NOTES

PORNOGRAPHY, EQUALITY, AND A DISCRIMINATION-FREE WORKPLACE: A COMPARATIVE PERSPECTIVE

Over the past two decades, various forms of anti-pornography legislation have been proposed on the local, state, and national levels in the United States. Some of these measures have failed to be enacted while others have been struck down as unconstitutional by federal courts. However, the Canadian Supreme Court, in a 1992 decision that some commentators have hailed as groundbreaking, upheld a statute criminalizing "obscenity" and redefined the term to encompass materials that degrade or subordinate women. Recent U.S. Supreme Court free speech rulings may obstruct future attempts to follow Canada's lead and thus to eradicate pornography throughout the United States. But the Court's landmark decision in Meritor Savings Bank v. Vinson, which held that a hostile work environment could constitute actionable sex discrimination, has opened the door for narrower — yet still significant — restrictions on pornography. Indeed, several lower federal courts have recently concluded that pornography in the workplace may serve as evidence supporting a claim for hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964.

1 Ordinances have been proposed in the cities of Indianapolis, Indiana, Minneapolis, Minnesota, Cambridge, Massachusetts, Los Angeles, California, and Bellingham, Washington. See Andrea Dworkin, Pornography: Men Possessing Women at xxx-xxxi (1989).


4 For example, an anti-pornography ordinance was passed twice in Minneapolis, in 1983 and 1984, by two different city councils, and vetoed each time by the same mayor. See Dworkin, supra note 1, at xxx.


10 See id. at 66-67.

the Civil Rights Act of 1964. In only one case decided so far, however, did a federal court find pornography in the workplace to be the primary offensive conduct in the creation of a discriminatory environment. This Note argues that the eradication of pornographic materials in the workplace is necessary to achieve the objectives of Title VII — that is, "an environment free from discriminatory ridicule and insult," where women can "achieve equality of employment opportunities."

This Note adopts the feminist definition of pornography set forth in the Dworkin/MacKinnon civil rights antipornography ordinance. By that definition, pornography consists of "the graphic sexually explicit subordination of women through pictures or words" that also portray women in sexually degrading contexts, including submissive or servile poses, or sexualized in a manner involving violence. Importantly, this definition properly restricts the scope of this Note's inquiry to the materials that most directly harm women.

Part I explores the harms to women caused by pornography. Part II compares the societal responses to such harms in the United States and in Canada. Part III reviews precedents regarding sexual harassment and the use of pornography in the workplace, and describes a particularly compelling example of an instance where pornographic pictures were held to constitute a hostile working environment. Part IV explains how pornography in the workplace creates a hostile and discriminatory environment and therefore violates Title VII.


16 See, e.g., An Act to Protect the Civil Rights of Women and Children, supra note 2, at §1. The Act defines pornography as:
[T]he presentation of women's [sexual] body parts . . . such that women are reduced to those parts, or the presentation of women: (a) as dehumanized sexual objects, things, or commodities; (b) as sexual objects who enjoy humiliation or pain; (c) as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; (d) as sexual objects tied up or cut up or mutilated, bruised or physically hurt; (e) in postures or positions of sexual submission, servility, or display; (f) being penetrated by objects or animals; or (g) in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.

Id. at §1.

I. THE DIRECT EFFECTS OF PORNOGRAPHY ON WOMEN

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.

Some women describe their experiences with pornography as positive. The Feminist Anti-Censorship Taskforce (FACT), for example, filed a brief against the Indianapolis City Council in Hudnut, claiming that pornography may be a source of liberation and pleasure. Most of the material that FACT wanted to protect, however, was not violent pornography that had been produced by and for men but rather feminist or lesbian erotica, which FACT feared would be targeted by the male-dominated legislature and judiciary.

Although pornography may be pleasing to some women, it may terrorize others. For example, Andrea Dworkin describes a female response to a pornographic photograph of a woman, spread eagle, bound by ropes to the top of a Jeep in Hustler magazine:

The terror is implicit in the content of the photograph, but beyond that the photograph strikes the female viewer dumb with fear. One perceives that the bound woman must be in pain. The very power to make the photograph (to use the model, to tie her in that way) and the fact of the photograph (the fact that someone did use the model, did tie her in that way, that the photograph is published in a magazine and seen by millions of men who buy it specifically to see such photographs) evoke fear in the female observer unless she entirely dissociates herself from the photograph: refuses to believe or understand that real persons posed for it, refuses to see the bound person as a woman like herself. Terror is finally the content of the photograph, and it is also its effect on the female observer.

