN MARRIAGE 228 (1984).

131. FINAL REPORT, *supra* note 119, at 342-43.

132. Note, *supra* note 127, at 1077.

133. *Id.*

134. *Id.* at 1078.

135. *Id.*

136. *Id.* The author also notes that some studies indicate that the majority of women have been raped or otherwise sexually abused. *Id.* at 1078 n.26.

137. Note, *supra* note 127, at 1078-79.

138. For additional sources discussing the effect the consumption of pornography has on women, see Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 801 n.18 (1991).

3. Harm to Women in the Production of Pornography

The making of pornography inflicts real harm on the women who participate in its production.[139] Many women are physically forced to participate, and some are reportedly murdered to make "snuff" sex films.[140] Linda Marchiano tells of being abducted, beaten, and forced to participate in the making of the movie "Deep Throat."[141] While not all women are physically coerced, the fact that "prostitution and modeling are structurally women's best economic options should give pause to those who would consider women's presence there a true act of free choice."[142] Perhaps an even greater harm to these women, however, is the creation of a permanent record of their humiliation. As one "porn star" explains, "[v]irtually every time someone watches that film they are watching me being raped."[143] Acknowledgment of this type of harm helped to tip the balance in favor of the constitutionality of restrictions on child pornography.[144]

4. Reinforcement of Inequality

By depicting the dominance and submission of women as desirable and normal, pornography simultaneously sexualizes and reinforces women's inequality.[145] Pornography inflicts harm by "thrusting upon [women] insulting and degrading views of their societal roles and their sexuality. . . . [and these] images carry over to a social structure of gender inequality as a whole."[146] While the "connection between inequality, unlawful discrimination, and pornography cannot be firmly established[,] . . . pornography undeniably reflects inequality, and through its reinforcing power, helps to perpetuate it."[147]

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139. Cass R. Sunstein, *Notes on Pornography and the First Amendment, in Pornography: Social Science, Legal, and Clinical Perspectives*, 4 LAW & INEQ. J. 28, 31 (1986).

140. MacKinnon, *supra* note 117, at 33. A "snuff" film is a sex film in which someone is tortured to death. "In the movies known as snuff films, victims sometimes are actually murdered." 130 CONG. REC. S13,192 (daily ed. Oct. 3, 1984) (statement of Senator Specter introducing the Pornography Victims Protection Act).

141. LINDA LOVELACE AND MIKE MCGRADY, ORDEAL (1980).

142. MacKinnon, *supra* note 117, at 33.

143. Linda Marchiano, testifying at Public Hearings on Ordinances to Add Pornography as Discrimination Against Women, Committee on Government Operations, City Council, Minneapolis, Minn. (Dec. 12-13, 1983) (*quoted in* MacKinnon, *supra* note 117, at 37).

144. *See* New York v. Ferber, 458 U.S. 747, 759 (1982).

145. Catharine A. MacKinnon, *Pornography as Sex Discrimination, in Pornography: Social Science, Legal, and Clinical Perspectives*, 4 LAW & INEQ. J. 38, 41 (1986).

146. Note, *supra* note 127, at 1078.

147. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 601 (1986).

5. Sexual Stereotypes

Finally, the presence of pornography in the workplace may reinforce stereotypes about women that lead to impermissible sex discrimination or create a hostile work environment. Sex-role stereotyping was recognized as impermissible sex discrimination in *Price Waterhouse v. Hopkins*.[148] The Court held that the employer had the burden of proving that it based its decision to deny a woman partnership on legitimate factors and not on any bias reflected by stereotypes about women.[149] While the decision addressed stereotypes that characterized women as unsuitable for partnership because of traits that were "too feminine" or "too masculine," Justice O'Connor noted in her concurrence that though sex-stereotyped "stray remarks" may not justify a requirement that the employer prove its personnel decision was based on legitimate criteria, they may be probative of sexual harassment.[150]

In *Robinson v. Jacksonville Shipyards, Inc.*, an important case on pornography and hostile work environment harassment, the district court found in favor of the plaintiff who brought a hostile work environment claim against her employer.[151] The claim focused on the "presence in the workplace of pictures of women in various stages of undress and in sexually suggestive or submissive poses, as well as remarks by male employees and supervisors which demean women."[152] The lengthy catalogue of harassing behavior, which the court ultimately held constituted a hostile environment, included the reading of pornographic magazines in the workplace.[153]

In so holding, the *Robinson* court accepted expert testimony supporting the link between pornography and sexual stereotypes that can lead to a "sexualized working environment [that] is abusive to a woman because of her sex."[154] An expert in *Robinson* testified that the "availability of photographs of nude and partially nude women" en-

148. 490 U.S. 228 (1989).

149. *Id.* at 251-52.

150. *Id.* at 277 (citing Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)).

151. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991). It is interesting that the *Johnson* court makes no reference to the *Robinson* decision, not even to distinguish it. While holding no precedential value over the *Johnson* court, it is nonetheless an important decision on workplace pornography.

152. *Id.* at 1490.

153. *Id.* at 1494.

