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## HOOTING: PUBLIC AND POPULAR DISCOURSE ABOUT SEX DISCRIMINATION†

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Kenneth L. Schneyer\*

*In this Article, Professor Schneyer focuses on the debate surrounding the Hooters restaurant chain. He argues that the debate surrounding Hooters inevitably addresses the nature and importance of gender and sexuality in culture and business. Professor Schneyer uses the lens of constitutive rhetoric to analyze several texts created by both sides during this debate. He concludes that varying participants in the debate use rhetoric for different purposes. Some, like commentator Laura Archer Pulfer, use rhetoric that encourages growth and critical analysis, while others, like Hooters itself, use rhetoric to encourage unquestioning belief. Overall, Professor Schneyer observes that Hooters's supporters use their rhetoric to proffer the view that the intellectual and political elites are at war with "common sense" and the ordinary American. In a debate this complex, however, rhetoric of this sort is not helpful in resolving the underlying issue of the propriety of sexual entertainment in a society that condemns sex discrimination. To address this issue, Professor Schneyer argues that we need a nuanced debate that encourages critical and independent analysis of the complexities involved, not a debate hemmed in by simplistic metaphors and thought-stifling rhetoric.*

In recent years there have been a surprising number of legal attacks on the restaurant chain named Hooters. These attacks have all been based, one way or another, on claims of sex discrimination in employment. Yet the attacks vary considerably: some are based on claims of sexual harassment, some on claims by private individuals that they have been discriminated against in hiring because they are male, still others on general claims that the chain is engaged in systemic sex discrimination. Many of these claims are concerned with the

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troubling boundaries of the bona fide occupational qualification, that uncomfortable defense to claims of overt discrimination. That a single business enterprise should be the target of so many different kinds of sex discrimination claims is curious.

These claims have inspired a broad, loud, public debate. Spurred by the public relations efforts of the Hooters chain itself, hundreds of editorials have been written; legal scholars have ventured their opinions; and ordinary people can discuss the topic reasonably well. This dissonant chorus of voices is struggling to create a public consciousness about the Hooters controversies, a consciousness that cannot avoid addressing the nature and importance of gender and sexuality in culture and business. It is trying to reconstitute the world.

In this Article, I use the tools of constitutive rhetoric to examine the texts created by several different kinds of voices speaking about this subject. My aim is to assess and criticize the kind of worlds being remade by these texts. In Part I, I review the relevant principles of sex discrimination law as they apply to employment. In Part II, I explain and justify the tools of constitutive rhetoric. In Part III, I recount the history of the Hooters restaurant chain and its legal difficulties involving sex discrimination. In Part IV, I speculate about some theoretical commonalities between the different types of sex discrimination claims against Hooters, necessarily discussing some rudimentary notions of feminist legal theory. In Part V, I analyze some public statements made by the parties, or the central combatants, involved in these controversies; specifically, I examine a press kit distributed by Hooters, a press release published by the Equal Opportunity Employment Commission, and an advertisement published by Hooters. In Part VI, I examine the public texts created by two lawyers who debated in print on the subject in a lawyers' trade journal. In Part VII, I move to a discussion of texts created by non-lawyers, specifically a widely-read newspaper editorial and a nationally broadcast radio commentary. Part VIII is a conclusion.

## I. BACKGROUND: SEX DISCRIMINATION IN EMPLOYMENT

As everyone knows, employers are generally forbidden to discriminate among their employees based on sex. Sex discrimination is specifically prohibited by Title VII of the Civil

Rights Act of 1964, which applies to discrimination in hiring as well as discrimination among employees already hired.<sup>1</sup> Sex is one of five forbidden categories of discrimination specifically named by Title VII;<sup>2</sup> additional specific categories of discrimination in employment are forbidden by other statutes.<sup>3</sup>

It is of both historical and legal interest that the sex discrimination provision was added rather belatedly to Title VII when the Act was adopted in 1964; consequently, there is very little in the way of legislative history describing precisely what Congress had in mind by adopting that specific provision or what sort of interpretations it would have preferred.<sup>4</sup> Historically, sex discrimination in employment has remained socially acceptable to a much later date, and in more ways, than has race or religious discrimination.<sup>5</sup> Further, while particular varieties of race, religious, and national origin discrimination in employment can frequently be traced to specific historical moments, such as the competition for jobs between a new wave of immigrants into the United States and those already

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1. See 42 U.S.C. § 2000e-2(a)(1) (1994). Title VII generally applies only to employers who employ more than fifteen employees. See *id.* § 2000e(b).

