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How Speech Can Constitute Discrimination: Using Philosophy of Language to Analyze Hostile Work Environment Sexual Harassment

Kate Applegate
kapplega@wellesley.edu

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How Speech Can Constitute Discrimination:
Using Philosophy of Language to Analyze Hostile Work Environment Sexual Harassment

Kate Applegate

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of the
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in Philosophy
under the advisement of Mary Kate McGowan

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Introduction

Since the #MeToo movement gained popularity, sexual harassment has been a more frequent topic of casual conversation. For many in my generation, this national dialogue is shaping how we think about the workplace and how we will act in it. For that, I am grateful but not content. When I tell people the topic of my thesis, many want to talk to me about how things have gone too far in the ‘other direction.’ They don’t understand why discrimination law can mean some comments and jokes are no longer allowed in the workplace. This thesis is to explain how utterances can constitute discrimination, and thus, why they should not be permitted in such an environment.

Consider the case of Kevin, Susan, and Will, three co-workers at a corporate office of a large technology company. They all share a large office, where each individual has a desk. The three are all equals in the office; no one person has more authority than the other, and they all report to the same supervisor. Kevin and Will are closer friends with one another than either of them are with Susan.

After performance reviews are emailed back, this conversation occurs:

Kevin: Did you guys get your performance reviews back?

Will: Yep. I didn’t do so well.

Susan: I actually did fairly well.

Kevin: Me too, I did better than I expected.

Will: Well, not all of us have a chest like Susan’s or legs like Kevin’s!

Kevin laughs at Will’s jokes, but Susan doesn’t find this to be all that funny. She actually finds Will’s words, and Kevin’s reaction, to be really upsetting. She hopes Will doesn’t actually think she got a good performance review because of her body, but even if he was ‘just joking,’ she feels uncomfortable. She didn’t think she worked in a place where that kind of joke was ‘okay.’ This may

seem like a “harmless” joke and a case of an unfortunate desk placement, but by the end of this thesis, I will prove that the situation above is an instance of hostile work environment sexual harassment by clarifying the nature of discrimination, explaining hostile work environment sexual harassment, exploring how freedom of speech interacts with harassment law, and applying tools from philosophy of language to Will’s utterances.

Chapter 1: The Nature of Discrimination

To approach the issue of the nature of discrimination, this chapter will work through a series of approximate definitions of discrimination, raising issues with different conceptions in order to arrive at an appropriate working definition.

At first glance, it seems discrimination is just the distinguishing of differences. When we say someone has discriminating taste, we mean that they can find differences among options. This sort of neutral discrimination, finding variances among things, is commonplace. For example, consider a gym that has separate locker rooms for men and women.¹ The gym discriminates between men and women, but not against either of them. This is an instance of discrimination *between*, in which differences determine treatment, but neither treatment is better nor worse. This thesis, however, intends to focus on discrimination *against* rather than *between*, and discrimination for this purpose cannot just be different treatment, but instead has to be “disadvantageous treatment”.²

But just “disadvantageous treatment” is not necessarily discrimination. Consider a case in which a toddler can tell the difference between her mother and her brother. The toddler can discriminate between the two of them, in the neutral sense of discrimination mentioned above. Imagine this toddler is kind to her mother, providing her with affection, but cruel to her brother, crying and throwing fits when he is there. In effect, this toddler is distinguishing between her mother and brother and providing only her brother with the disadvantageous treatment. Still, we would not say the toddler is *discriminating against* her brother.

¹ Lippert-Rasmussen, K. (2014). *Born free and equal?: A philosophical inquiry into the nature of discrimination*. Oxford: Oxford University Press. Pg 14.

² Altman, A. (Winter 2016 Edition), "Discrimination", *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2016/entries/discrimination/>>.

There is something about what the disadvantageous treatment is *on the basis of* that makes it discriminatory. For disadvantageous treatment to constitute discrimination, it must occur on the basis of social group membership. Social group membership is typically characterized by a societal treatment that constrains or enables the individual in ways beyond their control.³ This is best explained through example. People buying cars may face societal messages and tax incentives encouraging them to buy a hybrid. That is, societal treatment enables them to act in a certain way, but it is certainly still their choice to buy a hybrid or not. Thus, people buying cars are not a social group, because the societal treatment they face does not affect them in a way beyond their control. However, if an individual slashes the tires of a few hybrids, he may be treating hybrid owners in a way that constrains them beyond their control. Yet, because there is no different and constraining societal treatment of hybrid owners, they are not a social group. This type of social group membership must entail a better or worse societal treatment, and that treatment must affect the individual beyond their control. For example, doctors constitute a social group. Doctors face societal treatment different than non-doctors. Society privileges their communications with patients, licenses them to perform medical procedures, and gives them the authority to prescribe medications. Thus, doctors face better societal treatment in these contexts. This societal treatment also affects doctors beyond their control – doctors do not decide how society treats them, but they face that treatment regardless. Therefore, doctors receive better societal treatment, which affects them beyond their control, making them a social group.⁴

³ Young, I. M. (March 2001) “Equality of Whom? Social Groups and Judgments of Injustice.” *Journal of Political Philosophy* 9, no. 1.

⁴ The legal recognition of social groups is more limited and varies upon jurisdiction and will be explained later in this thesis. Some commonly legally recognized social groups are various races (White people, Black people, Latino people, Asian people, etc.), religions (Christians, Jewish people, Muslim people, etc.) sexes (male, female, intersex, etc.), the differently abled, etc.

But the privileges doctors receive over non-doctors (communications with patients, license to perform medical procedures, and the authority to prescribe medications) are not unjust. Doctors must go to medical school and become board-certified in order to receive these privileges. Thus, non-doctors are not discriminated against when they receive disadvantageous treatment because such treatment can be justified: non-doctors do not have the qualifications to receive the privileges of doctors. For an act to constitute discrimination, it must be both unfair and disadvantageous treatment on the basis of a person's membership in a social group. For example, refusing to let the blind become pilots is a denial of privilege based on their being differently abled, but it is not an unfair denial. Allowing them to pilot would endanger everyone's safety and benefit no one. So, the denial of the privilege can be fairly justified, and thus is not discrimination. A better approximate definition of discrimination is then unfair and disadvantageous treatment on the basis of a person's membership in a social group. Discrimination has two requirements: it must be both disadvantageous and unjustified treatment and based on social group membership.

So, we've established that discrimination has two requirements- it must be unfair and based on social group membership. The "unfair treatment" is inherently based in a comparative, because an advantage or disadvantage is determined through comparison to the relevant group. One group cannot be treated worse without being treated worse than another group, and so the treatment of one group must be compared to its relevant comparison class. Still, picking the relevant comparison class can be difficult. Take the example of America under Jim Crow laws, where voting was harder for Black citizens than for white citizens. Black voters were being put at a disadvantage because of their group membership, as literacy tests and grandfather laws made it more difficult for them to vote as compared to their white peers. When those Black citizens are compared to citizens in

another country that is a monarchy, where no one can vote, they are no longer at the relative disadvantage, but rather, at an advantage. It is harder for Black Americans to vote compared to white Americans, but the system allows for Black voters more than a monarchy would. However, the citizens of a monarchy are not the relevant comparison classes. It follows that discrimination is not relative disadvantage of any social groups to any other, but rather, inequalities in the treatment of the relevant comparison classes.⁵

Discrimination takes direct and indirect forms, but my thesis will focus on direct discrimination. There are many different ways direct discrimination can occur. Consider a high school policy that says explicitly “no non-heterosexual couple can run for prom king and queen.” This policy disadvantages LGBTQ couples as compared to heterosexual couples by not allowing them the ‘honor’ of being prom king or queen, and it does so unfairly, because the policy has no reasonable justification. It is not like the pilot example, because there is no evidence that heterosexuality is a necessary requirement for the ‘duties’ of being prom king or queen. Therefore, the policy is discriminatory because it disadvantages a social group (LGBTQ students) relative to the relevant comparison class (heterosexual couples) because of their social group, and it does so unfairly (as being non-LGBTQ is not vital to being prom queen or king).

Now consider another school, with no explicit ban on non-heterosexual couples running for prom king and queen. Instead, this school has students fill out ballots to elect prom king and queen but will only list boys under king and girls under queen.⁶ This ballot policy then effectively prevents

⁵ Altman, A. (Winter 2016 Edition), "Discrimination".

⁶ This does not address that having a prom queen and king may exclude non-binary and gender non-conforming students, and thus be an act of discrimination in and of itself.

non-heterosexual couples from running.⁷ This school's policy is discriminatory because it unfairly disadvantages members of one social group (LGBTQ couples) as compared to another (heterosexual couples) by not letting the LGBTQ couples run, and for doing so without a fair justification. Although the ballot policy is not explicit in banning non-heterosexual couples from running, it effectively prohibits them from doing so by requiring the couples to be made up of a boy and a girl. Both of these are direct because each policy is disadvantaging one social group (LGBTQ students) with respect to another (heterosexual students), and that disadvantage arises directly from the policy.

Additionally, discrimination being direct does not necessarily mean it is motivated by hatred or hostility. It often occurs because of indifference or ignorance. Consider a student prom committee designing ballots for the school to vote on prom queen and king. They type up a ballot listing only boys under king and only girls under queen, effectively preventing non-heterosexual couples from running. The students on this committee do not hate LGBTQ people, but they are ignorant of the fact that their action is exclusionary. The students have then written a policy that unfairly disadvantages the social group of LGBTQ couples as compared to heterosexual couples, not out of bias or hostility, but out of indifference. However, the effect of the policy is the same. The policy still directly discriminates against LGBTQ couples. It is still an instance of direct discrimination because there is an unfair disadvantaging of one social group as compared to another arising directly from the student committee's policy.

Discrimination being direct does not necessarily mean it is intentional. Consider a brand-new principal joining a school. On his first day, the prom committee asks for his approval of ballots,

⁷This is not to say that a couple constituted by a boy and girl would be inherently heterosexual, but merely that this policy would prevent many non-heterosexual couples from running.

needing his signature before they can be copied and distributed. Busy with other things, the principal has the students place the ballot approval on a pile of paperwork he has to sign. Later in the day, the principal quickly reads through it, does not think of LGBTQ students, and does not find anything wrong with it. He signs and approves the ballot that only lists boys under king and girls under queen, and effectively prevents non-heterosexual couples from running.⁸ The principal then has continued the policy without the aim of discriminating. He maintains the policy that unfairly disadvantages the social group of LGBTQ couples as compared to heterosexual couples. It is still directly discriminating against LGBTQ couples, even if the principal did not intend to do so. Furthermore, it is an instance of direct discrimination because there is an unfair disadvantaging of one social group as compared to another arising directly from the principal's policy.

Indirect discrimination is more difficult to characterize, and there is controversy over whether what is described as indirect discrimination is actually discrimination. Indirect discrimination is typically characterized by policies that, because of outside forces, result in the disadvantaging of members of a social group.⁹ When such discrimination occurs, it is typically not because the policy or actor was discriminatory, but because of a variety of factors affecting enforcement and producing an unjust outcome.¹⁰

One such example of indirect discrimination may be in *Bowers v. Hardwick* (1986). Prior to its decision, Georgia still had anti-sodomy laws that banned oral and anal sex. The statute was written with the intention of banning oral and anal sex among all couples.¹¹ Later, *Griswold v. Connecticut*

⁸ This is not to say that a couple constituted by a boy and girl would be inherently heterosexual, but merely that this policy would prevent many non-heterosexual couples from running.

⁹ Altman, A. (Winter 2016 Edition), "Discrimination".

¹⁰ Ibid.

¹¹ One could argue that the motivation for outlawing such sodomy is rooted in a heterosexist view of sexuality, in which case, this may not be an instance of indirect discrimination but rather direct discrimination.