154. *Id.* at 1505. In fact, the expert in *Robinson* supported a portion of her testimony that pornography in the workplace encouraged men to treat women coworkers as sex objects on the same study rejected by the *Johnson* court. *Id.* at 1503.

hanced one of four preconditions that increase the likelihood that harmful stereotyping will exist in a workplace.[155]

While the factual circumstances of *Robinson* are not directly analogous to those in *Johnson*, the rationale behind the decision is applicable. In contrast to the *Johnson* court's rejection of expert testimony linking pornography to discriminatory sex-role stereotyping, the *Robinson* court, as part of the order and judgment, ordered the employer to implement the Shipyard's Sexual Harassment Policy,[156] which included a prohibition against "reading or otherwise publicizing in the work environment materials that are in any way sexually revealing, sexually suggestive, sexually demeaning or pornographic."[157] In fact, one commentator contends that:

> The *Robinson* court's decision that pornography in the workplace created an abusive environment was based largely on the notion that pornography in the workplace leads to sexual stereotyping by male coworkers. A female employee who accepts this reasoning could well want to complain about a coworker privately reading sexually explicit materials, even if she is not herself exposed to their contents. And once the complaint is made and proven, the company is bound by the court order to discipline the offender.[158]

Constraints on speech have been allowed in certain factual circumstances by including in the evaluation the harm inflicted by the speech. Child pornography,[159] the advocacy of illegal action,[160] and even the posting of election signs on public property,[161] have been constitutionally restricted based, at least in part, on the harm that each inflicts.[162] In light of the harm pornography inflicts on women, it may be constitutional to restrict pornography even outside the work-

155. *Id.* at 1503 (referring to the precondition of priming). Another precondition was rarity—few women in the workplace compared to the number of men—which is also present in County firehouses.

156. *Robinson*, 760 F. Supp. at 1541.

157. *Id. at* 1542.

158. Volokh, *supra* note 36, at 1815 n.106 (citation omitted).

159. New York v. Ferber, 458 U.S. 747 (1982).

160. Brandenburg v. Ohio, 395 U.S. 444 (1969).

161. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). Though the case was analyzed under a public forum rationale, the Court considered the visual blight created by posting signs on utility poles to be a harm that the community had a substantial interest in eliminating.

162. Catharine MacKinnon has argued that many harm-based restrictions on speech have been found constitutional based on much less evidence of harm than is available to support the harm of pornography. *See* MacKinnon, *supra* note 117, at 28-31. In order to be constitutional, she asserts, the restricted speech must inflict harm "that counts." *Id.* at 28.

place.[163] Within the workplace, where the government as employer has both the compelling interest of eradicating workplace discrimination and the flexibility to impose restrictions on speech to facilitate workplace efficiency, restrictions on pornography may be even easier to justify as consistent with the First Amendment.

B. Constitutionally Permissible Restrictions Outside the Workplace

While efforts to restrict the production and distribution of pornography have met with little success[164] and generated considerable debate, particularly within the feminist movement,[165] several arguments suggest that at least some pornography can be restricted outside of the workplace without offending the First Amendment's guarantee of free speech. This Section will outline these arguments and extend their application to the sexual harassment policy struck down in *Johnson*.[166]

1. Low-value Speech

Professor Cass Sunstein suggests that pornography is "low-value" speech, and can therefore be regulated without demonstrating a compelling government interest.[167] He argues that speech which has little to do with public affairs is accorded less protection, and that therefore pornography is not the kind of speech traditionally protected by the

163. *See infra* notes 164-204 and accompanying text.

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

165. *See, e.g.*, Joan Kennedy Taylor, *Does Sexual Speech Harm Women? The Split Within Feminism*, 5 STAN. L. & POL'Y REV. 49 (1994).

166. Some of the harms described in the previous section may not apply with equal force to pornography of men. For example, it may not be true that a causal link exists between pornography of men and violence against them, and, arguably, pornography of men cannot reinforce stereotypes of inferiority that do not exist. Therefore, a harm-based rationale for restricting pornography in the workplace may not be as persuasive when applied to the pornography of men. Nonetheless, a policy which prohibited pornography of women, but allowed pornography of men, may raise questions of viewpoint neutrality, and both the low-value speech and captive audience arguments discussed below suggest that pornography of men could be constitutionally restricted even without a harm component. The presence of homosexual pornography raises similar questions, though it is difficult to imagine that male firefighters would not claim they were harmed by a gay firefighter reading male pornography at work. In fact, it is equally difficult to imagine that the firefighters would support a lesbian firefighter who sought to read *Playboy*. The *Johnson* decision addressed none of these issues, and this Note focuses its analysis, as did the *Johnson* court, on the plaintiff's "quiet possession, reading and sharing of *Playboy* magazine." Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1442 (C.D. Cal. 1994).