18 See, e.g., Margaret Jean Intons-Peterson & Beverly Roskos-Ewoldsen, Mitigating the Effects of Violent Pornography, in FOR ADULT USERS ONLY, 218, 220–28 (Susan Gubar & Joan Hoff eds., 1989) (overviewing the current research of the effects of pornography on men).
19 See Ann Russo, Pornography's Active Subordination of Women: Radical Feminists Reclaim Speech Rights, in WOMEN MAKING MEANING 144, 146 (Lana F. Rakow ed., 1992) ("In the typical debates over pornography women's experiences and lives are usually invisible and socially meaningless.").
23 See id. at 109.
24 DWORKIN, supra note 1, at 27.
Pornography instills fear and humiliation in countless women.\(^{25}\) Women who have been raped or otherwise sexually abused\(^{26}\) suffer even more profoundly from forced exposure to pornography, largely because it validates and celebrates the criminal behavior of which they have been victims,\(^{27}\) and thus they are unable to dissociate themselves completely from the women in the photographs.\(^{28}\) It seems clear that women, far more often than men, are likely to identify with the subjects used in the production of the materials.\(^{29}\)

This pain is particularly magnified for women who are coerced into the production of pornography and must suffer the enjoyment of a "permanent record"\(^{30}\) of their sexual abuse as someone else's sexual pleasure. Perhaps the most well-known account of this pain is that of Linda Marchiano, who was kidnapped and raped in the production of "Deep Throat." "[E]very time someone watches the film," she has testified, "they are watching me be raped."\(^{31}\)

Pornography may also harm women by thrusting upon them insulting and degrading views of their societal roles and their sexuality. Indeed, Robin West has argued that pornography's greatest harm lies in its ability to define narrowly the way in which women (and men) see themselves. Pornography enforces and legitimates images of sexuality that exclude the perception of women as in sovereign possession of their bodies and their own sexuality, and these images carry over to a social structure of gender inequality as a whole.\(^{32}\) Pornography degrades and objectifies women; some reports suggest that women find nonviolent degrading pornography more upsetting than the violent

\(^{25}\) See, e.g., Susan Gubar, Representing Pornography: Feminism, Criticism, and Depictions of Female Violation, in FOR ADULT USERS ONLY, supra note 18, at 47, 50–52 (describing René Magritte's Le Viol as pornographic "art" that may horrify women).

\(^{26}\) According to some studies, the majority of women may have been raped or otherwise sexually abused. See, e.g., Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1301–02 & nn. 99–102 (1991) (reporting statistics that reveal that 44% of women have been victims of rape or attempted rape, and 92.5% of women have been subject to sexual harassment).

\(^{27}\) See Catharine A. MacKinnon, Francis Biddle's Sister, in FEMINISM UNMODIFIED 163, 171 (1987) ("Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them.").

\(^{28}\) See MacKinnon, supra note 27, at 184; cf. Bowman, supra note 8, at 536 (describing the heightened injury suffered by rape victims who are subject to street harassment).

\(^{29}\) Sex-role identification is a well-established concept in the field of psychology. See, e.g., HENRY GLEITMAN, BASIC PSYCHOLOGY 323–26 (1983) (describing a variety of theories which account for this process).


\(^{31}\) Public Hearings on Ordinances to Add Pornography as Discrimination Against Women, Minneapolis City Council, Government Operations Comm., Dec. 12–13, 1983, quoted in DWOR-}

\(^{32}\) See Robin West, Pornography as a Legal Text, in FOR ADULT USERS ONLY, supra note 18, at 108, 116.
kind. Pornography conveys a message to women of how the dominant (male) society views them; it is not surprising that surveys reveal women to have far more negative views toward pornography than men. To many women, pornography is hardly "harmless" and "fun."