(1965) established privacy in such matters among married couples, rendering such anti-sodomy laws unconstitutional when applied to married couples. Then *Eisenstadt v. Baird* (1972) established the same privacy protection for unmarried heterosexual couples, meaning the anti-sodomy laws could not be applied to unmarried heterosexual couples. So, although the law itself didn't specify anything about sexuality, other cases regarding privacy in heterosexual relationships made it unconstitutional to enforce on heterosexual couples. Thus, the law effectively banned those acts among only homosexual couples. The legislation is then an example of indirect discrimination, as it does not explicitly single out a social group in the text and was not intended to apply to only that social group, but in its application, it disproportionately disadvantaged that social group by opening them and only them up for prosecution. Unlike the prom examples, the sodomy laws were not motivated by bias or indifference regarding non-heterosexual couples. Indirect discrimination is typically found in applications of laws and not directly from the stated policy. In the example of sodomy laws, it is the evolution and application of the law, not the policy directly, that discriminates against homosexual couples.

The purpose of this thesis is to explore discrimination in the legal sense. Such discrimination is the unjust and disadvantageous treatment of a social group, but the law is narrower than philosophers in defining a social group. For discrimination to be legally recognized, it has to be on the basis of someone's perceived race, religion, gender, and/or sexuality.¹² This is not to say that the groups mentioned are the only socially salient ones, but rather, the only legally recognized ones. Additionally, the way anti-discrimination laws are written, different social groups are protected under

For the purposes of this thesis and illustrating indirect discrimination, however, an investigation of the potential biases of early lawmakers is not essential.

¹² Lippert-Rasmussen. K. (2014) *Born free and equal?: A philosophical inquiry into the nature of discrimination*.

different jurisdictions. Title VII of the Civil Rights Act of 1964 “prohibits employment discrimination based on race, color, religion, sex and national origin.”¹³ It is then illegal on the federal level to discriminate on the basis of membership in any of those stated social groups, but there are other social groups that different states prohibit employment discrimination against. For example, if a national company refused to hire LGBTQ people because of their sexual orientation, they are committing an illegal act of discrimination in California but not in Texas.¹⁴ California state law establishes that LGBTQ people are a legally protected social group, but Texas state law does not. Furthermore, even certain cities have anti-discrimination laws that protect social groups that state and federal law ignores. New York City has outlawed discrimination on the basis of gender identity.¹⁵ Unlike the rest of the state, in New York City, those who identify as “agender, bigender, butch, female/woman/feminine, female to male (FTM), femme, gender diverse, gender fluid, genderqueer, male/man/masculine, male to female (MTF), man of trans experience, pangender, or woman of trans experience,” are in a legally recognized and protected social group.¹⁶ The social groups that count as legally protected from discrimination vary by jurisdiction.

Furthermore, the legal definition of discrimination requires some legal harm present in the disadvantaging of the social group. Employment discrimination has the tangible harm of a loss in job benefits or promotions. If an employer were to refuse to hire Black people, he would be denying that social group the opportunity to make money, receive benefits, and participate in that workforce. Such discrimination then has a legally recognized harm stemming from the disadvantaging of that

¹³ Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964)

¹⁴ Movement Advancement Project. "Equality Maps: State Non-Discrimination Laws."
http://www.lgbtmap.org/equality-maps/non_discrimination_laws

¹⁵ New York City Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); N.Y.C. Admin. Code § 8-102(23)

¹⁶ Ibid.

social group. If an employer were to refuse to be friends with Black people, he would be denying them his friendship and perhaps disadvantaging them. Nevertheless, the denial of friendship is not a legally recognized harm, and thus, his actions would not be legally actionable discrimination. So, discrimination in the legal sense must be unfair and disadvantageous treatment based on social group membership and thus constitutes a legally recognized harm.

Within the legal definition, discrimination can be classified as organizational or structural. Organizational discrimination occurs when an organization's member engages in discrimination while acting in their capacity as such a member.¹⁷ If a principal appointed by the school board to enact a policy prohibiting interracial couples from running for prom queen or king, that school board would be engaging in organizational discrimination. Even though the principal is an individual, the collective school board has vested its authority in the principal to act as its representative. As a representative of their organization, he has enacted a discriminatory policy. Thus, the organization is guilty of organizational discrimination.

But if that principal, on his own time, decided to not to hire any black people as domestic workers in his home, the school board would not have committed organizational discrimination. The principal is acting as a private employer, not an agent of the school board. Because he is not acting with the power the organization grants him, his actions are not organizational discrimination. Of course, his actions are employment discrimination and illegal, but because he is acting as a private employer and not in his capacity as a principal, it is not organizational discrimination. Organizational discrimination often overlaps with illegal discrimination, but organizational discrimination is not always illegal. Religious organizations, for example, are legally allowed to

¹⁷ Altman, A. (Winter 2016 Edition), "Discrimination".

discriminate against women or members of different religions in hiring for ministerial positions.¹⁸

So, although the legal notion is concerned with organizational discrimination, it does not always forbid it.

Discrimination can also be structural. Structural discrimination is characterized by societal institutions continually and unjustly generating “disproportionately disadvantageous outcomes” for members of socially salient groups.¹⁹ Such discrimination concerns the effects of systematic disadvantages of social groups. This is illustrated by the funding mechanism of the United States public school system. Public schools are funded by property taxes, which are determined by property values. Higher property values mean more property taxes and thus more funding for schools. Because of this nation’s history of oppression and denying Black people opportunities to accumulate wealth and property, it is unsurprising that they are more likely to live in heavily populated areas with lower property values. Thus, Black students are more likely to attend schools with less funding and resources, putting them at a disadvantage relative to their white peers. The less-funded schools often have leaky roofs, broken windows, and peeling paint.²⁰ They also are unable to afford field trips, have fewer after school-activities, and face larger class sizes resulting in busier teachers with less time to spend per student.²¹ In this example, the disadvantageous outcome is the poor facilities generated by the societal institution of property-tax funded schools. It is not one particular racist person committing an act against Black people, but rather, a systematic disadvantage of lower-income students who, because of the nation’s racist past, are often people of color.

¹⁸ Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e-2(e)(2) [Section 703] (1964)

¹⁹ Altman, A. (Winter 2016 Edition), "Discrimination"

²⁰ Turner, C. (2016, April 18). Why America's Schools Have A Money Problem [Radio series episode]. In *Morning Edition*. NPR.

²¹ Strauss, V. (2018). *This is what inadequate funding at a public school looks and feels like — as told by an entire faculty*. Washington: WP Company LLC d/b/a The Washington Post.

Although there are some cases where structural discrimination was ruled illegal, the Supreme Court ruled in *San Antonio Independent School District v. Rodriguez* (1973) that the property tax basis of school funding is not illegal discrimination. Here, as in organizational discrimination, the legal notion only covers certain cases of discrimination.

Chapter 2: Hostile Work Environment as Discrimination

In the previous chapter of this thesis, I established a legal definition of discrimination as the unfair treatment on the basis of membership in a legally protected social group resulting in a legally recognized harm. In this chapter, I discuss and define discrimination on the basis of sex.

In order to understand discrimination on the basis of sex, sex must be defined. Sex is a biological classification based on physical characteristics.²² Sex is distinct from gender, and the two often but not always correspond.²³ Traditionally, it has been thought that people with the sex classification “male” were men, and those with the sex classification “female” were women. But equating sex classification with gender identification ignores those who are transgender, non-binary, gender non-conforming, etc. Sex classification is the application of “socially agreed upon biological criteria” that are used to designate an individual as male, female, or intersex.²⁴ Sex is more narrowly defined by physical characteristics, but the meaning of gender is more contentious.

Feminist philosophical thought has commonly considered gender to be the social performance of sex. In 1949, Simone de Beauvoir wrote, “One is not born, but rather becomes, a woman,” and argued that gender was the social or cultural meaning of sex.²⁵ Later, Judith Butler’s work in “Performative Acts and Gender Constitution,” similarly argued that gender is the social performance of sex,²⁶ influenced by societal and cultural expectations of one’s sex classification.²⁷ The dominant view in philosophical literature is that because gender is influenced by cultural

²² Oakley, A. (1972) *Sex, gender and society*. London: Maurice Temple Smith Ltd. 158.

²³ Ibid.

²⁴ West, C. & Zimmerman, D. H. (1987). "Doing Gender." *Gender and Society* 1, no. 2: 125-51.

²⁵ Beauvoir, S. D. (1973). *The Second Sex*. New York: Vintage Books. 301.

²⁶ Butler, J. (1988). Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory. *Theatre Journal*, 40(4), 519-531. doi:10.2307/3207893

²⁷ Ibid, 527-528.

expectations, it is linked to social positioning and subordination.²⁸ Some philosophers, like Sally Haslanger, believe the genders are synonymous with social subordination, defining ‘women’ as those systematically subordinated because of their perceived female reproductive ability.²⁹ This is just a brief but incomplete sketch of the complex and evolving discussion of the sex-gender distinction.

One issue with the concepts of sex and gender operative in law is that sex and gender are not always defined and, often, the law makes no distinction between the two. For the purposes of this paper, we will use the traditional definition of sex as the biological classification of an individual as male, female, or intersex. The court does not always recognize the sex/gender distinction. In fact, it often conflates the two, using gender and sex discrimination to mean the same thing. This is changing, as discrimination based on gender identity becomes more widely understood.³⁰ This chapter will focus on the traditional legally recognized definition of sex but will have to examine cases in which gender and sex are conflated.

Defining sex as the biological classification of an individual as male, female, or intersex, the legal understanding of sex discrimination is the unfair treatment of an individual on the basis of their legally recognized sex. The law does not recognize all sex classifications nor all gender classifications, and thus, what counts as a legally recognized sex often depends on local and state laws. For example, in New York City, Washington state, Oregon, and California, birth certificates offer labels of male, female, or “X”. Maine and Washington D.C. allow a third gender on driver’s licenses but not birth certificates. Kansas birth certificates and driver licenses, however, list only male and female on birth

²⁸ Mikkola, M. (Winter 2017). "Feminist Perspectives on Sex and Gender", *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2017/entries/feminism-gender/>.

²⁹ Haslanger, S. (2000). Gender and Race: (What) Are They? (What) Do We Want Them To Be?. *Noûs*, 34: pg 38.

³⁰ Davis, H. (2014). Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique. *Perspectives on Politics*, 12(1), 45-60. doi:10.1017/S1537592713003708

certificates.³¹ Thus, someone who does not identify as male or female may be recognized on their birth certificate in California but not Kansas. Or in Maine, someone identifying as non-binary may have a driver's license indicating this identification but still have a birth certificate that says male or female. Because different sexes are recognized in different states and even on different forms within each state, an individual's "legally recognized sex" can vary upon jurisdiction.

The EEOC (Equal Employment Opportunity Commission) defines sex discrimination as "treating someone (an applicant or employee) unfavorably because of that person's sex."³² This chapter will provide a brief history and identification of one such form of sex-based discrimination, sexual harassment. In the United States, federal law outlaws sexual harassment, arguing it is a form of sex-based discrimination and thus violates Title VII of the Civil Rights Act.³³ Federal regulation defines sexual harassment as:

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."³⁴

³¹ Newman, A. (2018, September 27). Male, Female or 'X': The Push for a Third Choice on Official Forms. *The New York Times*. Retrieved from <https://www.nytimes.com/2018/09/27/nyregion/gender-neutral-birth-certificate.html>

³² <https://www.eeoc.gov/laws/types/sex.cfm>

³³ Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964)

³⁴ C.F.R. §1604.11(a) (1999)

Sections 1-2 of that law identify the subset of sexual harassment considered “quid pro quo.” Such harassment is typically defined as sexual requests or threats that are made a condition of employment or influence employment decisions.³⁵ This is sex-based discrimination because it is unfair treatment, as it attempts to force the victim of the harassment to choose between yielding to sexual demands or their job, and it does so because of the victim’s sex.

Even within “quid pro quo harassment,” the law recognizes distinctions. Section 1 of this law outlines harassment that occurs when the sexual requests or threats are made as a condition of employment, while section 2 refers to cases in which such threats influence employment decisions. To illustrate these various forms of sexual harassment, consider an example. Suppose Jane interviews at a corporate office as an assistant to John. Here, Jane is simply an interviewee, not an employee. John tells Jane she has to have sex with him if she wants the job. Jane, the interviewee, first thinks John is kidding. But John continues in his ultimatum, insisting that she must have sex with him to get the position. Jane then has to choose between yielding to John’s sexual demands or not getting the job. Jane is a victim of the type of sexual harassment outlined by section 1, as John is explicitly asking for a sexual favor as a condition of Jane’s employment. Here, it is important to note that someone like Jane, a non-employee, can still be a victim of sexual harassment.