167. Sunstein, *supra* note 147, at 602-08.

First Amendment.[168] When combined with the harms it produces, regulation is justified.[169] While conceding that the line between speech that is protected and that which is not protected may be difficult to draw, he suggests that materials that promote sexual arousal rather than deliberation on public or private issues fall outside of traditional First Amendment concerns.[170]

This low-value argument has been reflected in the Court's jurisprudence as well. In arguing for what amounts to a sliding scale of First Amendment values, Justice Stevens upheld zoning restrictions on adult bookstores and movie theaters.[171] Justice Stevens found that the state may legitimately use the content of sexually explicit material as a basis for denying some movies the same protection as others.[172] In so holding, Justice Stevens stated, "it is manifest that society's interest in protecting this type of expression is of a wholly different, *and lesser*, magnitude than the interest in untrammeled political debate."[173] Similarly, in *FCC v. Pacifica Foundation*,[174] Justice Stevens found that a radio broadcast of "offensive and indecent" material was a far cry from core political speech, and as such was unprotected when it was broadcast in a time slot in which it was accessible to children.[175] While recognizing that even offensive words may be protected in some instances, the Court held that the level of protection need not be the same in every context.[176] Finally, in *Barnes v. Glen Theatre, Inc.*,[177] the Court upheld a restriction on nude dancing even though it found it to be expressive conduct.[178] The Court found the nude dancing was "within the *outer perimeters* of the First Amendment, although only *marginally* so."[179]

168. *Id.* at 603-04. Commercial speech is another example of speech that receives limited protection because of its "subordinate position in the scale of First Amendment values." Ohralik v. State Bar Ass'n, 436 U.S. 447, 456 (1978).

169. Sunstein, *supra* note 147, at 608.

170. Sunstein, *supra* note 139, at 29.

171. Young v. American Mini Theaters, 427 U.S. 50 (1976). In discussing this sliding scale, one commentator notes that "adult materials and other offensive speech [are] near the bottom of this scale." She notes that Justice Stevens's abandonment of content neutrality has not been expressly adopted by a majority of the Court. Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 21 (1990).

172. *American Mini Theaters*, 427 U.S. at 70-71.

173. *Id.* at 70 (emphasis added).

174. 438 U.S. 726 (1978).

175. *Id.* at 747-48.

176. *Id.* at 746-47.

177. 501 U.S. 560 (1991).

178. *Id.* at 565, 572.

179. *Id.* at 566 (emphasis added).

When applied to the *Johnson* decision, the low-value rationale suggests that a workplace is exactly the context in which low-value speech is unprotected. Despite the *Johnson* court's categorization of *Playboy* as a matter of public concern for the purposes of the *Pickering-Connick-Rankin* balancing test, it is debatable whether the primary purpose of the magazine's sexually explicit photos, cartoons, and jokes is to further discourse and discussion of public matters or to produce sexual arousal and stimulation. Surely such material does not qualify as core political speech. Simply because the magazine contains an occasional article without sexually explicit material does not mean that its primary speech is not sexually arousing "adult entertainment."[180] While a magazine of mixed content may fall within the category that Sunstein identifies as troublesome outside the workplace, within the workplace, where wider latitude is given to employers to restrict the speech of employees, and where achieving equality is a compelling government interest,[181] the primarily low-value content of *Playboy* suggests it may be constitutionally restricted.

Indeed, a restriction justified on the low-value rationale need not make a distinction between private consumption and public display of pornography. If pornography falls outside of the rigorous protection provided core political speech, an employer need not provide a compelling justification for its decision to restrict pornography. Given the harms of pornography and the nature of firefighting as a traditionally male occupation, the County's concern that the mere presence of pornography contributes to a sexually harassing environment amply satisfies this lowered standard.

2. *Child Pornography*

An analogy to child pornography suggests a second argument. In *New York v. Ferber*,[182] the Court upheld a criminal ban on child pornography because the state had a right to prevent the harm it inflicted on children, even though the material did not satisfy the *Miller* ob-

180. The *Johnson* court stated that the plaintiff's First Amendment rights were not diminished by the sexually-oriented nature of the material. *Johnson*, 865 F. Supp. at 1438 n.3. It cited for support, however, two cases outside of the employment context. *Id.*

181. *See infra* note 234 and accompanying text.

182. 458 U.S. 747 (1982).

scenity standard.[183] This harm included a "permanent record of children's participation," which is "exacerbated by circulation."[184]

That pornography directly "harms women's opportunities for equality and rights [of all kinds]" has been recognized.[185] Nonetheless, courts have refused to extend the *Ferber* protection to pornography of women, finding that the harm itself proved "the power of pornography as speech" and therefore justified its protection under the First Amendment.[186]

This novel approach seems to equate the harm inflicted with the value as speech: the more harm, the more valuable the speech. The refusal to apply the *Ferber* reasoning to the pornography of women, however, overlooks an important analogy[187] to the Equal Protection Clause[188] as interpreted by the Court in *Brown v. Board of Education.*[189] In *Brown,* the Court found that racial segregation perpetuated feelings of inferiority in African American children.[190] Pornography harms a group of people in a similar manner by "reinforcing the view that [the group's] members are inferior and worthy of mistreatment."[191] Following *Ferber's* rationale, the First Amendment would not be violated by restricting the production and distribution of pornography in order to prevent the harm it inflicts on women.

The idea that women need protecting in the same way that children do has been criticized as paternalistic.[192] Certainly there is a dis-

183. *Id.* at 755-56. In 1973, the Supreme Court adopted a "test" for identifying obscene material: "The basic guidelines for the trier of fact must be: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

184. *Ferber*, 458 U.S. at 759.

185. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

186. *Id.*

187. Note, *supra* note 127, at 1083.

188. U.S. CONST. amend. XIV.

189. 347 U.S. 483 (1954) (overturning the constitutionality of segregated schools based in part on the lasting harm inflicted on African American children by "separate but equal" schools).

190. *Id.* at 494. *See* TRIBE, *supra* note 18, § 12-5, at 821 (stating that the Court invalidated segregation because it "unavoidably communicated a social message of [B]lack inferiority").