II. COMPARATIVE APPROACHES TO PORNOGRAPHY AND ITS DIRECT EFFECTS ON WOMEN

A. Canada

In Canada, as in the United States, feminists, libertarians, and others have engaged in a contentious battle over the harm and constitutional implications of pornography and its regulation. Besides geographic proximity, Canada and the United States share many sociological similarities. Canada is governed under a constitution similar to that of the United States. Thus, the United States could greatly benefit from a comparative examination of Canadian law.40

In its landmark ruling in Butler v. Her Majesty the Queen,41 the Supreme Court of Canada upheld the constitutionality of Canada's obscenity statute, which criminalizes the publication and distribution

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33 See, e.g., A New Way of Looking at Porn, GLAMOUR, Apr. 1992, at 54 (describing studies revealing women's negative views toward pornography).

34 See Kathleen Mahoney, The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography, 55 LAW & CONTEMP. PROBS. 77, 101 (1992) (describing the "true essence of discrimination" as how members of a disadvantaged group are "viewed by members of the dominant majority").

35 See, e.g., Doris-Jean Burton, Public Opinion and Pornography Policy, in FOR ADULT USERS ONLY, supra note 18, at 133, 135 (describing surveys which demonstrate that nearly half of all women surveyed would like pornography to be entirely illegal, while less than a third of the men surveyed agreed).

36 Harry Hurt III, Zipless Sex: Or Why Men Love Pornography, SELF, Nov. 1992, at 169, 184 (suggesting that pornography is merely harmless "fantasy").


38 See Mahoney, supra note 34, at 86.

39 However, the Canadian constitution, unlike that of the United States, has an equal rights amendment for women. See infra note 47.

40 See Mahoney, supra note 34, at 105 ("The Butler decision is a welcome development in the law that other countries and the international human rights community should contemplate if they are genuinely serious about women's human rights, violence against women, and women's equality."); see also Mary Ann Glendon, A Beau Mentir Qui Vient de Loin: The 1988 Canadian Abortion Decision in Comparative Perspective, 83 NW. U. L. REV. 569, 591 (1989) (noting the "great opportunity afforded [to the United States] by the developing jurisprudence under the Canadian Charter").

of obscene materials, defined as those that have as a "dominant characteristic" the "undue exploitation of sex." Donald Butler owned a store in Winnipeg that sold and rented "'hard core' videotapes and magazines as well as sexual paraphernalia." Pursuant to an arrest warrant the police seized the entire inventory of Butler's store and charged him with 250 violations of Canada's criminal obscenity statute. The trial court convicted him on eight counts relating to eight films and granted acquittals on the other 242 counts on the ground that most of the seized materials were constitutionally protected by the guarantee of freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms. The appellate court reversed the acquittals and entered convictions for all of the counts.

The Canadian Supreme Court addressed two specific questions in Butler: whether a criminal ban on obscenity, interpreted to include pornography, infringed upon the guarantee of free expression, and, if so, whether such an infringement was "demonstrably justified" in a free and democratic society and therefore constitutionally valid under section 1 of the Charter as "a reasonable limit prescribed by law." The court concluded that the obscenity law did infringe upon section

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42 Criminal Code, R.S.C. ch. C-46, § 163(8) (1985) (Can.) ("For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene."); see also id. § 163(1) (making it an offense to produce or distribute such materials).


45 See id. at 463 (citing Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 (1989) (Can.); see also CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b) ("Everyone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . . .").


47 Id. at 471. Section 1 of the Charter of Rights and Freedoms, the Canadian analog to the U.S. Constitution's Bill of Rights, provides that limitations upon constitutional rights may be allowed if they can be "demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

The Canadian Charter of Rights and Freedoms also contains an equality section, which, unlike other national and international instruments that exist to prohibit discrimination, contains express equality guarantees, an open-ended list of prohibited bases for discrimination, and an affirmative action provision that allows beneficial programs for disadvantaged groups or individuals. See id. § 15. Section 28, the gender equality section, states that, "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Id. § 28. Although the United States Constitution does not have a Equal Protection Amendment for women, Section 28 might be viewed as Canada's analogue to the Equal Protection Clause of the Fourteenth Amendment and to Title VII.
\(2(b)\) of the Charter because it sought to prohibit certain types of expressive activity on the basis of the content or meaning being conveyed.\(^{48}\) Nonetheless, it held that the obscenity ban, interpreted to include pornography, was justifiable under Section 1 of the Charter because the overriding objective of the law was the avoidance of harm to society in general and to women in particular,\(^ {49}\) an interest sufficient to warrant a restriction on the freedom of expression.\(^ {50}\)