Let’s say John got a new assistant, Kelly. He is Kelly’s boss, and has the power to hire or fire her. One night, John asks Kelly out on a date and tells her he thinks rejection is a fireable offense. Kelly asks if he’s joking, but John insists he’s being genuine and sincere in asking her out. By implying she could be fired for rejecting his advances, John is implicitly making sexual favors a condition of Kelly’s employment. Kelly then has to choose between dating her boss or losing her

³⁵ Welsh, S. (1999) "GENDER AND SEXUAL HARASSMENT." *Annual Review of Sociology*, p. 169.

job. Thus, John has committed the first type of sexual harassment outlined by section 1, by making the submission to his sexual demands a term or condition of Kelly's employment. He treats Kelly unfairly, and he does so on the basis of her sex, making him guilty of sex discrimination.

The form of sexual harassment outlawed in section 2 occurs when an employer makes employment decisions about the employee based on the employee's response to the employer's sexual advances. Suppose Sally is in charge of performance reviews at a corporate office. One night, Sally tells Sam that he has to have sex with her to get a good performance review and thus a promotion. Sam is then a victim of the second type of sexual harassment. Sally leads Sam to believe she is making an employment decision about him based on his response to her asking for a sexual favor. No matter Sam's reaction, he is sexually harassed. If he submits or rejects Sally's advances, he is doing so thinking Sally will make her employment decision off that choice. He is put into the position of having to have sex with his boss or face a bad performance review. It is unfair for Sally to treat him that way, and she is doing so because of Sam's sex/gender. Sally is guilty of sex discrimination because she treats Sam unfairly and does so on the basis of his gender.

The first two forms of sexual harassment discussed above are known as "quid quo pro" sexual harassment because they attempt to exchange something (sexual favors) for something (positive employment decisions). But federal code also mentions a third type of sexual harassment that occurs when sexual advances, requests, or conduct, have "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."³⁶ This is known as hostile work environment sexual harassment. But the federal government did not legally recognize this form of harassment as gender discrimination until

³⁶ C.F.R. §1604.11(a) (1999)

Meritor Savings Bank v. Vinson (1986). In that case, the Supreme Court recognized hostile work environment sexual harassment as a form of sex discrimination, and thus illegal under Title VII of the Civil Rights Act of 1964.

The plaintiff, Michelle Vinson, worked at Meritor Savings Bank as a teller trainee in 1974. Over the next four years, she would earn promotions to teller, head teller, and assistant branch manager based entirely on her own merit.³⁷ Vinson testified that in 1975, her boss Sidney Taylor invited her to dinner and suggested they begin a sexual relationship.³⁸ When Vinson declined, Taylor said she “owed him since he obtained the job for her.”³⁹ Unlike cases one and two, in which the harasser had the authority to fire the victim of the harassment, Taylor did not have the authority to fire, promote, demote, or make employment decisions about Vinson. However, Vinson did not know this, and then began a sexual relationship with Taylor, consenting out of fear of losing her job.⁴⁰ Over the next two years, Vinson faced not only Taylor’s sexual demands, but his fondling, indecent exposure, and crude sexual comments while at their place of work.⁴¹

What Vinson faced was not like the first two forms of sexual harassment outlined above. She was not faced with an explicit or implicit asking for a sexual favor as a condition of her employment, nor was her sexual conduct used as the basis for employment decisions. Vinson and her lawyers argued that although she faced no explicit offer of exchange of sexual favors for job benefits or threat of job loss, Taylor’s behavior created a hostile work environment, which disadvantaged her because of her sex.⁴² The court unanimously agreed that this claim constituted sex

³⁷ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

discrimination. In the majority opinion, Justice Rehnquist found “Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate[s] on the basis of sex.”⁴³ Although there was no exchange of employment benefits for Vinson’s submission to Taylor’s sexual demands, the court acknowledged that this work environment treated Vinson worse because of her sex. Compared to the relevant comparison class, her male equals at the bank, she was put at a relative disadvantage. She had to deal with Taylor’s demands, remarks, and fondling, while they did not. Thus, Vinson was harmed by Taylor’s actions. Not in tangible job-related consequences (like a demotion or firing), but in having unequal access to her workplace. Taylor’s harassment of Vinson created a hostile environment that constituted a denial of Vinson’s equal access to the workplace.

Vinson was harmed in a legally recognized way. The law recognizes some harms and does not recognize others. Consider two examples. In the first, I lie to my friend, saying I am not planning a birthday party. I do have a birthday party and do not invite her, but she has spent a great deal of her own money on a present for me, which I gladly take. She finds out, feels betrayed and hurt, can no longer trust me, and has lost the money she spent on my present. She is thus harmed. Now consider another example, in which a friend comes to me at my workplace, where I am a hedge fund manager. I tell her I can triple her investment in two years, so she gives me a great deal of her own money to invest. I cannot triple her investment; I have actually just lied to her and am running a Ponzi scheme. She finds out, feels betrayed and hurt, can no longer trust me, and has lost the money she gave me to invest. Although the impact on my friend may be identical, the law only recognizes the harm in the second case, not the first.

⁴³Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

One way to understand why the law covers some but not all harms is through the harm principle. The harm principle, as outlined by John Stuart Mill, argues that in deciding the law, the government must find the balance of limiting the personal freedom of one citizen to protect another from harm.⁴⁴ Limiting the personal freedom of one citizen can be a harm, so the law must only interfere when the harm to another person is greater than the harm of limiting the autonomy of the citizen.⁴⁵ Mill finds that “the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others.”⁴⁶ Consider the case of Vinson and Taylor. The law is limiting the personal freedom of Taylor by finding his conduct – the inappropriate sexual requests, sexual comments, and fondling in the workplace – to be illegal. He can no longer act freely in those ways. But the law weighs Taylor’s loss of autonomy against the harm done to Vinson – dealing with Taylor’s demands, remarks, and fondling while her male co-workers did not, and thus, having unequal access to her workplace. The harm of unequal access on the basis of sex is a legally recognized harm of sex-based discrimination. Thus, the court found that the harm done to Vinson is worse than the harm that would be done to Taylor in limiting his conduct. The law then exercised its power over Taylor by outlawing his conduct in order to protect Vinson from the harm of a hostile work environment.

Because Taylor’s conduct created an environment hostile to Vinson because of her sex, he effectively denied her equal access to her workplace as compared to her male counterparts. In this

⁴⁴ Stanton-Ife, J. (Winter 2016). "The Limits of Law". *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2016/entries/law-limits/>>.

⁴⁵Ibid.

⁴⁶ Mill, J. S. (1947). *Utilitarianism, On Liberty and Considerations on Representative Government*, London: Dent. Chapter 1.

case, the environment is only hostile to Vinson because she is a woman, making it a form of sex-based discrimination: it puts an unjust burden upon women on the basis of their sex.

It is important to note that this case was the beginning of the court's recognition of hostile work environment claims. In the next chapter, I will analyze some precedent-setting cases of hostile work environment sexual harassment.

Chapter 3: Cases of Hostile Work Environment Sexual Harassment

In the previous chapter, I established a legal definition of discrimination on the basis of sex and explained the Supreme Court case that acknowledged hostile work environment sexual harassment as an instance of sex-based discrimination. This chapter looks at three different cases of hostile work environment sexual harassment, explaining how each are instances of sex-based discrimination.

1 § Harris v. Forklift Systems, Inc.

In *Harris v Forklift Systems, Inc. (1993)*, the Supreme Court reaffirmed that hostile work environment protections extend to conduct that does not lead the employee to suffer physical or psychological injury.⁴⁷ Rather, as established in *Meritor*, such an environment is an act of discrimination because it constitutes unequal access to the workplace. *Harris v Forklift Systems, Inc. (1993)* then established that a hostile work environment occurs when the victim perceives that the environment is abusive or hostile and a “reasonable person” would agree.⁴⁸ The victim does not have to prove that the hostile environment caused a physical or psychological injury to prove discrimination.

Teresa Harris worked at Forklift Systems, Inc., as a manager under the supervision of Charles Hardy, president of the company.⁴⁹ Throughout her time at work, Hardy made degrading comments to Harris, calling her “a dumb ass woman,” suggesting they go to a hotel to negotiate her raise, and making sexual innuendos.⁵⁰ Harris confronted Hardy, who claimed to be surprised that

⁴⁷ Harris v. Forklift Sys., Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

Harris took offense, said he was only joking and promised to stop if Harris stayed in her position.⁵¹

But less than a month after that conversation, when Harris was making a deal with a customer, Hardy asked, “What did you do, promise the guy ... some [sex] Saturday night?”⁵² Harris then filed a claim that Hardy’s conduct created a hostile work environment for her because she was a woman.⁵³

The lawyers representing Forklift Systems, Inc., conceded that Hardy’s comments were offensive to Harris and to a “reasonable” woman.⁵⁴ However, they argued that these comments alone were not so severe that they interfered with Harris’ work performance or caused her psychological injury.⁵⁵ The court agreed, but found that a hostile work environment need not interfere with work performance or cause injury to be discriminatory under Title VII. Rather, “the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.”⁵⁶ Thus, sex discrimination occurs not only when the employee suffers psychological injury or negative work performance, but when both the victim and a “reasonable person” would find the environment to be hostile because of the employee’s sex. The court found that the harm is in the unequal access to the workplace, not just tangible job-related or psychological consequences.

2 § Robinson v. Jacksonville Shipyards, Inc.

In *Robinson v. Jacksonville Shipyards, Inc.* (1991), the United States District Court of Florida established that the workplace presence of images of nude or partially nude women in

⁵¹ Ibid.

⁵² *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

sexually submissive poses can create a hostile work environment that constitutes sex-based discrimination.⁵⁷ Plaintiff Lois Robinson worked for Jacksonville Shipyards Inc., (JSI) as a welder.⁵⁸ JSI employed very few women as craftworkers (less than five percent) and never had a woman Leaderman, Quartermaster, Assistant Foreman, Foreman, Superintendent, Coordinator, Vice-President or President.⁵⁹ Throughout the JSI workplace, there were pictures of nude and partially nude women ripped from magazines such as “Playboy” and “Penthouse.”⁶⁰ JSI employees were encouraged to ask permission before hanging any materials up, but many in management had such images displayed in their offices, and nude images were not technically prohibited.⁶¹ Additionally, “Playboy,” “Penthouse,” and other pornographic materials were often read on the job by Robinson’s co-workers, although the reading of magazines or newspapers was prohibited by JSI.⁶² Workers at JSI were encouraged by management to hang vendors advertising calendars, which contained images of nude and partially nude women posing pornographically with various tools and supplies.⁶³ None of these calendars ever contained men in such poses.⁶⁴ Robinson not only had to deal with the pornographic images on the wall, but graffiti in her workspace that said: “lick me you whore dog bitch,” “eat me,” and “pussy.”⁶⁵ Furthermore, employees and supervisors frequently made demeaning and overtly sexual comments about women to Robinson, including her supervisor, who said: “women are only fit company for something that howls,” “there's nothing worse than

⁵⁷ Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991)

⁵⁸ Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991)

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

having to work around women,” and when asked by Robinson about her assignment: “I don't know, I don't care where you go. You can go flash the sailors if you want.”⁶⁶

The lawyers for JSI argued that this was culturally ingrained practice at such a shipyard.⁶⁷ They cited two other shipyards, Norfolk Shipbuilding & Drydock Corp and Colona Shipyard, with a similar gender imbalance (less than 10-15% women).⁶⁸ Like JSI, Norfolk Shipbuilding and Drydock Corp and Colona have images of nude and partially nude women in the shops and locker rooms, but no complaints about the pictures or a hostile environment were ever filed.⁶⁹ However, the court found this attempt to provide “social context” for the behavior and practices of JSI to be immaterial. The absence of complaints at the other two shipyards does not mean their work environments are not hostile and is not relevant to determining if JSI had a hostile work environment.⁷⁰

Ultimately, the court ruled that due to the intensive and pervasive nature of the images hung up around JSI, “the presence of the pictures, even if not directed at offending a particular female employee, sexualizes the work environment to the detriment of all female employees.”⁷¹ Thus, the images created a hostile work environment for Robinson because of her sex, and therefore, denied her equal access to the workplace. Because of this, JSI’s condoning of the displayed images and graffiti constitute sexual harassment and therefore sex-based discrimination.