191. Note, *supra* note 127, at 1084 (citing MacKinnon, *supra* note 138, at 812-13).

192. Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., in* American Booksellers Association v. Hudnut, 21 U. MICH. J.L. REF. 69 (1988). "[T]he [Indianapolis] ordinance perpetuates a stereotype of women as helpless victims, incapable of consent, and in need of protection." *Id.* at 130.

tinction between a child's and a woman's capacity to consent. Even if women do not need protection from being unwilling participants,[193] however, the pornography of women harms not only those women involved in its production, but all women in society through its message of inferiority and reinforcement of social inequality. Women have little ability to consent to or prevent this harm once the pornography is distributed. If restricting pornography is viewed as granting relief from discrimination and providing a measure of social equality, rather than expressing the view that women cannot make choices for themselves, the restrictions are no longer "special protection."[194]

There are probably few places in which the social inequality of women is more pronounced than in traditionally male-dominated fields such as firefighting.[195] If *Ferber* is extended to the pornography of women, restricting the presence of pornography in the County's firehouses is easily justified and supports the County's claim that the private reading of pornography contributes to a sexually harassing atmosphere. Having recognized that material which is not obscene may be restricted to prevent harm to a group of people, prohibiting pornography in the County's firehouses presents no substantial First Amendment problems once courts acknowledge the harm that pornography inflicts.

3. *Silencing of Women*

Examining the values and principles behind the First Amendment suggests a third argument for the constitutional restriction of pornography. If the goal of the First Amendment is to encourage public discourse by ensuring that citizens are free to exercise their right to free speech, then a careful balance is required between one person's exercise of that right and the prevention of others from fully exercising theirs.[196] The silencing argument proposes that pornography can be

193. *But see supra* note 142 and accompanying text.

194. Note, *supra* note 127, at 1085 ("To protect women from the terrorization of pornography is thus to grant them relief from discrimination, and social equality, rather than 'special protection' in the paternalistic sense.").

195. The expert who testified in *Robinson* identified rarity as one of four preconditions that enhance the negative effects of stereotyping on women in the workplace. The social inequality reflected in sex stereotyping can result in "'sex role spillover,' where the evaluation of women employees by their coworkers and supervisors takes place in terms of the sexuality of the women and their worth as sex objects rather than their merit." Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1503 (M.D. Fla. 1991).

196. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the FCC's fairness doctrine requiring licensees to make free reply time available). *But see* Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (holding that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is

restricted because it prevents women from exercising their right to free speech by devaluing what women have to say. By reinforcing inferiority, subordinate status, and inequality, pornography effectively silences women.[197] In doing so, it undermines the very values that the First Amendment is designed to protect.[198]

Traditional thought maintains that when society is faced with potentially harmful or offensive speech "the remedy to be applied is more speech, not enforced silence."[199] By conditioning society to the inferiority of women, however, pornography ensures that when women do engage in "more speech" to counter the effects of pornography, their voices will be denied "credibility, trust, and the opportunity to be heard—the predicates of free expression."[200] Pornography itself is "inconsistent with rectifying or even counterbalancing its damage through speech. . . . Pornography strips and devastates women of credibility, from our accounts of sexual assault to our everyday reality of sexual subordination. We are deauthoritized and reduced and devalidated and silenced."[201] It is argued that racist speech silences minority groups in much the same manner: "[n]ot only does racist speech, by placing all the credibility with the dominant group, strengthen the dominant story, it also works to disempower minority groups by crippling the effectiveness of their speech in rebuttal."[202] Through its sexualization and reinforcement of inferiority, and its portrayal of women as primarily sexual objects, pornography ensures that women's voices on any topic will be consumed by the dominant one. In doing so, pornography effectively decreases the total amount of speech in the marketplace.[203]

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wholly foreign to the First Amendment"). The *Buckley* holding, however, ignores the important role that wealth and property ownership play in securing a "voice" in our society. In effect, the Court already "enhance[s] the relative voice" of some at the expense of others through its many decisions perpetuating property rights and private or corporate wealth.

197. For analysis of this argument, see Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1907-09 (1992).

198. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957) (*quoted in* Connick v. Myers, 461 U.S. 138, 145 (1983)).

199. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring) *overruled in part on other grounds,* Brandenburg v. Ohio, 395 U.S. 444 (1969).

200. Sunstein, *supra* note 147, at 619.

201. MacKinnon, *supra* note 117, at 63.

202. Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 385 (1991).

203. Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 468 (1990) (arguing that racist speech reduces speech by coercively silencing members of the targeted groups).

This silencing may be especially pernicious in a traditionally male-dominated occupation such as firefighting. Male resentment toward women in the field and a woman's desire to fit in make it unlikely that women will be able to engage in speech that counters the presence of pornography. This enforced silence means not only that women's objections to the presence of pornography in the workplace will be ignored, but that women's input into policy decisions and workplace issues may also be devalued and "silenced."