Notably, the Court expanded on the statute's scant definition of obscenity — "the undue exploitation of sex" — by focusing on the harms to society in general and to women in particular, stating that these "degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings."\(^ {51}\) The Court also held that in pornography the appearance of participants' consent does not determine whether material is degrading or dehumanizing because "[s]ometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing."\(^ {52}\)

Moreover, the Canadian Supreme Court expressly recognized that pornography not only affects men and men's behavior, but also corrodes women's integrity and self-esteem. The Court wrote:

\[\text{[I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on "the individual's sense of self-worth and acceptance."}^{53}\]

The Court also emphasized that "obscenity wields the power to wreak social damage in that a significant portion of the population is humiliated by its gross misrepresentations."\(^ {54}\) This acknowledgment of the difference between male and female perceptions of, depictions in, and attitudes toward pornography is arguably one of the greatest strengths of the Canadian decision. It treats pornography not as a

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\(^ {49}\) See id.

\(^ {50}\) See id. at 498–99.

\(^ {51}\) Id. at 479.


\(^ {53}\) Id. at 497 (quoting Regina v. Red Hot Video Ltd., 45 C.R. 3d 36, 43–44 (B.C.C.A. 1985)).

\(^ {54}\) Id. at 501. The court rejected the argument offered by the British Columbia Civil Liberties Association that pornography "celebrates both female pleasure and male rationality." Id. at 500 (quoting Robin West, The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report, 4 AM. B. FOUND. RES. J. 681, 696 (1987)). Instead, the Court concluded that this description "ignore[s] . . . the realities of the pornography industry." Butler, [1992] 1 S.C.R. at 500.
mere idea, but as a concrete act of discrimination against women which degrades both their self-respect and their social status.

B. The United States

By contrast with the course taken by its Canadian counterpart, the U.S. Supreme Court has never directly addressed pornography's harm to women. In a long line of cases the Court has analyzed the constitutionality of anti-obscenity laws almost exclusively by reference to pornography's impact on (and importance to) male consumers, and on the traditional moral fabric of heterosexual society.55

If the Court would view allegedly obscene material from the point of view of the participants and unwilling observers, however, it could better discern which materials were harmful and therefore justifiably regulable. Such was the case in New York v. Ferber,56 in which the Court upheld a criminal ban on non-obscene child pornography — specifically, in that case, films depicting young boys masturbating57 — on the ground that the state could rationally conclude that child pornography harms children.58 Ferber thus carved out a new category of unprotected speech for child pornography. In so doing, it effectively equated child pornography with child abuse.59

Unfortunately, the Supreme Court has yet to apply similar insight to the pornography of women. The only federal court of appeals, however, to review the constitutionality of an antipornography law (as opposed to an anti-obscenity law) has acknowledged that pornography directly harms women. In American Booksellers Association, Inc. v. Hudnut,60 Judge Easterbrook, writing for a panel of the Seventh Circuit, explained:

57 See id. at 752.
58 See id. at 757–58. The Ferber Court stated that prevention of sexual exploitation and child abuse constituted a government objective of “surpassing importance” and accepted the legislative judgment that child pornography harms minors. First, the Court reasoned, “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.” Second, the distribution of child pornography harms children by creating a “permanent record” of the child’s participation, and such harm is exacerbated by the circulation of the materials. Third, this harm is not mitigated by any serious literary, artistic, or political value. And fourth, the best means of reducing pornographic exploitation of children is to attack the economic incentive in the distribution and production of such materials. Further, the Ferber Court expressly recognized that the Miller obscenity standard was not useful in determining whether children were hurt by pornography. See id. at 757–55.
59 See Lahey, supra note 37, at 674; Mahoney, supra note 34, at 92.
60 771 F.2d 323 (7th Cir. 1985), aff’d without opinion, 475 U.S. 1001 (1986).
Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]."61

The court concluded, however, that the very fact that it harms women proves "the power of pornography as speech" and consequently justifies its protection under the First Amendment's Free Speech Clause.62 The Supreme Court affirmed without comment.63