⁶⁶ Ibid.

⁶⁷ Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991)

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

Some free speech scholars argue that this understanding of hostile environment harassment can restrict free speech.⁷² In *Meritor Savings Bank v. Vinson* (1986), it was the demands of sexual favors that made the work environment hostile. In *Robinson* (1991), part of the hostile work environment was pornography and sexual imagery, which are in many cases considered constitutionally protected speech.⁷³ The court found that the posters, pictures, and calendars mentioned in *Robinson* (1991), including those with nude and partially nude women and the photos ripped from “Penthouse” and “Playboy,” were sexually suggestive and thus created a hostile work environment for Robinson.⁷⁴ They established a now oft-cited standard, stating:

“A picture will be presumed to be sexually suggestive if it depicts a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body.”⁷⁵

Some scholars think that much art, which historically has First Amendment protections even in the workplace, would fall under this definition.⁷⁶ The next chapter will address the free speech principle and explain its limitations concerning cases of sexual harassment.

3 § Holman v. Indiana

⁷² Volokh, E. (1996). Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment. *Berkeley Journal of Employment and Labor Law*, 17(20), 305-312.

⁷³ United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000)

⁷⁴ Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991)

⁷⁵ Ibid.

⁷⁶ Volokh, E. (1996). Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment. p. 305-310.

In *Holman v. Indiana* (2000), the Seventh Circuit United States Court of Appeals ruled that a supervisor who harasses both his male and female employees by asking for sexual favors is not guilty of sex-based discrimination.⁷⁷

The plaintiffs in this case were Steven and Karen Holman, a married couple, working at the Indiana Department of Transportation.⁷⁸ The Holmans both worked under the supervision of the male shop foreman, Gale Ulrich. They alleged that Ulrich had sexually solicited and harassed each of them individually, touching their bodies and asking for sexual favors.⁷⁹ When such requests for sexual favors were denied, Ulrich retaliated against them.⁸⁰

However, the court did not find in favor of the Holmans. Rather, they found that Ulrich was not guilty of discrimination under Title VII of the Civil Rights Act because he did not discriminate on the basis of sex. They ruled:

Title VII does not cover the “equal opportunity” or “bisexual” harasser, then, because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).⁸¹

The great irony of this case is that in harassing Steven Holman as much as he harassed Karen Holman, Ulrich was able to defeat legal action against him. If he were to have harassed only Karen Holman and not Steve Holman, or vice versa, the court would have found him guilty of sex-based discrimination. It was in harassing both victims, and effectively causing *more* harm than if he had harassed only one, that Ulrich was able to prove he did not discriminate *at all*.

⁷⁷ *Holman v. Indiana*, 211 F.3d 399, 400–01 (7th Cir. 2000)

⁷⁸ *Ibid.*

⁷⁹ *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000)

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

I disagree with the court's ruling and argue that Ulrich's mistreatment of Steven Holman and Karen Holman was an act of discrimination. Using Catharine MacKinnon's dominance model, we can understand that there is societal subordination of women upheld by institutions that perpetuate the dominance of men.⁸² To fully understand this model, recall the definition of discrimination from the first chapter of this thesis. Discrimination is unfair and unjustified treatment on the basis of social group membership in a legally protected social group resulting in a legally recognized harm. The "unfair treatment" is inherently based in a comparative, because an advantage or disadvantage is determined through comparison to the relevant group. One group cannot be treated worse without being treated worse than another group, and so the treatment of one group must be compared to their relevant comparison class. In cases of sex discrimination, the court typically considers men to be the relevant comparison class for women, and women to be the relevant comparison class for men. Discrimination that occurs on the basis of sex when women are being treated worse than men because they are women, or when men are being treated worse than women because they are men. Thus, the court in *Holman v. Indiana* (2000) found that Ulrich may have mistreated Steven Holman because he was a man and Karen Holman because she was a woman, but neither one was treated worse than the other, and so no discrimination occurred.

MacKinnon finds that this type of analysis, based on a direct comparison of treatment, ignores larger societal power structures. Particularly, MacKinnon finds that men's sexual domination of women maintains a male-dominance structure.⁸³ She argues that societal and systemic inequalities

⁸² MacKinnon, C. (1987). *Feminism Unmodified: Discourses on Life and Law*. Cambridge, MA: Harvard University Press.

⁸³ MacKinnon, C. (1987). *Feminism Unmodified: Discourses on Life and Law*.

for women in the workforce are reinforced and perpetuated by sexual harassment.⁸⁴ Such inequalities include horizontal segregation, the statistical domination of a gender within certain gendered professions.⁸⁵ For example, women are underrepresented in manual occupations (e.g. manufacturing, construction, transportation) and overrepresented in non-manual occupations (e.g. nursing, social work, childcare).⁸⁶ Vertical segregation refers to gendered status differentials within these professions.⁸⁷ Men dominate the highest status occupations within the manual and non-manual sectors of the economy.⁸⁸ MacKinnon also points out inequalities in sex-defined work, professions in which one's sex is considered essential to the position, and in income; on average, men have a greater income than women.⁸⁹ Although MacKinnon's work was published in 1979, recent empirical evaluations show that the US continues to face these gendered societal and systemic inequalities within the workforce.⁹⁰

Furthermore, MacKinnon argues that these inequalities stem from a social context that defines womanhood through women's sexualized bodies and compliance with male sexual advances.⁹¹ MacKinnon's argument has a clear historical precedent; the exchange of sex for survival, through marriage or sex work, has ensured that women were sexually available to men and economically

⁸⁴ MacKinnon, C. (1979). *Sexual Harassment of Working Women: A Case of Sex Discrimination* (19 ed.). Yale University Press. 9-23.

⁸⁵ Ibid.

⁸⁶ Charles, M. (2003). Deciphering Sex Segregation: Vertical and Horizontal Inequalities in Ten National Labor Markets. *Acta Sociologica*, 46(4), 267–287. <https://doi.org/10.1177/0001699303464001>

⁸⁷ MacKinnon, C. (1979). *Sexual Harassment of Working Women: A Case of Sex Discrimination*. 9-23.

⁸⁸ Ibid.

⁸⁹ Income inequality is measured differently by various authors; sometimes adjusted to control for different profession choices, sometimes not. This thesis will not delve into the many different methodologies used to prove income inequality.

⁹⁰ Charles, M. (2003). Deciphering Sex Segregation: Vertical and Horizontal Inequalities in Ten National Labor Markets. 267–287.

⁹¹ MacKinnon, C. (1979). *Sexual Harassment of Working Women: A Case of Sex Discrimination*. 174-178.

dependent on them.⁹² Women in the workplace exist within a larger historical and social context that values their bodies, and not men's bodies, for sex. This is not to say that the larger historical and social context has been good for all men, or even that such context places the 'proper' value on men's bodies. Men's bodies can certainly be sexualized within a workplace and men can certainly be sexually harassed. But the societal context in which women exist in the workforce is different than that of men. Men do not have a history of their manhood being defined through their objectified, sexualized bodies, nor do they have a history of being economically dependent on women. Thus, gender in the workplace exists within a larger historical and social context that values the bodies of women for sex and does not do the same for men. Thus, MacKinnon argues that the sexual harassment of women is a practice of male sexual dominance that reinforces the male dominant power structure.⁹³

In *Holman v. Indiana* (2000), Ulrich sexualized both Steven and Karen Holman, but he did so within a societal structure of male dominance. There is a societal history of women having to exchange of sex for survival, through marriage or sex work, that ensured that women were sexually available to men and economically dependent on them. Thus, when Ulrich sexualized Karen Holman, because of the history of women in the workplace, he was reinforcing a structure of male sexual dominance. When Ulrich sexualized Steven Holman, Ulrich was still reinforcing the male sexual dominance by sexualizing the employee/boss relationship. Regardless of the gender of the individual Ulrich demands sexual favors from, Ulrich's sexualization of the workplace maintains the male dominance structure, which hurts women more than men through horizontal segregation, vertical segregation, income inequality, and sex-defined work.

⁹² Ibid.

⁹³ MacKinnon, C. (1979). *Sexual Harassment of Working Women: A Case of Sex Discrimination*.

Thus, when you compare the treatment of the Holman's, the two are sexualized in the same way, and both have to work in a male dominant structure perpetuated by Ulrich. But Karen Holman will be hurt more by such a structure than Stephen will, because the harms of the sexualization of women in the workplace - horizontal segregation, vertical segregation, income inequality, and sex-defined work - most affect women. Ulrich's actions mean that Karen Holman faces worse treatment at work because she is a woman. Even when sexual harassment occurs identically to a man and a woman, that sexual harassment is a practice of male sexual dominance, which maintains the societal subordination of women, and thus, is an act of sex discrimination.⁹⁴ Because the 'equal opportunity' harasser exists within a society that sexualizes the workplace to uphold male sexual dominance, their harassment is an act of sex-based discrimination. This dominance model of analysis will be applied to the case introduced at the start of this thesis in the final chapter.

⁹⁴ MacKinnon, C. (2018). Difference and Dominance: On Sex Discrimination [1984]. *Feminist Legal Theory*, 81-94.

Chapter 4: The Free Speech Principle

In the previous chapter, I looked at three different cases of hostile work environment sexual harassment, explaining how each is an instance of sex-based discrimination. Those cases raised some interesting free speech concerns. In this chapter, I will outline what free speech is, what it does, and what we need to justify the regulation of speech, and finally, address some free speech concerns regarding claims of hostile work environment sexual harassment.

Before attempting to understand free speech, I first must define speech and free speech. In the legal sense, speech is best understood not as verbal language use but as an act of communication or expression.⁹⁵ There are things we consider speech in the ordinary sense and things we consider speech in the free speech sense. Saying, “I will pay you ten thousand dollars to kill my wife,” is, in the ordinary sense, speech. The sentence is an utterance of words communicating an idea, but such a sentence is not covered by free speech. The speech is not merely expressing some opinion, but rather, hiring someone to murder one’s wife. Thus, there is a distinction between speech in the ordinary sense and that which is covered by free speech.

What is covered by free speech continues to be a contentious topic and need not be explicitly defined for the purposes of this thesis; however, we must define speech in the ordinary sense that is not considered speech in the ‘free speech’ sense. What is not covered by free speech, but is speech in the ordinary sense, are communicative acts that the government has a compelling and justified state interest in regulating. Consider an example in which a company lawyer writes an employee contract that an Employee A signs. That contract is essentially an agreement, in which the employee agrees to carry out certain duties and abide by certain rules in exchange for the employer

⁹⁵ Schauer, F. (2015). On the Distinction between Speech and Action. *Emory Law Journal*, 65(2), 427–454.

agreeing to pay the employee for a length of time. A similar agreement might be made by two teenagers betting – the first friend saying to the second one, “I’ll pay you 15 dollars if you jump in the pool right now,” and the second one responding, “I’ll do it.” This agreement consists of the second friend agreeing to carry out a duty (jumping in the pool) in exchange for the first friend agreeing to pay him. But the government has a compelling interest in regulating the employment agreement, but little interest in regulating an agreement about jumping into a pool. Both are agreements, and thus speech in the ordinary sense, but the government only has a compelling state interest in regulating the employment agreement, and thus, it is subject to regulation. Thus, a contract that the government has a compelling state interest is not speech in the free speech sense of the word.

Furthermore, some utterances that constitute crimes are speech in the ordinary sense but not subject to free speech protections. Consider a husband who says to an assassin, “I will pay you ten thousand dollars to kill my wife.” That utterance is not covered by free speech because it is committing a crime in hiring an assassin. The government has a justified interest in outlawing the hiring of criminals for murder, and so the utterance is subject to being outlawed. There are similar crimes – i.e. solicitation, insider trading, witness intimidation – that are speech in the sense that they are communicative acts, but their communication constitutes an action that the government has a compelling reason to regulate and thus is not considered to be “speech” in the free speech sense.