The *Johnson* court could have upheld the County's ban on pornography in the workplace by recognizing that the silencing effect it has on a woman's right to free speech outweighs any value promoted by protecting it. While it may be difficult to prove that pornography chills women's expression, it is equally difficult to prove that legitimate speech would be suppressed by restricting pornography. This difficulty of proof, however, has not prevented the proponents of pornography from arguing that pornography deserves protection.[204] Without reaching the question of whether the County had established that restricting pornography furthered its goal of eliminating sexual harassment, the court could have recognized that by suppressing the speech of women throughout society, pornography itself is inconsistent with the values the First Amendment is thought to protect. Such an argument does not exclude private consumption from regulation, for pornography accomplishes its silencing effect even when women are not forced to look at it. Its existence alone is sufficient to alter the marketplace of ideas to disadvantage women's speech. A nation committed to equality in the workplace cannot rely on such a marketplace to achieve that goal.

C. Constitutionally Permissible Restrictions Within the Workplace

The recognition of a hostile work environment based on the presence of pornography in the workplace has focused primarily on situations where sexually explicit material has been posted in common areas.[205] *Johnson*, however, concerns private reading and consensual sharing of sexually explicit material, and disinterested workers are not forced to look beyond the titillating cover of the magazine. This distinction is of little importance, however, because pornography is objectionable in the workplace not because it may be offensive to some, but because of the harm inflicted on women through its production

204. Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 337 (1984).

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

and distribution. Eliminating pornography in firehouses will announce that the government recognizes the injury inflicted by pornography and will not condone the discrimination it perpetuates.

Citizens do not forego their First Amendment rights entirely by choosing to work for the government.[206] As *Pickering, Connick,* and *Rankin* suggest, however, the government as an employer, rather than a legislature, may restrict employee speech in ways it could not restrict citizen speech generally.[207] Furthermore, the government-as-employer's interest in an efficient workplace has almost always carried more weight than an employee's free speech rights.[208] This Note proposes that once the personal and societal harm of pornography is included in the constitutional balance, the government as employer may restrict even private consumption of pornography to rid the workplace of discrimination because, beyond the justifications articulated above in Part IV(B): (1) it is a permissible time, place, and manner regulation; (2) women at the firehouse are a captive audience to the presence of the pornography; and (3) pornography is not protected by the First Amendment because it subordinates women and is discrimination per se.

1. Time, Place, and Manner Regulation

In balancing an employee's speech interest against an employer's interest in an efficient workplace, a court must consider the extent of the regulation. Regulations that prohibit certain kinds of discriminatory speech in the workplace may be valid if they are nothing more than a time, place, and manner regulation of speech.[209] However, a "constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech."[210]

As outlined in *United States v. O'Brien*,[211] a restriction on speech that is consistent with the First Amendment as a permissible time,

206. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

207. Gerard, *supra* note 24, at 1033.

208. Waters v. Churchill, 114 S. Ct. 1878, 1888 (1994); *see also* Horton, *supra* note 11, at 422-23. Horton notes that "although the background assumption is that public employees have free speech rights that can be overcome only where the government's interest as employer is quite strong, just the opposite turns out to be true in practice." *Id.* at 423.

209. *Robinson*, 760 F. Supp. at 1535. *See also*, Rankin v. McPherson, 483 U.S. 378, 388 (1987).

210. Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980). *Accord* Pacific Gas & Elec. v. Public Util. Comm'n, 475 U.S. 1, 20 (1986) ("For a time, place, or manner regulation to be valid, it must be neutral as to the content of the speech.").

211. 391 U.S. 367, 377 (1968).

place, and manner regulation must be (1) content neutral,[212] (2) serve a legitimate government interest unrelated to the suppression of speech, and (3) be narrowly tailored to accomplish this interest. These restrictions are permissible because "banning sexist speech in the workplace does not censor such speech everywhere and for all time."[213]

Antipornography legislation and sexual harassment laws have been attacked as incompatible with the First Amendment because they are not thought to be content or viewpoint neutral.[214] The *Hudnut* court found the Indianapolis ordinance to be "thought control," for it decided what the socially acceptable view of women would be and sought to enforce this view through law, to the exclusion of others holding a different view.[215] The *Robinson* court, however, rejected the *Hudnut* approach urged by the defendant,[216] and found that even though such regulations are not entirely content neutral, they do not offend constitutional principles because of the "distinction based on the sexually explicit nature of the pictures and other speech."[217] The *Johnson* court, following the *Hudnut* approach, found the policy "undoubtedly content-based"[218] and attempts to restrict the thoughts men may form about women while reading the magazine to be impermissible thought control.[219]

These arguments can be rebutted in several ways. First, every antidiscrimination law expresses the view that *practices* reflecting discriminatory ideas are illegal—laws prohibiting segregation are not impermissible thought control simply because they express the view that racial minorities are not inferior to whites.[220] Similarly, "pornography is identified in part through its content, but regulated through its

212. *See supra* notes 22-24 and accompanying text.

213. Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 46 (1990).

214. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); Gerard, *supra* note 24, at 1009-10; Volokh, *supra* note 36, at 1854-55 n.277.

215. Sunstein, *supra* note 139, at 33. *But see* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 213 (1989) (stating that "[in *Hudnut* t]he Court saw legal intervention against acts . . . as 'point of view' discrimination without doubting the constitutionality of state intervention against obscenity, which has no connection with acts and is expressly defined on the basis of point of view about sex").

216. *Robinson*, 760 F. Supp. at 1536.

217. *Id.* at 1535 (citing Renton v. Playtime Theatres, 475 U.S. 41, 48-49 (1986) and Sunstein, *supra* note 147, at 616-17).