The Hudnut court's characterization of pornography as powerful yet harmful speech was, at the same time, both reminiscent of and contrary to the reasoning of the Canadian Supreme Court in Butler. On the one hand, both courts acknowledged the serious harms to women caused by pornography. But on the other hand, these two courts reached diametrically opposing results because of their differing approaches to gender equality. In the Canadian case, the Court looked to a constitutionally-grounded guarantee of gender equality (encompassed by Section 28, the gender equality section, and Section 1, allowing reasonable limits in a "free and democratic society") and held that the right to gender equality trumped the right to free expression.64 By contrast, the Hudnut court, which of course could look to no express constitutional guarantee of gender equality and which chose to ignore the Fourteenth Amendment's Equal Protection Clause,65 held that the right to free expression trumped women's right to equality.

One powerful analogy that the Hudnut court overlooked was that of the Equal Protection Clause66 as interpreted by the Supreme Court in Brown v. Board of Education.67 The Brown Court sought to eradicate racial segregation in the schools not on the grounds that it harmed traditional morality in society at large or that it inspired

61 Id. at 329 (footnote omitted) (quoting INDIANAPOLIS, IND., CODE § 16-1(a)(2)). Notably, the Seventh Circuit cited national studies conducted in Great Britain and Canada, as well as in the United States for the proposition that pornography harms women. See id. at 329 n.2.
62 Id. at 329.
64 See Mahoney, supra note 34, at 102.
65 U.S. CONST. amend XIV, § 1 ("No State shall . . . deny to any person . . . the equal protection of the laws.").
66 See MacKinnon, supra note 17, at 810–15 (arguing that an equality approach should have been applied in Hudnut).
whites to commit acts of violence against Blacks, but rather because such discrimination "generate[d] a feeling of inferiority as to [Black children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The system of racial discrimination that U.S. courts began to dismantle in the 1950s can be analogized to the system of sex inequality that pornography perpetuates today: both harm a group of human beings by reinforcing the view that its members are inferior and worthy of mistreatment. Consequently, as Professor Catharine MacKinnon has argued, "making pornography actionable as sex discrimination would delegitimize the ideas the practice advances," just as "deinstitutionalizing segregation [did] a great deal to undermine the point of view it expressed." Unfortunately, U.S. courts — unlike those in Canada — have failed to recognize that the eradication of discriminatory messages is often both a necessary means and effect of eliminating discrimination, and that rights to free expression must sometimes be sacrificed in order to vindicate rights to equality.

Another powerful analogy that the Hudnut court overlooked was that of the First Amendment as interpreted by the Supreme Court in Ferber. The Ferber Court's reasoning, which upheld the regulation of child pornography because it directly harmed children, could be extended to women. Contrary to fears expressed by civil libertarians, such a judgment need not rest on Victorian morals and condescending views toward women. Rather, it would rely upon an acknowledgment that women are systematically harassed, assaulted, raped, and killed, and that women experience such treatment as part of an experience of social inequality based on gender. Because men typ-

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68 Id. at 494; see Tribe, supra note 17, § 12-5, at 821 (stating that the Court invalidated segregation because it "unavoidably communicated a social message of [B]lack inferiority").
70 Id.
71 See supra pp. 1079–82.
74 Often it is not clear whether violence is inflicted on women because they are women or because they were simply in the "wrong place at the wrong time." Judith G. Greenberg, Introduction to Mary Joe Frug, Postmodern Legal Feminism at ix (1992) (problematizing this very question). It is clear, however, that these injuries are often inflicted as a part of the
ically do not undergo these experiences, they may not suffer from the same threat to equality and integrity that pornography poses to women. 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.

Despite the power of these analogies, the U.S. Supreme Court has given no indication that it is willing to treat the pornography of women as it has treated either racial segregation or child pornography. Yet, such a result should follow when the Court recognizes that pornography does harm women directly — most invidiously by expressing to women that they exist for the purpose of male gratification and that their proper place in society is that of sexual subservience to men. Although the redress of these dignitary harms is currently close to impossible in U.S. society at large, a pocket of protection from these harms in the workplace has been created by Title VII of the Civil Rights Act of 1964.