Of course, that which is covered by free speech includes some instances of expression that are not speech. For example, the Supreme Court ruled that the burning of the American flag “constituted expressive conduct.”⁹⁶ Even within the category of what we consider expressive

⁹⁶ Texas v. Johnson, 491 U.S. 397, 397, 109 S. Ct. 2533, 2535, 105 L. Ed. 2d 342 (1989)

conduct (that which is speech in the free speech sense), there exists speech that is regulated.

Consider the act of defamation – I may write an opinion piece in a newspaper in which I say, of some public figure, “Mr. Jones is an alcoholic,” in an effort to reduce the sales of Mr. Jones’ book and perhaps damage his reputation. It is speech in which there may be an expression of somewhat political ideas, but it is actionable if and only if what was communicated is proven to be false, that I failed to take reasonable actions to verify if the information was false (negligence) or I knew it to be false and acted anyway (malice), and the communication must cause injury, either through material losses or reputational damages.⁹⁷ Unlike the cases of contract killing, solicitation, insider trading, and witness intimidation, in the case of defamation, the utterance itself is not legally actionable. It is that the utterance causes injury that makes it actionable. In the case of contract killing, merely saying “I will pay you ten thousand dollars to kill my wife,” is a crime that warrants legal action, regardless of whether the hit-man actually hurts my wife. However, saying, “Mr. Jones is an alcoholic” does not, by itself, justify legal action. Legal action can only be successful if Mr. Jones can prove he is both not an alcoholic and that my statement was injurious to him. The utterance itself then is not justifiably legally actionable.

Underlying the distinction above is the assumption that there is a higher standard of justification to regulate speech (that is, speech in the free speech sense) than is necessary to regulate action.⁹⁸ This is the free speech principle; the idea that speech requires a higher level of justification for regulation⁹⁹ as compared to other forms of conduct. This presupposes that there is something special about speech that makes it different and thus more deserving of protection than other

⁹⁷ New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)

⁹⁸ Schauer, F. (1993). The Phenomenology of Speech and Harm. *Ethics*, 103(4), 637.

⁹⁹ From this point forward, “speech” will be used to mean speech in the free speech sense of speech as expressive conduct that does not constitute a crime.

actions.¹⁰⁰ There are many reasons for believing in the free speech principle. Philosopher John Stuart Mill, mentioned in the second chapter of this thesis, argued that freedom of expression must be protected to allow for the pursuit of the truth and knowledge.¹⁰¹ Consider a claim, X. According to Mill, no matter the truth value of X, prohibiting the expression of X is detrimental.¹⁰² Because Mill believes all knowledge is gained from experience, he argues that our beliefs must be open to reconsideration upon the introduction of new evidence.¹⁰³ So, even if we think X to be false, it is possible that X is true, and thus, it should not be suppressed. True beliefs are often suppressed because they are thought to be false.¹⁰⁴ Even if X is actually false, it should not be suppressed. Rather, false beliefs should be welcome because they lead to debate and a greater pursuit of knowledge.¹⁰⁵

Take, for instance, the case of Galileo Galilei, who was punished by the Church for holding what the Church saw as false beliefs of heliocentrism, the view that the planets circled the sun. Of course, we now know that the Church was the holder of false beliefs, not Galileo. But it was only after Galileo's belief, initially deemed false, that other astronomers and scientists further investigated the issue and were able to gather more knowledge of astronomy. What is deemed false one day may turn out to be true upon further evidence, so suppressing a belief that is considered false may be suppressing a true belief.¹⁰⁶ Furthermore, even if a false belief turns out to be false, there is value in assessing the justification of the beliefs we hold to be true.¹⁰⁷ Of course, some beliefs are neither

¹⁰⁰ Schauer, F. (1993). *The Phenomenology of Speech and Harm*.

¹⁰¹ Mill, J. S. (1947). *Utilitarianism, On Liberty and Considerations on Representative Government*.

¹⁰² Macleod, C. (Fall 2018). "John Stuart Mill", *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/fall2018/entries/mill/>>.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

entirely true nor entirely false, but evaluating them leads to greater discourse that can be knowledge producing. Listening to different beliefs, even if we think they could be false, can help us clarify what we believe is true, why we have those beliefs, and what evidence we have for them. Although this argument has great merit, this thesis will ultimately argue that when the expression of false beliefs constitutes an action that the government has a compelling and justified interest in preventing, such expressions ought to be suppressed.

Other philosophers find that free speech must be protected to sustain a healthy democracy. One argument for this is that free speech, and the freedom of the press, are essential in keeping the public informed in their political decision making.¹⁰⁸ Others argue that because a democratic government has authority only because it is vested in her by the people, it is wrong to use that authority to censor them.¹⁰⁹ Additionally, some think freedom of speech is essential to respecting and maintaining the individual autonomy necessary for free thought.¹¹⁰ Upon these arguments, freedom of speech is essential for a functioning democracy.¹¹¹ Some free speech skeptics, like Free Speech scholar Fredrick Schauer, argue that speech deserves no special protection; and it only currently has such protections because of enduring circumstances and a series of historical contingencies.¹¹²

Even if speech deserves special protections, I will prove that the speech at play in hostile work environment meets the heightened standards required to regulate it. Free speech legal scholar Eugene Volokh worries about the precedent set by Robinson (1991), arguing that this understanding

¹⁰⁸ van Mill, D. Freedom of Speech. *The Stanford Encyclopedia of Philosophy*, (Summer 2018 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/sum2018/entries/freedom-speech/>>.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Lawrence, A., and Horton, F. (1983). The Impossibility of a Free Speech Principle. *Northwestern University Law Review*, 78, 1319-57.

of hostile environment harassment can restrict free speech.¹¹³ Volokh does not think quid pro quo harassment, unwanted, physical touching, discriminatory job assignments, and unwanted one-to-one speech concern the First Amendment. For Volokh, those are instances of speech that are and should continue to be regulated because of a compelling state interest. However, he believes that “one to many” communication should be protected.¹¹⁴ Under his definitions, “one-to-many” communication includes posters, newsletters, and conversations involving willing listeners.¹¹⁵ He thinks this speech is especially valuable and thus argues this speech is and should remain protected: One-to-many speech ... is generally constitutionally protected even when some of its viewers are likely to be offended. So long as some of the viewers are likely to be open to the message, the message remains protected, precisely because restricting the message would cut off constitutionally valuable communication to willing listeners as well as constitutionally valueless communication to unwilling listeners.¹¹⁶

Volokh believes this one-to-many communication ought to be protected because it may be ‘constitutionally valuable,’ meaning it may lead to an exchange of ideas, political discourse, and perhaps a pursuit of knowledge.¹¹⁷

However, the one-to-many communication Volokh is speaking of includes the posters of nude women, the pictures ripped from “Penthouse” and Playboy, and the sexually explicit calendars mentioned in Robinson (1991) that the court found to be sexually suggestive.¹¹⁸ In the case of

¹¹³ Volokh, E. (1996). Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment. *Berkeley Journal of Employment and Labor Law*, 17(20), 305-312.

¹¹⁴ Ibid, 311.

¹¹⁵ Volokh, E. (1996).Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment. 311.

¹¹⁶ Volokh, E. (2013). One-To-One Speech Vs. One-To-Many Speech, Criminal Harassment Laws, and “Cyberstalking.” *Northwestern University Law Review*, 107(2), 742.

¹¹⁷ Ibid, 742.

¹¹⁸ Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991)

Robinson (1991), many of the viewers were ‘open to the message’ of nude and degraded women, mainly, the men who worked at the shipyard.¹¹⁹ What Volokh fails to realize is that the women who constitute the “unwilling listeners” are not merely offended. They are harmed in such a way where they do not have the same access to their work environment as their male peers. Furthermore, Volokh is arguing that the content of the message is “constitutionally valuable communication to willing listeners.”¹²⁰ Volokh thinks much art, which he believes has First Amendment protections even in the workplace, would fall under this definition.¹²¹ His concern is then that the “speech” restrictions in established Robinson (1991) will only grow larger; arguing that “Narrow speech restrictions do over time lead to broader ones.”¹²² And he provides evidence to back up this position, noting the Robinson (1991) was cited by Penn State administrators who took down Goya's *Naked Maja* after a Professor complained it constituted sexual harassment.

Although I agree some art, which may fall under the Court’s definition of “sexually suggestive” pictures, may lead to constitutionally valuable communication, unilaterally allowing such sexually suggestive and explicit images in the workplace would be tolerating discrimination against women and unequal access for the mere possibility of constitutionally valuable communication. Volokh argues that this speech should not be regulated although it may cause harm, but this is a misconception of the harm of speech in this situation. It is not that the “sexually suggestive” pictures may **cause** discrimination, but rather, that in certain contexts they **are** discrimination. I will further detail the distinction between the constitution of harm and the causation of harm in the next

¹¹⁹ Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991)

¹²⁰ Volokh, E. (2013). One-To-One Speech Vs. One-To-Many Speech, Criminal Harassment Laws, and “Cyberstalking.” 742.

¹²¹ Volokh, E. (1996). Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment. 305-310.

¹²² Volokh, E. (2000, Winter-Spring). Freedom of speech, cyberspace, harassment law and the Clinton administration. *Law and Contemporary Problems*, 63(1-2), 313.

chapter. In the final chapter of this thesis, I will respond to Volokh's argument, explaining why the first amendment is not applicable to workplace speech that creates a hostile work environment.

Furthermore, Volokh argues that the standard established in *Robinson* (1991) is inconsistent with the First Amendment's protection the court has shown in other cases, like *Erznoznik v. City of Jacksonville* (1975), in which the court ruled that a city ordinance outlawing a drive-in movie theater from exhibiting films containing nudity, when the screen is visible from a public street or place, violated First Amendment rights.¹²³ I disagree with Volokh's assertion that these cases represent an inconsistent application of the First Amendment. In *Erznoznik* (1975), the protected speech was nudity in a film at a drive-in theater,¹²⁴ and in *Robinson* (1991), the outlawed "speech" was nude and often pornographic images of women hung up in a Shipyard.¹²⁵ The nudity in the film at the drive-in theater is appropriate for the business. A theater, presumably, should show films. However, the photographs and graffiti on the walls of JSI were not appropriate for the business. Had the photographs of women in various stages of undress been hung up in, perhaps, the office of Playboy or Penthouse, they would have been necessary for the business conducted there. But JSI is a shipyard, and their mission has nothing to do with displaying pornography. Furthermore, it was the psychological damage of the pornographic images displayed around JSI, not their mere presence, that led the court to their decision. The speech was harmful, and harmful because it gave Robinson unequal access to the workplace because of her sex, thus violating Title VII of the Civil Rights Act. The nudity present in the films in *Erznoznik* (1975) presented no such harm, and thus, the court protected their speech.

¹²³ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 205, 95 S. Ct. 2268, 2270, 45 L. Ed. 2d 125 (1975)

¹²⁴ *Ibid.*

¹²⁵ *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991)

Volokh disagrees with the notion that harassing speech is harmful speech and thus should not be protected by the First Amendment.¹²⁶ Volokh argues that lots of speech is ‘offensive’ but protected by free speech, even within a workplace.¹²⁷ Boycotts, which the court found to be protected political speech in *N. A. A. C. P. v. Claiborne Hardware Co* (1982), have tangible harm and millions of dollars in damages.¹²⁸ Furthermore, malicious parodies, true but cruel or unfair statements, and abstract teaching of violence or lawlessness are all protected speech with potentially great harms.¹²⁹ Volokh then argues that “if one approves of the protection given to harmful speech, one can't then just argue that speech which "caus[es] foreseeable injury to another" is unprotected. One has to explain why harassing speech is different.”¹³⁰ In the next chapter of this thesis, I will do just that, by explaining some concepts from philosophy of language and explicating the distinction between constitution and causation of harm. In the last chapter of this thesis, I will fully address Volokh’s argument after having explored the distinction between constitution and causation of harm.

¹²⁶ Volokh, E. (1996). *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*. 313-315.

¹²⁷ *Ibid*, 314.