218. *Johnson*, 865 F. Supp. at 1436.

219. *Id.* at 1442.

220. MacKinnon, *supra* note 138, at 812.

acts."[221] Antipornography legislation is not aimed at restricting ideas, but at restricting harm. It does not seek to establish a government-sanctioned view of women and censure those who disagree. The goal of antipornography regulation is to prevent real harm to women.[222] Consistent with the First Amendment, courts may balance this harm against any value pornography has as speech.

Second, the Supreme Court has indicated that even when the government appears to be making distinctions based on content, such distinctions may be permissible when the material is considered in the context of its surroundings.[223] In his concurring opinion to *American Mini Theatres*, Justice Powell noted that the government "can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated."[224] In a male-dominated firehouse, where the effects of pornography may be especially effective in making women feel unwelcome, and given the government's compelling interest in eradicating workplace discrimination,[225] the government may be able to make even content-based restrictions to achieve this "special and overriding interest."

Finally, the Court has upheld restrictions based on secondary effects.[226] Though the Court has held that a government body cannot rely on the "secondary effects" doctrine when the secondary effect is the emotive impact of the speech,[227] if the secondary effect of pornography is seen as the perpetuation of inequality, rather than controlling

221. *Id.* at 814-15.

222. Sunstein, *supra* note 139, at 33.

223. Young v. American Mini Theatres, 427 U.S. 50, 83 n.6 (1976) (Powell, J., concurring) (noting that zoning regulations prohibiting adult movie theaters were not an impermissible time, place, and manner restriction based on content because it was "merely a decision . . . to treat certain movie theaters differently because they have markedly different effects upon their surroundings").

224. *Id.* (citing, inter alia, Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1969) (holding that school officials could not ban the wearing of armbands protesting the Vietnam War when other political symbols were permitted, unless there was "evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline"); Procunier v. Martinez, 416 U.S. 396, 413 (1974) (holding that prison officials could not censor inmate mail unless the government could show that such regulation "furthers one or more of the substantial governmental interests of security, order, and rehabilitation")).

225. *See infra* notes 234-237 and accompanying text.

226. Renton v. Playtime Theatres, 475 U.S. 41 (1986) (upholding a zoning ordinance prohibiting adult movie theaters within 1000 feet of a residential zone based on the secondary effect these theaters have on a residential neighborhood).

227. Boos v. Barry, 485 U.S. 312 (1988) (striking down a regulation which prohibited placing signs near foreign embassies which would offend the foreign governments).

men's thoughts, its regulation does not violate the requirement of content neutrality.[228]

Furthermore, Justice Souter's application of the secondary effects doctrine in his concurring opinion in *Barnes* supports the regulation of pornography in the workplace as an interest that is unrelated to the suppression of free expression. In *Barnes*, the Court majority upheld a state public indecency law requiring dancers to wear pasties and a G-string. Deciding that nude dancing is expressive conduct "within the outer perimeter of the First Amendment," the Court nonetheless upheld the restriction and found that it did not violate the requirement of content neutrality because it sought to ban all public nudity, not just public nudity that is combined with expressive activity.[229] Justice Souter concurred, but for somewhat different reasons:

> To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation actually are. . . . Because the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression.[230]

Similarly, pornography can be correlated with sexual harassment in the workplace and therefore may be constitutionally restricted without offending the requirement of content neutrality. In *Johnson*, the County is regulating the workplace presence of the harm that is associated with sexually explicit magazines, and the harm exists whether the pictures are posted or viewed privately. Sexual arousal, presumably the expressive component of pornography, is neither directly regulated by the County's restriction on sexually-oriented magazines in the workplace, nor is it indirectly regulated as a secondary effect. Here,

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228. *See* Keith R. Fentonmiller, *Verbal Sexual Harassment as Equality-Depriving Conduct*, 27 U. MICH. J.L. REF. 565 (1994).

> While the "emotive impact of speech on its audience is not a 'secondary effect,'" the harm that hostile environment law seeks to eradicate is equality-deprivation, not emotional distress. Thus, under the "secondary effects" exception, Title VII imposes no unconstitutional restrictions on freedom of speech because it regulates only the secondary, equality-depriving effects of sexually abusive workplace speech.

Id. at 604 (citations omitted).

229. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1990).

230. *Id.* at 585-86 (Souter, J., concurring).

the County is regulating a secondary effect that is associated with expressive content without requiring the expression to be the cause of the harm.[231] Following Justice Souter's argument, it does not violate the requirement of content neutrality to restrict speech associated with an evil that society has an interest in suppressing.

The second prong of the *O'Brien* test requires an examination of the government interest behind the regulation.[232] In performing the *Pickering-Connick-Rankin* balancing test, the *Johnson* court found that the County failed to establish that its interest in an efficient workplace surpassed the free speech rights of the plaintiff.[233] The proper comparison, however, is not simply between the First Amendment and workplace efficiency. A court evaluating a time, place, and manner restriction on pornography in the workplace must also balance a woman's right to equality in the workplace, and the government's interest in eradicating workplace discrimination, against the plaintiff's right to read material such as *Playboy* at work.