III. PORNOGRAPHY IN THE WORKPLACE: THE CREATION OF A DISCRIMINATORY AND OFFENSIVE ENVIRONMENT

A. The Purpose and Meaning of Hostile Environment: Sexual Harassment under Title VII

Unlike Canada, the United States has not enacted an explicit constitutional guarantee of equal rights to women in all aspects of society. Congress has, however, enacted the Civil Rights Act of 1964, which prohibits unlawful discrimination in the workplace. Title VII makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." In the 1986 case, Meritor Savings Bank v. Vin-
son, a unanimous Supreme Court, in an opinion written by then-Justice Rehnquist, interpreted Title VII to prohibit sexual harassment. The Court recognized two types of sexual harassment: "quid pro quo" sexual harassment — conditioning employment on "sexual favors" — and "hostile environment" sexual harassment — unwelcome sexual conduct which "unreasonably interferes with an individual's work performance" or promotes an "intimidating, hostile, or offensive working environment." 

In recognizing a hostile environment as sexual harassment, the Court explicitly acknowledged that Title VII was aimed at "the entire spectrum of disparate treatment of men and women in employment," which includes psychological as well as economic and physical abuse. Drawing from the context of racial harassment, the Court recognized that psychological and dignitary harms may not be trivial; rather, "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers" — which, according to the Court, includes women.

The Meritor Court also noted that sexual conduct of a verbal, as well as physical nature may create a hostile environment in violation of Title VII. Such verbal conduct, according to the Court, may be so demeaning that it interferes with an employee's ability to perform her job. An employee should not be forced, simply because she is a woman, to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." Consequently, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.

B. Workplace Pornography and Hostile Environment Sexual Harassment

Although images of women as sexual objects may be pleasurable to some women when enjoyed in private, they can be particularly invidious when displayed at work, where a woman is striving to be treated as a "credible coworker." Stories of women in nontraditional
fields such as the trades demonstrate that pornography is often used by men in the workplace to send messages to the women that they do not belong there.\textsuperscript{90} The existence of pornography in the workplace may undermine a woman's sense of self-worth and make the conditions of her employment either unbearable or devastating for her self-esteem.\textsuperscript{91} It may drive women out of male-dominated workplaces that are badly in need of integration.\textsuperscript{92}

Although many, if not most, women find pornography, particularly in workplace settings, to be insulting, intimidating, and degrading, courts generally have not held that pornography in the workplace, even when unwelcome and pervasive, constitutes hostile environment sexual harassment per se. Rather, most courts have cited pornography in the workplace as mere evidence of a hostile environment, if they found pornography to be worth mentioning at all,\textsuperscript{93} and have focused primarily on other aspects of harassing behavior, such as offensive comments and sexist pranks.\textsuperscript{94} That is, most courts found pornography to be evidence of discrimination in the workplace, rather than discrimination itself. The following case demonstrates that pornography in the workplace may in fact unreasonably interfere with a woman's ability to perform her job and consequently create a hostile working environment under Title VII.

\textbf{C. Robinson v. Jacksonville Shipyards}

In the spring of 1993, the U.S. Court of Appeals for the Eleventh Circuit will decide \textit{Robinson v. Jacksonville Shipyards,}\textsuperscript{95} in which a female welder sued her employer for sexual harassment. Lois Rob-
inson worked as one of only a very few women who held a skilled crafts position at the shipyards. Robinson worked in an environment immersed in pornography — photographs and plaques of nude women in submissive poses covered the walls; vendors who did business with the shipyards routinely distributed advertising calendars with "pin-ups" to employees, who were encouraged by their employer to post them at work. Many pictures explicitly and violently demeaned women, and none depicted men. Several were placed either in Robinson's working area or on the box where she left her tools, or handed to her directly in front of male co-workers in order to humiliate her. For example, one of Robinson's co-workers taunted her with a photograph of a nude woman with long blond hair holding a whip. Because Robinson has long blond hair and worked with an instrument called a "whip," she understandably experienced the man's actions as a personal threat. Robinson on numerous occasions complained to her employer that she found the pornographic pictures "degrading and humiliating" and that "they nauseated her," and requested that they be removed, but to no avail — her requests only prompted the male workers to bring in "hard pornography" instead.