¹²⁸ *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982)

¹²⁹ Volokh, E. (1996). *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*. 314.

¹³⁰ *Ibid*, 313.

Chapter 5: Language Tools

The previous chapter briefly outlined and addressed some free speech concerns regarding claims of hostile work environment sexual harassment. In this chapter, I will explain some relevant elements of philosophy of language that will prove useful in my later analysis of a case of hostile work environment sexual harassment. Much of this chapter draws on work from philosophers of language from the mid to late twentieth century, who expanded philosophy of language to include not only an analysis of the literal meaning of utterances, but to include an analysis of the many things we *do* with language.¹³¹ I will first provide a brief overview of speech act theory and implicature, and then go on to explain the difference between constituting and causing harm.

1 § Speech Act Theory

In *How To Do Things With Words*, J. L. Austin introduces the idea that there are some utterances that do not merely *describe* action, but actually *are* action.¹³² If I were to say, “I proposed to her,” that utterance would be describing my action of proposing to someone. However, if I utter, “Will you marry me?” to a longtime partner, the utterance is not describing the action of proposing, it actually *is* the act of proposal. Austin dubs these utterances, that constitute the performance of an action, “performatives.”¹³³ Those utterances are in contrast to constative utterances, which make a statement. Constatives *say* things, and can be assessed as true or false, but performatives *do* things, and can be successful or unsuccessful.¹³⁴ For example, the constative utterance, “I proposed to her,” can be true or false, if I actually did propose to her or not. However, “I recommend that you

¹³¹ Green, M. (Winter 2018) "Speech Acts", *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2017/entries/speech-acts/>>.

¹³² Austin, J. L. (1962). Lecture I in *How to do things with words*. London: Oxford University Press. 1-12.

¹³³ Ibid, 1-12.

¹³⁴ Ibid, 47-55.

propose to her,” cannot be true or false. A speaker cannot falsely recommend. They can make such a recommendation in bad faith, or the hearer can choose to ignore the recommendation, but the speaker makes a recommendation regardless of the hearer’s decision to act upon such a recommendation. It may be an unsuccessful recommendation, but the action of recommending occurs regardless.

Austin establishes four conditions necessary for a performative to be successful. If one of these conditions is not met, the act constitutes a misfire, meaning the performative utterance was spoken, but not successfully performed.¹³⁵ First, there must be an accepted conventional procedure.¹³⁶ Society has certain socially constructed conventional procedures that allow for the utterances of particular words in a particular context to constitute a certain type of action. For example, saying “I do” sometimes counts as marrying because of convention and laws surrounding marrying in the United States, but the same utterance may not constitute marrying in another country that has different conventions surrounding marriage.

That the societal *convention* that allows the utterance to count as the action it does is distinct from the utterance being spoken in the appropriate *circumstances*. That is the second condition, that the particular speakers and circumstances must be appropriate for such a procedure.¹³⁷ If someone were to say “I do,” at their wedding standing at the altar with their fiancée, they would be speaking the utterance in the appropriate circumstances for the utterance to count as marrying. However, if they said, “I do,” at an altar on a television set while filming a television wedding, their utterance would not count as marrying because the circumstances are not appropriate, which prevents them

¹³⁵ Austin, J. L. (1962). *How to do things with words*. 1-12.

¹³⁶ Ibid; Lecture VIII-Lecture XI.

¹³⁷ Ibid.

from invoking the convention. For the utterance to count as marrying, they must be following the societal *convention*, and they must be doing so within the appropriate *circumstance*. Furthermore, third condition is that the procedure must be executed correctly.¹³⁸ If the fiance at the altar says, “I don’t,” the act of marrying does not occur. The fourth condition is that it must be executed completely; if the priest leaves in the middle of the ceremony, the couple does not get married.¹³⁹

Additionally, Austin introduces two conditions that if not met, make a performative utterance less than ideal, or as he refers to them, “unhappy.”¹⁴⁰ The first is that if the performative utterance should be accompanied by certain thoughts, emotions, intentions or feelings from the speaker, then that person ought to have those required thoughts, emotions, intentions or feelings.¹⁴¹ For example, if I promise to go to a friend’s party, I ought to intend to go when I make that promise. If I didn’t, I would be making an insincere promise, which is less than ideal. However, even an insincere promise is still a promise. My promise is still a performative utterance, but it is an unhappy one. The second condition is that the person must actually perform the subsequent behavior expected on the basis of the promise.¹⁴² I may intend on going to my friend’s party when I promise her that I would, but I may end up not going. This is a broken but sincere promise. But that it is a broken promise does not mean that I didn’t promise my friend I would go to her party; it is still a promise, although not ideal.

Austin then distinguishes between the three forces of an utterances. If I were to say to you, in my dining room “Set the table,” my utterance would have three forces. The first is the locutionary

¹³⁸ Austin, J. L. (1962). Lecture VIII-Lecture XI in *How to do things with words*. 94-147.

¹³⁹ Ibid; 94-147.

¹⁴⁰ Austin, J. L. (1962). Lecture II in *How to do things with words*. 12-24.

¹⁴¹ Ibid, 12-24.

¹⁴² Ibid.

force, which is the content of what is said; the semantic meaning of my words.¹⁴³ In this case, the utterance has the meaning “Set the table,” with ‘set’ referring to putting out the necessary tableware and ‘the table’ referring to the dining table in front of us. The second force is the illocutionary force, which is the act constituted by the utterance. It is what the speaker does when they say something; urge, whine, warn, demand, etc. When I say “Set the table,” the illocutionary force is that I ordered you to set the table.¹⁴⁴ There is also the perlocutionary force, which is the causal effect of the utterance on the hearer.¹⁴⁵ So, the perlocutionary force would be that you have been persuaded or convinced to set the table. This perlocutionary force is distinct from the explicit meaning of my words (locutionary force) and the act constituted by the utterance (illocutionary force).¹⁴⁶

Austin also makes the distinction between explicit and implicit illocution. In the case of setting the table if I was to say, “I’m ordering you to set the table,” the speech act performed would be explicit. I inform you of my illocutionary force by saying the word “ordering.” However, if I was to just say, “Set the table,” I would still be ordering you to set the table. However, this case is implicit illocution, as I do not explicitly state my illocutionary force.¹⁴⁷

The first condition on Austin’s view of performatives mentioned above is the notion that all performatives must have an accepted convention. Consider marriage, in which the utterance “I do” socially counts as marrying in the proper circumstances because of the accepted conventional procedure of marriage in the United States. Convention is then what allows the utterances of particular people in particular circumstances to constitute marrying. Austin is a force

¹⁴³ Ibid.

¹⁴⁴ Austin, J. L. (1962). Lecture II in *How to do things with words*. 12-24.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

conventionalist, meaning that he believes there must be a convention for an utterance to constitute action.¹⁴⁸

Furthermore, Austin comes to argue that whether an utterance is performative or constative is a matter of degree, and utterances are often not “purely” one or the other.¹⁴⁹ Furthermore, we should think of different types of speech acts not as strictly distinct categories, but as “more general families,” that may relate to and overlap each another.¹⁵⁰ He introduces five categories of speech acts: verdictives, exercitives, commissives, behabitives, and expositives. For the purposes of this paper, only verdictives and exercitives are of concern. Verdictives are speech acts that have the illocutionary force of rendering a verdict.¹⁵¹ Take the instance of a referee who calls a ball “out.” In uttering, “out” the referee not only changes the course of the game by determining who gets the ball but makes an authoritative judgement about an antecedent matter of fact, that the ball was out of bounds. The verdict is then making a decision about what happened in the past and fixing what happens going forward.

Exercitives are speech acts giving a decision that attempts to fix a certain course of action. Unlike verdictives, they don’t attempt to track what happened in the past. Exercitives often have the illocutionary force of granting or denying power, rights, or authority to people.¹⁵² Consider a judge who says, “The defendant is sentenced to life in prison,” during a sentencing hearing. The exercitive determines the course of action the legal system will take, but it does not purport to describe an antecedent fact about the defendant in the way the verdictive “We find the defendant guilty,” does.

¹⁴⁸ Green, M. (Winter 2017 Edition) "Speech Acts", *The Stanford Encyclopedia of Philosophy*.

¹⁴⁹ Austin, J. L. (1962). Lecture VIII in *How to do things with words*. 94-108.

¹⁵⁰ Ibid, 149.

¹⁵¹ Ibid, 147-163.

¹⁵² Ibid.

Verdictives and exercitives are both exercises of speaker authority. If a courtroom observer stood up and said the same thing as the foreman or the judge, their words would have the same locutionary force. Both statements would have the same semantic meaning. However, the bystander's statement would not have the same illocutionary force. The bystander merely makes an observation, whereas the jury foreman delivers a verdict, and the judge fixes a course of action. Their statements have the same locutionary force, but their authority gives them different illocutionary force. There is something about the authority of the foreman and the judge that allows for their speech act to count for more in these situations.

Some philosophers, including P. F. Strawson, think that although some illocutionary acts, especially ceremonial performatives, may follow conventional procedures, not all do.¹⁵³ Thus, Strawson argues that the illocutionary force of many speech-acts can be explained through a speaker's communicative intentions and the audience's recognition of that intention.¹⁵⁴ Consider an example of a child who really wants a certain toy. Upon seeing it at the mall, the child asks for it, but his mother says, "Your birthday is coming up soon, maybe you'll get it then." The mother intends for her child to recognize her intention to deny him the toy. The mother's utterance thus denies her child the toy not because she said "I deny you this toy" or "You cannot have it," but because the mother intends for the utterance to be a denial, intends for the child to recognize her utterance as a denial, and for the child to recognize her intention for the utterance to be a denial. If the child did not recognize his mother's intention because he did not hear or understand her, and asked again for the toy, he would not have understood his mother's denial. Whether his mother's utterance

¹⁵³ Strawson, P.F. (1964). "Intention and Convention in Speech Acts," *The Philosophical Review*, Vol. 73, No. 4., pp. 439-460.

¹⁵⁴ Ibid.

constitutes a denial or merely a failed attempt at one depends on how necessary one finds audience uptake, the hearer's understanding of the speaker's intentions, to be. The child could also recognize his mother's intention to for him to recognize her intention to deny him the toy and simply choose to ignore it and ask for the toy again. Unlike the instance of the child not recognizing his mother's intention, in the case of the child who ignores his mother's intention, the denial is successfully communicated to the child but ignored.

2. § Implicature

Speech act theory was not the only philosophical development in the analysis of ordinary usage of language. Philosopher of language Paul Grice argued that how we understand the meaning of a speaker's words is highly contextual, and often comes from what is implied rather than what is said.¹⁵⁵ One such way this occurs is through "conversational implicature." For example, if I were asked whether a potential blind date was smart, and got the response, "He's very attractive and athletic," what's being implied is that the person is not smart, but attractive and athletic. Underlying the Gricean analysis of conversation is the assumption that most speakers are abiding by the cooperative principle, that one should "make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."¹⁵⁶ The cooperative principle describes how most people participate in conversations.

Furthermore, there are four maxims that govern the rules of conversation: relation, quantity, quality, and manner.¹⁵⁷ The relation maxim exhorts what the speaker says be relevant.¹⁵⁸ If I asked if

¹⁵⁵ Grice, H.P. (1975). "Logic and Conversation," *Syntax and Semantics*, vol.3 edited by P. Cole and J. Morgan, Academic Press. 41-58.

¹⁵⁶ Ibid, 45.

¹⁵⁷ Ibid, 41-58.

¹⁵⁸ Ibid.

potential blind date is smart and receive the response, “He’s attractive and athletic,” in order for the speaker to be following the relevance maxim, “He’s not very smart” must be implicated. Consider another example, if I were to say, “Where is the bathroom?” and my interlocutor responded, “Apples can be green or red,” she would be ignoring the relevance maxim. The maxim of quantity assumes the speaker will make contributions as informative as is necessary; not more or less.¹⁵⁹ If I was to say, “Where is the bathroom?” and my interlocutor responded, “On Earth,” they would be disregarding the quantity maxim by providing me with inadequate information. The quality maxim is that the speaker will not say what they do not have adequate evidence to support.¹⁶⁰ If I was to say, “Where is the bathroom?” and my interlocutor responded, “To the left and down the hall,” but had never been there before and did not have any idea where the bathroom was, they would be breaking the quality maxim. Finally, the last maxim is manner, which states that the speaker should be clear in their utterances.¹⁶¹ This means they are not using obscure language or expressions; they are not being unnecessarily vague or protracted, or unorganized.¹⁶² If I asked where the bathroom was, and my instructor responded, “It’s, two hops down yonder, but there’s a peeler outside if you get lost,” they would not be abiding by the manner maxim because they would be using obscure language.