The *Robinson* court noted that the government's interest in the "eradication of workplace discrimination is more than simply a legitimate governmental interest, it is a compelling government interest."[234] The *Johnson* court itself recognized that preventing sexual harassment is a compelling government interest.[235] While the suppression of some "speech" may result from the County's restrictions on pornography, the employee's speech interest must be balanced against the compelling government interest of equality in the workplace. Furthermore, the Court has shown a willingness to subordinate First Amendment rights of association to the compelling state interest of equality.[236] In a traditionally male-dominated workplace, restrictions on pornography serve this interest by eliminating the discrimina-

231. *See* Sunstein, *supra* note 139, at 32 (stating that the harmful effects of pornography are "usually a by-product rather than a purpose of pornography").

232. United States v. O'Brien, 391 U.S. 367, 377 (1968).

233. *See supra* notes 93-111 and accompanying text.

234. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (citing Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (eliminating discrimination against women is compelling government interest); Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984) (compelling government interest in removing barriers to advancement for women)).

235. Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1439 (C.D. Cal. 1994).

236. *See, e.g., Roberts*, 468 U.S. at 628 (1984) (stating that Minnesota's interest in eradicating discrimination against women justified restrictions on male Jaycee's freedom of association). *See also* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (rejecting the argument that application of Title VII to a law firm's decision not to offer partnership to a woman because of her sex violated their freedom of association).

tion inherent in the message of inferiority perpetuated by pornography.[237]

Finally, the *O'Brien* test requires that a valid time, place, and manner restriction be narrowly tailored to accomplish the government's interest.[238] Following the *Robinson* court's reasoning,[239] the County's regulation is sufficiently narrowly tailored. The *Johnson* court found the restriction particularly onerous because firefighters are often at the station for several days at a time and because it applies during hours when the firefighter is on duty but not performing assigned tasks. The regulation, however, need not be the least-restrictive means of accomplishing its purpose—it need only avoid a solution that is "substantially broader than necessary to achieve the government's interest."[240] Given that women firefighters are also at the station for extended periods and the work environment is created in part by "otherwise unrestricted time," the regulation is tailored to control that environment and eliminate barriers created by the presence of pornography.

It may be argued that prohibiting private consumption goes farther than is necessary. Such an argument, however, ignores the fact that a more narrow restriction prohibiting only the posting of sexually explicit material would be substantially less effective in achieving the government's objective. A woman may not find that viewing pornography in the workplace is offensive, but this does not diminish the message of inequality that pornography reinforces. Moreover, the County has not foreclosed the entire medium or method of communication; firefighters have not been entirely denied access to the speech that pornography voices. Firefighters work an average of ten shifts per month;[241] in the remaining twenty days they are free to consume pornography while not on duty in the County's employ.

As a narrowly tailored regulation aimed at eradicating workplace discrimination, the County's restriction on sexually explicit material in the workplace satisfies the *O'Brien* standard. Consistent with the First

237. The government as employer also has an interest in an efficient workplace. This interest may not be compelling; nonetheless, efficiency must be given considerable weight in determining the constitutionality of workplace restrictions on speech. Waters v. Churchill, 114 S. Ct. 1878, 1888 (1994).

238. United States v. O'Brien, 391 U.S. 367, 377 (1968).

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

240. Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989).

241. Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1434 (C.D. Cal. 1994).

Amendment, the restriction is a permissible time, place, and manner regulation.

2. Captive Audience Doctrine

The captive audience doctrine is a "separate and distinct justification for regulating speech. These regulations are promulgated to cover situations in which an unwilling listener cannot avoid another's speech."[242] The doctrine provides that:

> In public places an individual's privacy interests in avoiding offensive communications are generally thought insubstantial unless the person is deemed a member of a "captive audience," either because the person is literally not free to leave without great burden or because the person is in a place where there is a basic right to remain and where one cannot readily avoid exposure to the unwanted communication.[243]

An audience is captive, however, "only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."[244] Though most frequently applied to prevent unwanted intrusions into the home, the Court has extended the doctrine's protection to such audiences as women seeking medical services at a health clinic[245] and passengers on a public bus.[246] The doctrine has also been applied in the employment context. The *Robinson* court found the female shipyard workers to be a captive audience to the speech comprising the hostile work environment, and stressed that the "free speech guarantee admits great latitude in protecting captive audiences from offensive speech."[247] Apparently focusing on the fact that the sexually explicit material was not posted in the firehouse, the *Johnson* court found that the women firefighters were not a captive audience because they could avoid the material by averting their eyes.[248]

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242. Gerard, *supra* note 24, at 1030.

243. TRIBE, *supra* note 18, § 12-19, at 949 n.24 (citations omitted).

244. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (citation omitted).

245. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2526 (1994) (holding that targeted picketing of a health clinic threatened the psychological and physical well-being of patients held captive by medical circumstances).

246. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding a city ban on political advertising on public buses because passengers were a captive audience).

247. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535-36 (M.D. Fla. 1991); *see also* Jessica M. Karner, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637, 678-91 (1995) (arguing that a modified captive audience doctrine should be applied in the workplace to help eliminate sexual harassment).

248. *Johnson*, 865 F. Supp. at 1440 n.6.

The rejection of the captive audience rationale is inappropriate for two reasons. First, the "remedy" of averting one's eyes presupposes that the harm of pornography is in the viewing. The harm of pornography and its ability to create a hostile work environment goes beyond any offense or insult a woman may experience upon viewing it. The very existence of pornography, its creation and distribution, inflicts harm upon women and promotes inequality and thereby contributes to a hostile atmosphere in which women may feel unwelcome. A policy aimed at eliminating sexual harassment that relies solely on individual initiative to avoid exposure is insufficient.