The men who worked at the shipyards acknowledged that the environment was a "boy's club," "more or less a man's world." Federal District Judge Melton took a different view of the work environment: a "visual assault on the sensibilities of female workers." After hearing expert testimony concerning the effects of pornography on women in the workplace, the court held that a policy that allowed these materials to be displayed contradicted the spirit of Title VII — the creation of a workplace free of discrimination, where

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96 See id. at 1493. The shipyard employed 2 women and 958 men as skilled craftworkers in 1980, 7 women and 1010 men as skilled craftworkers in 1983, and 6 women and 846 men as skilled craftworkers in 1986. See id.

97 See id. at 1493–94.

98 See id. at 1493, 1495–99. For example, one picture displayed a woman's torso with a meat spatula pressed onto her pubic area and another showed a nude woman with the words "USDA Choice" printed on her stomach. See id. at 1495. In addition, the employees hung a dart board with a drawing of a woman's breast on which the woman's nipple served as the bull's-eye. See id. at 1497. A life-size picture of a nude woman was drawn on a wall; another drawing depicted a nude woman with fluid coming from her genital area. See id.

99 See id. at 1494 (quoting one foreman as saying that if he ever saw a calendar with pictures of nude men, he would throw it in the trash, and another as saying that if he saw a vendor distributing a calendar with pictures of nude men, he would think the "son of a bitch" was "queer").

100 See id. at 1496.

101 Id. at 1514–15.

102 Id. at 1498. After Robinson complained about a graphic calendar in the shipfitter's trailer, male workers retaliated by posting a sign on the trailer's door that read "MEN ONLY." See id.

103 Id. at 1495.
women are afforded equal opportunity to pursue a career. Pornography, explained the court, "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 subvert their identities to the sexual stereotypes prevalent in that environment." The Robinson court explicitly found that pornography in the workplace differentially harms women. It noted that pornography may threaten women in the workplace even more than it does in society at large. It described pornography's impact on workplace equality:

Pornography on an employer's wall or desk communicates a message about the way he views women, a view strikingly at odds with the way women wish to be viewed in the workplace. . . . It may communicate that women should be the objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual. . . . All of the views to some extent detract from the image most women in the workplace would like to project: that of the professional, credible coworker.

The court concluded that such an atmosphere deters women from entering or remaining in a profession and is "no less destructive to and offensive to workplace equality than a sign declaring 'Men Only.'" It is "absurd to believe that Title VII opened the doors of such places in form and closed them in substance." The court ordered the shipyards to implement a sexual harassment prevention policy that mandated removing the pinups and other pornographic visuals.

In confronting the shipyards' argument that a judicially imposed sexual harassment policy would violate its free speech right to pornography, Robinson resembles both Butler and Hudnut. The District Court in Robinson, however, explicitly rejected the applicability of Hudnut and ultimately followed a Butler-like analysis in recogniz-

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104 See id. at 1535–36.
105 Id. at 1523.
106 See id. at 1527 (citing Abrams, supra note 89, at 1212 n.118).
107 Id.
108 Id.
109 Id.
110 See id. app., at 1542. The sexual harassment policy mandated by the court defined harassing depictions as materials that are "sexually suggestive, sexually demeaning, or pornographic." Id. (emphasis added). It defined "sexually suggestive" in part as "posed for the obvious purpose of displaying or drawing attention to private portions of his or her body." Id. This definition incorporates both the Canadian and Dworkin/MacKinnon definitions of materials that harm women. See supra pp. 1075, 1080–81.
111 See id. at 1536 (distinguishing Hudnut because "the affected speech, if it is speech protected by the first amendment, is reached only after a determination that a harm has been and is continuing to be inflicted on identifiable individuals"). Had the Hudnut court interpreted
ing that speech rights sometimes must be sacrificed when the exercise of those rights harms others.112