Conversational implicature thus occurs when a speaker utters “X,” the speaker is presumably following the rules of conversation (mainly abiding by the cooperative principle), Y must be implicated by X in order for the speaker to be following the rules of the conversation, and that the audience is able to figure that out.¹⁶³ Most interlocutors are abiding by the cooperative principle. The

¹⁵⁹ Grice, H.P. (1975). "Logic and Conversation," *Syntax and Semantics*, vol.3 edited by P. Cole and J. Morgan, Academic Press. 41-58.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

cooperative principle is the bare minimum of communicative cooperation, not necessarily abiding by all four maxims, although some audiences might assume that the speaker is guided by the four maxims. So, when I say, “Where is the bathroom?” and my interlocutor responds, “This is my first time in this building,” I assume they are not breaking the relevance maxim. Rather, I take my interlocutor to be implicating that they do not know where the bathroom is located. This is not to say that speakers who break the maxims are not abiding by the cooperative principle; speakers can be both cooperative and break a maxim. For example, a speaker may flout a maxim, meaning they blatantly break a maxim in an attempt to achieve a desired effect, which is usually sarcastic or ironic implicature. A sarcastic speaker might respond to the question of “Where is the bathroom?” with “Somewhere in the building,” flouting the quality maxim to mock their interlocutor.

3 § Distinguishing the Constitution and Causation of Harm

These tools from philosophy of language will guide the analysis of the case in the next chapter of this thesis. Before doing that, however, this section will make the distinction between causing and constituting harm. Consider two cases of a private religious school in which a gay student running for prom queen is harmed by her principal’s actions. In the first case, the principal is helping the student with her college admissions essay. In the essay, the student talks openly about her sexuality. While revising it with the student, the principle accidentally presses the intercom button, and says about the essay, “Sarah, I think there’s a spelling error in the paragraph where you talk about being gay.” As a result of this utterance, the whole school learns of the student’s sexuality. The vast majority of students happen to be homophobic, and as a result of being outed by her principal, the student loses the vote for prom queen. His utterance then provided the information that enabled the students to discriminate against the student, and thus *causes* harm. The illocutionary

force, the act constituted by the utterance, may not have been an act of discrimination, but an attempt at helping her with the paper. But the perlocutionary force, which is the causal effect of the utterance on the hearer, is that the students know the candidate is gay, and resulting from that knowledge, they don't elect her prom queen.¹⁶⁴ So although the overheard statement has the illocutionary force of an observation, it has the perlocutionary force of informing the students of the candidate's sexuality, and thus *causes discrimination*.

Now consider a case in which the principal's actions do not just cause discrimination, but actually constitute it. The principal calls the student into his office and says, "You cannot run for prom queen because you are gay." Like the last case, this statement *causes* the student to not be able to win, and thus *causes* harm. However, unlike the last case of the principal accidentally outing the student, the principal is banning the gay student from running for prom queen with this utterance. The principal's utterance is then an exercitive, as it exercises the principal's authority by giving a decision that attempts to set a certain course of action. The principal's utterance fixes a course of action in which the student will have unfair treatment on the basis of her sexuality, and thus enacts discriminatory norms. These discriminatory norms are not just the unfair treatment of the student on the basis of her sexuality. Just in his utterance that attempts to ban this student from running, the principal treats her worse because of her sexuality without proper justification by making discrimination on the basis of sexuality more normal, and thus, enacting discriminatory norms. It is not just the perlocutionary force of the principal's utterance that causes others to discriminate; the utterance itself constitutes discrimination. But perhaps the student decides to ignore the principal and run regardless. That does not mean she didn't face discrimination from the principle. Even his

¹⁶⁴ Austin, J. L. (1962). Lecture XII in *How to do things with words*.

ban is unsuccessful, his utterance is an exercitive that creates discriminatory norms, but does not produce the intended result. In sum, the principal's utterance is an exercitive that constitutes discrimination by creating discriminatory norms in which the student will have unfair treatment on the basis of her sexuality.

Philosopher Rae Langton provides one way to differentiate between an utterance that causes discrimination and one that constitutes it. In *Speech Acts and Unspeakable Acts*, Langton builds off legal scholar Catharine MacKinnon's claims that pornography constitutes, and not merely causes, the subjugation of women.¹⁶⁵ Langton defines subordination as that which unfairly ranks certain people as inferior, legitimates discriminatory behavior towards them, or deprives them of powers and rights. Langton argues that pornography that depicts women being violently, sexually degraded, is both a verdictive and exercitive speech act that constitutes subordination.¹⁶⁶ Such pornography is verdictive, as it unfairly ranks women as submissive sex objects, and exercitive, by fixing a course of action by conditioning its consumers to sexualize violence against women.¹⁶⁷ Thus, by Langton's view, pornography speech constitutes subordination by unfairly ranking women as submissive sex objects and thus inferior, and by legitimating discriminatory behavior towards them by conditioning men to sexualize violence against women.

You might think this is just causal and not constitutive because viewers are being casually effected. However, one might think that a viewer may not choose to believe the actions depicted are acceptable, and thus, pornography merely causes the sexualization of violence against women among some viewers. However, pornography has a unique purpose in that it is "masturbation material,"

¹⁶⁵ Langton, R. (1993). *Speech Acts and Unspeakable Acts*. *Philosophy & Public Affairs*, Vol. 22, No. 4 pp. 293-330.

¹⁶⁶ *Ibid*, 303-308.

¹⁶⁷ *Ibid*, 312.

whose purpose is sexual gratification, and the content of pornography conditions what its viewers find sexually attractive.¹⁶⁸ The content, in virtue of being pornography, not only depicts the sexual degradation of women, but conditions the viewer to find pleasure in watching such degradation.¹⁶⁹ Thus, unlike a documentary or news story about pornography, pornography depicts the sexual degradation of woman for the purpose of the sexual gratification of the viewer.¹⁷⁰ However, this does not mean pornography is only that which is made with the intention to be pornography. The purpose does not have to be intended by the creator of the content when making the material; memoirs describing the violence, rape, and torture of performers in the adult industry have been marketed as pornography.¹⁷¹ In those cases, the author's intent was to produce disgust rather than sexual gratification, but by advertising such content next to adult erotic novels, it is marketed for the purposes of sexual gratification and therefore, in this context and for this audience, it is used as and thus becomes pornography.¹⁷² What makes such stories pornography is then not the speaker's intention, but that the stories are used for the purposes of pornography and produce the same effects of conditioning the viewer to find pleasure in the sexual degradation of women.

Using Langton's reasoning, I argue that such an argument can be applied to speech that constitutes discrimination. Speech that endorses the permissibility of discrimination is, itself, discriminatory. In the next chapter, I will argue that harassing speech is harmful in and of itself. It is not speech that advocates or proposes discrimination, it is speech that actually discriminates. By

¹⁶⁸ Langton, R. (1993). pp. 293-330.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid, 321. Langton uses the example of Linda Marchiano's autobiography *Ordeal*, where she recalls being beaten, raped, and tortured to perform as Linda Lovelace in *Deep Throat*, and which later appeared in a mail-order catalog advertising adult reading between titles "Forbidden Sexual Fantasies" and "Orgy: an Erotic Experience."

¹⁷² Ibid, 321.

creating a work environment hostile to women because of their gender, the harassing speech prevents equal access to the workplace and discriminates against women. Thus, for utterances that are hostile work environment sexual harassment, discrimination is not a consequence of the speech, rather, the speech is an act of discrimination. To do this, I will analyze the case presented at the beginning of this thesis to argue that because this harassing speech is different, it should not be afforded free speech protections.

Chapter 6: Original Case Analysis

The introduction of this thesis began by describing a conversation between Kevin, Susan, and Will, three co-workers at a corporate office of a large technology company. Recall that the three of them share a large office, where each individual has a desk, and that the three are all equals in the office; no one person has authority than another, and they all report to the same supervisor. After performance reviews are emailed back, this conversation occurs:

Kevin: Did you guys get your performance reviews back?.

Will: Yep. I didn't do so well.

Susan: I actually did fairly well.

Kevin: Me too, I did better than I expected.

Will: Well, not all of us have a chest like Susan's or legs like Kevin's

Kevin and Will laugh at this, but Susan doesn't find this to be all that funny. She actually finds Will's joke, and Kevin's reaction, to be really upsetting. She hopes Will doesn't actually think she got a good performance review because of her body, but even if he was 'just joking,' she feels uncomfortable. She didn't think she worked in a place where that kind of joke was 'okay.' This may seem like a "harmless" joke, but in this chapter, I will prove that Will's utterance constitutes discrimination on the basis of sex.

1§ Speech Act Analysis

This section will explain the implicature and linguistic forces of Will's utterance. Conversational implicature occurs when a speaker utters "X," the speaker is presumably following the rules of conversation, Y must be implicated by X in order for the speaker to be following the rules of the conversation, and that the audience is able to figure out that Y must be implicated by X in order for

the speaker to be following the rules of the conversation.¹⁷³ In this case, Will is following the rules of the conversation and utters “Well unfortunately, not all of us have a chest like Susan’s or legs like Kevin’s.” In order for Will to be following the rules of the conversation, his utterance must be relevant to what was just said by Susan and Kevin. Susan and Kevin said that they did well on their performance reviews. Thus, Will’s utterance “Well not all of us have a chest like Susan’s or legs like Kevin’s,” must be relevant to the conversation about how well Kevin and Susan did on their performance reviews and how badly Will did on his. Will’s utterance thus implies that having a chest like Susan’s or legs like Kevin’s is relevant to their performance reviews, the utterance implies that the Susan and Kevin did well on their performance reviews **because of** these specific body parts. Furthermore, Will and Kevin find the ‘leg’s like Kevin’ part of the utterance to be funny because it flouts the relevance maxim. In flouting the relevance maxim, the resulting implicature (that Kevin’s legs might be relevant to the performance review) is absurd and thus humorous to them. Susan and Kevin are able to figure this out, and thus, this is what Will’s utterance implies. This diminishes Susan’s work towards her performance review by reducing her accomplishments to her body, but it does not do the same to Kevin because that part of the utterance flouts the relevance maxim in an attempt to be funny.

Even so, it looks as if this analysis might unfairly assume that Will is not flouting the relevance maxim when he talks about Susan’s chest. If he is flouting the relevance maxim when talking about Kevin, it seems like he could be doing the same thing when he talks about Susan. This counterargument, however, ignores the context in which Will is making his joke. The workplace, especially within a male-dominated fields like tech, does not have a history of being welcoming to

¹⁷³ Grice, H.P. (1975). "Logic and Conversation."

women or taking their accomplishments seriously. Thus, commenting on a woman's body and suggesting that it is the reason she has done well in the workplace has a historical precedent, and reinforces existing harmful norms.

2§ Context of Women in the Workforce

To understand the historical precedent and social context in which Will's comment was made, this thesis will rely on legal scholar Catharine MacKinnon's analysis of women in the workplace. As discussed at the end of Chapter 3, MacKinnon argues that there are societal and systemic inequalities for women in the workforce, and such inequalities are reinforced and perpetuated by sexual harassment. Such inequalities include but are not limited to horizontal segregation (the statistical domination of a gender within certain gendered professions), vertical stratification (gendered status differentials within these professions), income inequality, and sex-defined work (professions in which one's sex is considered essential to the position).¹⁷⁴ Although MacKinnon's work was published in 1979, recent studies indicate that these issues persist.¹⁷⁵

According to MacKinnon's argument, these inequalities stem from a social context that defines womanhood through women's sexualized bodies and compliance with male sexual advances, as evidenced by the tradition of women exchanging of sex for survival, through marriage or sex work, which ensured that women were sexually available to men and economically dependent on them.¹⁷⁶ Thus, women in the workplace exist within a larger historical and social context that values their bodies for sex, and it does not do so for men.