Second, while an individual in a public building may not be captive to offensive language,[249] "[f]ew audiences are more captive than the average worker."[250] Employees exert little control over their workplace, and few are free to leave or restructure their jobs to avoid unwanted exposure without jeopardizing their career.[251] Furthermore, the fire station serves a dual purpose for its employees—while clearly a workplace, even the *Johnson* court admitted that the fire station was a de facto home to the firefighters.[252] The captive audience doctrine has protected individuals from unwanted intrusions into the privacy of their home,[253] and therefore the captive audience doctrine supports the County's efforts to remove sexually explicit material from the fire stations.

3. *Pornography as Discrimination*

The First Amendment need not protect "speech" that is itself discrimination.[254] Pornography in the workplace was traditionally viewed as evidence of discrimination rather than discrimination itself.[255] This changed in *Robinson*, however, when the presence of

249. *See* Cohen v. California, 403 U.S. 15, 21 (1971).

250. *Robinson*, 760 F. Supp. at 1535-36 (quoting J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423-24 (1990)).

251. *See* Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 517-18 (1995).

252. *Johnson*, 865 F. Supp. at 1438.

253. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).

254. *Cf.* United States v. Rowlee, 899 F.2d 1275, 1278 (2nd Cir. 1990) (quoting United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself.")).

255. Note, *supra* note 127, at 1087.

pornography alone was found to create a hostile work environment for women.[256]

The *Robinson* court recognized the equation of pornography and sex discrimination in finding that the pictures and verbal harassment present in the shipyard were "not protected speech because they act as discriminatory conduct in the form of a hostile work environment."[257] *Robinson* supports the assertion that pornography is not protected because it creates a sexually harassing atmosphere by its presence and is therefore discrimination per se.[258] "Potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."[259]

The *Robinson* court factored the harm of pornography into its constitutional balance, recognizing that even if pornography's "speech" is fully protected, the court must balance the government's compelling interest in eradicating workplace discrimination against it. Though the court-imposed sexual harassment policy included restrictions on private reading, the *Robinson* court found that the regulation was narrowly tailored to accomplish this compelling interest, and noted that other First Amendment rights, such as freedom of association and the free exercise of religion have bowed to this compelling government interest.[260] The *Robinson* court also looked to public employee cases for support, stating that the employer's interest in discipline and order in the workplace justifies restrictions if the employee's speech undermines the morale of the workforce.[261] Restrictions on the expression of some employees in order to prevent or remedy the harm that such expression inflicts on other employees does not necessarily violate the First Amendment.[262]

Simply because an illegality takes a verbal or expressive form does not mean it is protected:

> One can express the idea a practice embodies. That does not make that practice into an idea. Segregation expresses the idea of the inferiority of one group to another on the basis of race.

256. Nell J. Medlin, *Expanding the Law of Sexual Harassment to Include Workplace Pornography:* Robinson v. Jacksonville Shipyards, Inc., 21 STETSON L. REV. 661 (1992).

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

258. *Id.*

259. *Id.* (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

260. *Id.* at 1536 (citing Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987)).

261. *Id.*

262. *Robinson*, 760 F. Supp. at 1535 (citing as comparison McMullen v. Carson, 568 F. Supp. 937, 943-45 (M.D. Fla. 1983) (finding no First Amendment violation in discharge of KKK member from police force because inter alia internal discipline and morale were threatened by potential for racial confrontations), *aff'd*, 754 F.2d 936 (11th Cir. 1985)).

> That does not make segregation an idea. A sign that says 'Whites Only' is only words. Is it therefore protected by the [F]irst [A]mendment?[263]

Pornography is also not an idea, nor is it expression that deserves First Amendment protection.[264] Through its reinforcement of societal inferiority, pornography is equality-depriving conduct which the government has a compelling interest in regulating.[265] Just as laws against segregation undermine the point of view contained in the practice of segregation, so would the recognition that pornography is sex discrimination work to delegitimize the ideas behind its message.[266]

V. Conclusion

"What matters for a legal system is what words *do*, not what they *say* . . . ."[267] In a country where equality is guaranteed by the Constitution, and in which eradicating workplace discrimination is a compelling state interest, the First Amendment should not prohibit carefully tailored regulations designed to eliminate "ideas" in the workplace that are in reality acts which perpetuate and reinforce inequality. Had the *Johnson* court included harm in its evaluation—the harm inflicted on women who are unwilling participants in pornography, the harm inflicted by the silencing of women's voices, the harm inflicted by pornography's message of inferiority, and the role of each of these harms in keeping women out of male-dominated fields such as firefighting—the constitutional balance would have permitted restrictions against private consumption of pornography in the public workplace.

263. MacKinnon, *supra* note 117, at 65.

264. Fentonmiller, *supra* note 228, at 603. *See also*, Norwood v. Harrison, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.").

265. *See* Fentonmiller, *supra* note 228, at 599-603.

266. MacKinnon, *supra* note 138, at 813.

267. Edward J. Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 RUTGERS L. REV. 283, 299 (1988) (discussing Oliver Wendell Holmes's approach to freedom of speech).