IV. TOWARDS CREATING A DISCRIMINATION-FREE WORKPLACE THROUGH THE ERADICATION OF WORKPLACE PORNOGRAPHY

Regardless of whether the Eleventh Circuit reverses or affirms Robinson, the case still presents a strong argument for the elimination of pornographic materials in the workplace, or in any place governed by a mandate of gender equality under Title VII. In determining the extent of the harm that pornographic materials inflict upon women in the workplace, the district court set out several well-reasoned and well-supported factors that other courts should consider. For example, the court recognized that women who work in virtually all-male workplaces will experience pornography as particularly threatening.113 The negative consequences of extreme gender-imbalance in the workplace on women have been well documented;114 such considerations are properly addressed in any hostile environment case. In addition, the court correctly noted that a gender-based power hierarchy in the workplace will magnify the harm of pornography there, because “the people affected by the sexualized working conditions are women, and the people deciding what to do about it are men.”115 Arguably, this factor resembles the Butler decision to the extent that the Supreme Court of Canada recognized a gender-based power imbalance in society as a whole.116

Further, Robinson correctly recognized that women constitute “captive audiences” in the workplace to the same extent as do men.117 Most women, both single and married, work out of “pressing economic

the antipornography ordinance as it was written, it would have reached an identical conclusion. That is, the ordinance creates only a civil cause of action for damages for coercion or assault that stems from a particular piece of pornography. Cf. An Act to Protect the Civil Rights of Women and Children, supra note 2 (providing for the same causes of action as the statute at issue in Hudnut).

112 See id. ("[T]he Court may, without violating the first amendment, require that a private employer curtail the free expression in the workplace of some employees in order to remedy the demonstrated harm inflicted on other employees.").

113 See id. at 1503 (citing the testimony of Dr. Susan Fiske).

114 See generally Rosabeth M. Kanter, Men and Women of the Corporation 208–42 (1977) (describing the psychological harms caused by numerical male dominance in the workplace); Barbara Gutke, Sex and the Workplace 15–16 (1985) (discussing the harm of sex-role spillover).

115 Robinson, 760 F. Supp. at 1504.


need" and cannot afford to walk away from demeaning and hostile expression at work. Access to traditionally male, lucrative jobs, in fields such as the skilled trades, is crucial to the realization of gender equality. When male employees fight adamantly for their "right" to use pornography at work, a crucial question to ask is "Why?" When pornography is recast from a woman's perspective as the powerfully debilitating and terrorizing expression that it may be, arguments for its protection under Hudnut become arguments for its suppression under Butler and Robinson.

Finally, the Robinson court demonstrated the helpful nature of expert testimony in sexual harassment litigation. Since the law of sexual harassment is arguably one of the few legal remedies constructed both by and for women, courts and juries may benefit greatly from testimony that places women's reactions in the context of women's lived reality, rather than relying on harmful and outdated stereotypes. Further, changing times call for changing burdens of proof; perhaps when certain characteristics of a workplace are shown to exist — such as a sex-skewed worker ratio and a gendered power hierarchy — courts should place the burden on the employer to prove that its conduct was not harmful or discriminatory.

To be sure, pornographic materials may not create an unreasonably offensive environment for all women in all work settings. The Robinson court, for example, recognized that a determination of whether pornography creates a hostile environment must be made by reference to the context in which the pornography appears. In so doing, the court shifted the emphasis of the harms of pornography from a theoretical inquiry into the subordination of women in society, toward an empirical and experiential inquiry into the subordination of women in a particular working environment. Validating women's accounts of their reactions to the conduct and expressive behavior that they encounter may mitigate the problem of essentialization of women's
experience. By crediting a woman's description of her experience, and focusing on a woman's account rather than on the abstract nature of harassing conduct, courts may begin to allow women to describe the nature of their pain in a forum where they might be believed and eventually be afforded relief.

V. CONCLUSION

Pornography may be speech — speech that many men and some women may claim to enjoy in private — but in the circumstances of a male-dominated workplace, pornography is an issue of power. Its elimination from the workplace would be a narrowly tailored and reasonable remedial measure that would infringe minimally on rights to free expression while having a great impact on women's rights to equality. The right to work in a discrimination-free workplace is essential for women to obtain the equal employment status guaranteed by Title VII; moreover, it is a right that should be guaranteed to all individuals in any free and democratic society — including both Canada and the United States.

124 Cf. Abrams, supra note 89, at 1209 (arguing that courts should accord primary weight to a woman's reactions to sexual behavior and focus their attention on the victim's response, rather than on the harassing conduct in the abstract).

125 For an excellent overview of the First Amendment issues at stake in sexual harassment litigation, see generally Horton, cited above in note 123, at 410–52.