¹⁷⁴ MacKinnon, C. (1979). *Sexual Harassment of Working Women: A Case of Sex Discrimination*. 9-23.

¹⁷⁵ Charles, M. (2003). Deciphering Sex Segregation: Vertical and Horizontal Inequalities in Ten National Labor Markets. *Acta Sociologica*, 46(4), 267–287. <https://doi.org/10.1177/0001699303464001>

¹⁷⁶ Ibid.

When Will makes his utterance, he may not know about any of this history. Will may not have any idea of the historical context in which he makes his utterance. He is certainly not responsible or at fault for this history of women being subjugated and sexualized in the workplace. But that is not to say that Will cannot reinforce the norms created by these histories and perpetuate them through his own utterances. Discrimination need not be intentional, as shown in the chapter 1, and the same goes for speech that constitutes discrimination. Consider again the case memoirs describing the violence, rape, and torture of performers in the adult industry have been marketed as pornography.¹⁷⁷ In those cases, the author's intent was to produce disgust rather than sexual gratification, but the audience took it to be pornography, so it was used as and thus became pornography.¹⁷⁸ Will's intention in making his utterance need not be to imply something sexist, make sexist jokes permissible in the workplace, or make Susan uncomfortable. But if the audience takes it to do these things, and it functions as doing those things, then has the effect of actually doing those things.

3 § Will's Utterance Revisited

In order to prove that Will's utterance constitutes discrimination, I have to prove that this utterance treats Susan unfairly on the basis of her membership in a legally protected social group resulting in a legally recognized harm. First, consider how the utterance might constitute unfair treatment. The same thing is being said to both Kevin and Susan. They are both in the room when Will speaks, they are equals in authority at the accounting firm, and they both hear the utterance. On one level, the utterance implies the same thing about both of them: that they did well on their performance reviews because of their specific bodily traits.

¹⁷⁷ Langton, R. (1993). Speech Acts and Unspeakable Acts. 321.

¹⁷⁸ Ibid.

However, looking a bit closer, what is being implied about Susan is quite different than what is being implied about Kevin. Will's utterance implies that Susan got a good performance review because of her chest. It also implies that Kevin did well because of his legs. However, this implicature is meant to be funny and absurd because Kevin is a man, and within the historical and societal context of the workforce, it is women, and not men, whose bodies have been sexualized and exchanged for economic good.¹⁷⁹ Thus, Will's utterance really implies that Susan got a good performance review because of her breasts, which is a physical characteristic most commonly associated with women, and that it is absurd and thus funny to think that Kevin got his good performance review because of his legs because he is a man, and men's bodies are not sexualized or exchanged for workplace survival. Even though Will's utterance is 'just a joke,' its implicature communicates that men exchanging their bodies for economic good is funny, but such behavior is expected and normal for women. Thus, Will's utterance treats Susan unfairly on the basis of her sex.

One might argue that because Will may not have intended to communicate the message that men exchanging their bodies for economic good is funny, but such behavior is expected and normal for women. However, intention is not required for every act of communication. I may pretend to be very wealthy, intending for my audience to think I have a great deal of money. I may also be very bad at pretending to be wealthy, and the message communicated to my audience is that I am pretending to be wealthy. In such a case, I failed to communicate my intended message, that I am wealthy, to the audience, but I succeeded in communicating to them that I am pretending to be wealthy. What the speaker intends for the audience to recognize need not match what the audience actually recognizes.

¹⁷⁹ MacKinnon, C. (1979). *Sexual Harassment of Working Women: A Case of Sex Discrimination*. 174-178.

Furthermore, in order for Will's utterance to constitute discrimination, it must result in some legally recognized harm. Susan feeling vaguely uncomfortable by Will's utterance is not sufficient. As established in *Meritor Sav. Bank, FSB v. Vinson* (1986), unequal access to the workplace on the basis of sex is a sufficient legally recognized harm.¹⁸⁰ The victim need not prove physical or psychological injury caused by the hostility of the environment.¹⁸¹ Thus, to prove that Will's utterance is discriminatory exercitive, I must prove that the joke made the workplace less accessible to Susan because of her sex. To do so, I will examine how Will's joke functions as an exercitive, how such an exercitive makes such jokes permissible, and how the permissibility of those jokes makes Susan less accessible to the workplace because of her gender.

Will's joke was successful as Susan and Kevin understood his implicature and Kevin laughed. Thus, Will effectively communicated that men exchanging their bodies for economic good is funny, but such behavior is expected and normal for women. In communicating such a message, Will did not just communicate the literal content of his words. He also communicated that such an utterance, and what it implies, is permissible within the workplace. Furthermore, he was successful in doing this. Kevin laughed, and nothing else was said on the matter. The joke is, in fact, permissible in workplace, and Will helped make that so.

The utterance thus has the exercitive force of fixing a workplace culture in which such jokes are permissible. However, exercitives are exercises in speaker authority, and it seems unclear if Will has the authority to fix the rules of what jokes are permissible in the workplace.¹⁸² Consider a different conversation between a mother, a father, and their child. The mother and father curse

¹⁸⁰ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

¹⁸¹ *Harris v Forklift Systems, Inc.* (1993).

¹⁸² Austin, J. L. (1962). Lecture VIII.

around each other, but never in front of their child. One day, the child curses front of her parents, and the mother and father scold her for doing so, saying, “If you use swear words again, you’ll have to put a dollar in the swear jar.” In doing this, they are fixing the rules of what words are acceptable in conversation between them. This is an exercise of their speaker authority, which they clearly have over a child. Now consider the parents conversing with other parents at a dinner party. A guest begins to talk about politics. The other parents did not know this was a permissible topic of conversation, as some people choose to keep these matters private. By candidly discussing politics, the guest has changed the rules of the conversation by inserting politics into the domain of conversation. The other parents, or perhaps the host of the party, could stop her, and ask her not to talk about this topic, and thus change the rules of the conversation.¹⁸³ However, if they do not, the rules of the conversation were changed, and the speaker had no more authority than the other parents.¹⁸⁴ Thus, it seems that the speaker does not need authority over her audience to effect/change what utterances are permissible.¹⁸⁵ Rather, if her audience does not object, she has the requisite authority to dictate the rules of conversation. This is the same for Will. He does not need to have been explicitly vested with the authority to dictate the rules of the conversation. But if the audience takes him to do have such authority, and the utterance functions as if he has that authority, then his utterance has the effect of him having such authority.

Although Susan might not think the implicature of Will’s statement is permissible, Will still communicates the harmful notion that men exchanging their bodies for economic good is funny, but such behavior is expected and normal for women. His utterance is not taken to be an attempt at

¹⁸³ McGowan, Mary Kate (2004). Conversational exercitives: Something else we do with our words. *Linguistics and Philosophy* 27 (1):93-111.

¹⁸⁴ Ibid; 93-111.

¹⁸⁵ Ibid; 93-111.

educating his coworkers on sex inequities in workplace culture, but a joke, and one that Kevin finds funny. That it is taken as a joke and taken to be an acceptable one in that it goes unchallenged, such jokes become acceptable. Consider Langton's analogous view on pornography: when depictions of violence against women are taken to be pornography, and used for sexual gratification, they become pornography.¹⁸⁶ When a workplace joke is taken to be permissible, and goes unchallenged, such jokes become permissible. In the case of the corporate office, such jokes have become permissible in the workplace because Will's joke is successful.

That such jokes are permissible in the workplace is unfair to Susan, and it is unfair because she is a woman, a legally recognized social group. Consider Susan and Kevin's differing reactions to the joke. Kevin laughed and moved on. Susan felt uncomfortable, and she felt that way because of what Will said and because of her status as a woman. The implicature of Will's joke, that men exchanging their bodies for economic good is funny, but such behavior is expected and normal for women, treats women worse than men by reinforcing harmful norms regarding the sexuality of women in the workplace. Will's utterance therefore creates a work environment in which one can reinforce harmful ideas about women in the workplace, but one could never do the same for men in the workplace, because as a social group, men have dominance within the workplace. The workplace is one where women, and thus Sarah, face harmful norms about their sexuality that men do not. This gives her unequal access to the workplace when compared to her male peers, as she has to either put up with the harmful norms or try to change them. Kevin and Will do not, and thus, the workplace is more accessible to them.

¹⁸⁶ Langton, R. (2013). Pornography's Authority? Response to Leslie Green. In *Sexual Solipsism: Philosophical Essays on Pornography and Objectification* (pp. 89-102). Oxford: Oxford Univ. Press.

By communicating the permissibility of this notion, Will is communicating that jokes that treating men and women differently because of their differently sexualized bodies are acceptable, and thus, enacts norms regarding the permissibility of such jokes. After Will's joke, the work environment is now one where such jokes are allowed, making the workplace less accessible to Susan because of her womanhood. Thus, Will's utterance constitutes discrimination as an exercise that makes jokes of treating men and women differently because of their differently sexualized bodies permissible, which prevents Susan from having equal access to the workplace because of her status as a woman. Speech that creates unequal access to the workplace, like Will's utterance, is, itself, discriminatory.

5 § Final Response to Volokh

Now that this thesis has established the distinction between harm-causing speech and harm-constituting speech, I can respond to Volokh's free speech concerns with harassment law. Volokh disagrees with the notion that harassing speech is harmful speech and thus should not be protected by the First Amendment.¹⁸⁷ Boycotts, which the court found to be protected political speech in *N. A. A. C. P. v. Claiborne Hardware Co* (1982), have tangible harm and millions of dollars in damages.¹⁸⁸ Furthermore, malicious parodies, true but cruel or unfair statements, and abstract teaching of violence or lawlessness are all protected speech with potentially great harms.¹⁸⁹

However, Volokh does not think speech that is discrimination is protected under free speech. For example, if an employer were to say, "We will not hire black people," Volokh would

¹⁸⁷ Volokh, E. (1996). Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment. 313-315.

¹⁸⁸ *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982)

¹⁸⁹ Volokh, E. (1996). Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment. 314.

cede that such an utterance is not protected under the first amendment. I have argued that Will's utterance constitutes discrimination because it enacts norms regarding the permissibility of sexist jokes within the workplace. If I have done this successfully, then Volokh's free speech concern is irrelevant to this utterance, because it constitutes discrimination. Speech that prevents Susan from having equal access to the workplace, like Will's utterance, is discrimination, and thus should not be covered by the first amendment. By making a workplace less accessible to women because of their womanhood, the speech prevents equal access to the workplace, and is a harm, not just harm-causing. It is not merely the perlocutionary force of the utterances that cause discrimination, but that the utterance itself enacts the permissibility of sexist jokes and prevents equal access to the workplace. Thus, for utterances that are hostile work environment sexual harassment, discrimination is not a consequence of the speech, rather, the speech is an act of discrimination.

Conclusion

In this thesis, I have investigated Catharine MacKinnon's claim that sexual harassment is sex-based discrimination by explaining hostile work environment sexual harassment using philosophy of language. In the first chapter, I explained and defined discrimination as the unjustified and disadvantageous treatment based on one's social group membership that constitutes a legally recognized harm and does not require intention. The second chapter explained discrimination on the basis of sex and analyzed Catharine MacKinnon's legal argument that sexual harassment is sex-based discrimination, using *Meritor Sav. Bank, FSB v. Vinson (1986)*. The third chapter looked at three cases of this kind of harassment, explaining how each was an instance of sex-based discrimination. The fourth chapter outlined what free speech is, what it does, what we need to justify the regulation of speech, and presented some free speech concerns regarding claims of hostile work environment sexual harassment. The fifth chapter explains some relevant elements of philosophy of language, namely speech act theory, implicature, and the distinction between utterances that cause and constitute harm. Such tools proved useful in chapter six, where I provide an analysis of a case of hostile work environment sexual harassment, ultimately arguing that Will's utterance constitutes, rather than simply causes, sex-based discrimination, and using that distinction to respond to free-speech concerns.

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