2. The other four are race, color, religion, and national origin. See *id.* § 2000e-2(a)(1).

3. For example, discrimination based on disability is forbidden by the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (1994); discrimination based on age is forbidden by the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (1994). Various state statutes forbid an even broader range of types of discrimination. The Massachusetts statute, for example, forbids employment discrimination based on “race, color, religious creed, national origin, sex, sexual orientation, . . . or ancestry,” MASS. ANN. LAWS ch. 151B, § 4(1) (Law. Co-op. Supp. 1997); age, see *id.* § 4(1B); arrest without conviction, first conviction of minor offenses, stale misdemeanor convictions, see *id.* § 4(9); failure to report previous admission to mental health care facilities, see *id.* § 4(9A); or handicap, see *id.* § 4(16). Rhode Island, among others, forbids employment discrimination based on the results of genetic testing. See, R.I. GEN. LAWS § 28-6.7-1 (1995).

4. See Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163, 168–69 (1997). But see Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997).

5. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750 (1990); Vicki Schultz & Stephen Patterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992) (concluding that the courts have required more of sex discrimination plaintiffs than of race discrimination plaintiffs); Paula J. Finlay, Note, *Prying Open the Clubhouse Door: Defining the “Distinctly Private” Club After New York State Club Association v. City of New York*, 68 WASH. U. L.Q. 371, 373–74 (1990).

present,<sup>6</sup> sex discrimination appears to pervade Western culture from its earliest known antecedents.<sup>7</sup>

Judicial decisions under Title VII have distinguished between two distinct varieties of illegal discrimination, called "disparate treatment" and "disparate impact." Disparate treatment sex discrimination is an overt difference in the way men and women are dealt with as employees or applicants. For example, refusing to hire women as executives would be a type of disparate treatment sex discrimination.<sup>8</sup> Disparate impact sex discrimination, on the other hand, involves facially neutral tests, standards, or rules that have the effect of making it more difficult for one sex to obtain employment or promotion, or to work within the employment environment.<sup>9</sup> For example, a height requirement, while not overtly or explicitly treating the sexes differently, will have the effect of making it more difficult for one sex to obtain employment because the two sexes tend to have a general height difference. So far as I can determine, all claims of discrimination against Hooters have been based on disparate treatment rather than disparate impact sex discrimination. Consequently, the remainder of this discussion will focus on disparate treatment.

In addition to the relatively simple type of discrimination in which one sex is preferred over another, a second variety of disparate treatment has been identified, sometimes called "sex-plus" discrimination. In sex-plus discrimination, different standards of conduct are required of female employees than of male employees—or, to put it differently, the employer discriminates not against one sex as a whole, but against a subgroup within that sex.<sup>10</sup> Consider, for example, a female employee who

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6. See, e.g., Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin*, 1 MICH J. RACE & L. 347, 362–71 (1996) (analyzing the racism that developed following Chinese immigration to the U.S.); Kenzo S. Kawanabe, Note, *American Anti-Immigrant Rhetoric Against Asian Pacific Immigrants: The Present Repeats the Past*, 10 GEO. IMMIGR. L.J. 681 (1996).

7. See ELIZABETH FISHER, *WOMAN'S CREATION: SEXUAL EVOLUTION AND THE SHAPING OF SOCIETY* (1979) (analyzing the socio-historic roots and perpetuation of man's subjugation of woman). Some archeological evidence suggests that patriarchal or male-dominant sex discrimination may not have existed prior to the advent of animal husbandry. See *id.* at 187–89.

8. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Supreme Court emphasized the distinction between the two types of discrimination in *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197–98 (1991).

9. The statute has explicitly recognized disparate impact discrimination since 1991. See 42 U.S.C. § 2000e-2(k) (1994).

10. Still another way of putting it is to say that "sex-plus" discrimination involves discriminating against an employee based on her sex *plus* an additional

is fired or denied a promotion because her behavior is "insufficiently feminine." Strictly speaking, she has not received a lower preference or priority because of her sex, but she has been required to engage in a different class of performance because of it—presumably no man would be fired for being insufficiently feminine.<sup>11</sup> This constitutes illegal disparate treatment discrimination.<sup>12</sup>

For purposes of this Article, it is also useful to focus on sexual harassment, a form of behavior which has been recognized as a form of disparate treatment sex discrimination violating Title VII.<sup>13</sup> Generally speaking, the courts recognize two separate forms of sexual harassment. The first, called "quid pro quo" sexual harassment, consists of offering employment benefits or opportunities (or threatening employment sanctions or impediments) in exchange for sexual favors.<sup>14</sup> The second, called "hostile environment" sexual harassment, involves the

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characteristic. See generally Wendi Barish, Comment, "Sex Plus" Discrimination: A Discussion of *Fisher v. Vassar College*, 13 HOFSTRA LAB. L.J. 239 (1995).

11. There may be individual cases in which this presumption does not hold. That is, one could imagine employment settings in which behavior culturally recognized as "feminine" (e.g., empathy or nurturing) is expected of both males and females. Such a hypothetical situation might stand on different footing.

12. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

13. See 29 C.F.R. § 1604.11 (1996). It is worth noting that harassment based on race, color, religion, or national origin would also violate Title VII, although such forms of harassment are infrequently discussed in the cases or the literature nowadays. The Supreme Court compared sexual and racial harassment in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66–67 (1986). See Peter E. Millspaugh, *When Self-Organization Includes Racial Harassment: Must the NLRA Yield to Title VII?*, 2 GEO. MASON U. CIV. RTS. L.J. 1, 6–9 (1991). Catharine A. MacKinnon is generally credited with the first theoretical explication of the concept of sexual harassment. See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

14. See Rhee, *supra* note 4, at 169–71. It will be recognized that quid pro quo sexual harassment fits into the category of "sex-plus" discrimination. See *supra* note 10 and accompanying text. That is, the harassed employee is being asked to adhere to a different standard of conduct (engaging in some sexual contact with a supervisor, for example) than would be required of her if she were of the other sex. This would apply to quid pro quo harassment of male employees as well as female, and may hold true even if the harassing individual were of the same sex as the harassed employee. See *Oncale v. Sundowner Offshore Servs., Inc.*, 119 S. Ct. 998 (1998) (holding that same-sex sexual harassment is actionable under Title VII); Christopher W. Deering, Comment, *Same-Gender Sexual Harassment: A Need to Re-Examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because of" Sex*, 27 CUMB. L. REV. 231 (1996); Kara L. Gross, Note, *Toward Gender Equality and Understanding: Recognizing that Same-Sex Sexual Harassment Is Sex Discrimination*, 62 BROOK. L. REV. 1165 (1996); Trish K. Murphy, Note & Comment, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 WASH. L. REV. 1125 (1995); Regina L. Stone-Harris, Comment, *Same-Sex Harassment—The Next Step in the Evolution of Sexual Harassment Law Under Title VII*, 28 ST. MARY'S L.J. 269 (1996).

creation of a work environment that is made hostile, offensive, or intimidating for the particular employee because of her sex.<sup>15</sup> Normally the environment must be so altered as to affect a term, condition, or privilege of employment, although no specific damage or injury to the employee need be shown.<sup>16</sup> In all cases the harassment must be unwelcome, and its severity (that is, whether it actually does affect a term, condition, or privilege of employment) is assessed from the perspective of the reasonable victim, or as has been sometimes said, the "reasonable woman."<sup>17</sup>

Employers are liable for acts of sexual harassment committed by supervisory personnel against subordinates, and also for such acts committed by persons acting in an agency capacity for the employer.<sup>18</sup> Employers may be held liable for acts of sexual harassment committed against employees by fellow employees, or even by nonemployees, in situations where the employer had reason to know of the harassment and failed to take corrective action.<sup>19</sup> For example, if an employer learns that one of its employees is being repeatedly harassed by a particular customer, and the employer then fails to attempt to prevent further acts of harassment by the customer, the employer may be held liable for subsequent acts of harassment by

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15. See *Meritor*, 477 U.S. at 65; 29 C.F.R. § 1604.11(a)(3) (1996). Drucilla Cornell has suggested an alternative definition of sexual harassment:

My definition of sexual harassment reads as follows: sexual harassment consists of a) unilaterally imposed sexual requirements in the context of unequal power, or b) the creation and perpetuation of a work environment which enforces sexual shame by reducing individuals to projected stereotypes or objectified fantasies of their "sex" so as to undermine the primary good of their self-respect, or c) employment-related retaliation against a subordinate employee or, in the case of a university, a student, for a consensually mutually desired sexual relationship.

DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY & SEXUAL HARASSMENT* 170 (1995).

16. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

17. See *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991). For a lengthy recitation of different court pronouncements on this standard, see *Torres v. Pisano*, 116 F.3d 625, 632 n.6 (2d Cir. 1997). This particular term may be misleading, though, since in principle it is possible for a male to be the victim of sexual harassment. Nevertheless, I like the term: it represents an ironic reversal of the traditional "reasonable man" standard, which has sometimes been thought to exclude women from the category of reasonable persons. See Naomi R. Cahn, *The Looseness of Legal Language: the Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769.

18. See 29 C.F.R. § 1604.11(c) (1996).

19. See *id.* § 1604.11(d)-(e).

that customer. Of course, the degree to which the employer is actually able to exercise control over what is done by a nonemployee will be taken into account in determining liability.<sup>20</sup>

One well-established defense, and one theoretical possibility of a defense, should be considered in light of the Hooters controversies. First is the classic statutory defense to disparate treatment claims, the bona fide occupational qualification, or BFOQ. Title VII provides that an employer will not be held liable for discrimination when sex, religion, or national origin is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."<sup>21</sup> For example, an employer may legally refuse to hire women as attendants for a men's washroom. The boundaries of the BFOQ defense have gradually evolved since the enactment of Title VII, and still are not entirely fixed. Courts consistently acknowledge BFOQs when issues of sexual privacy are involved, as in the washroom example above.<sup>22</sup> Similarly, where the hiring of one sex is needed for reasons of authenticity or genuineness, as in the case of an actor, a BFOQ exists.<sup>23</sup> On the other hand, discrimination based on presumed qualities of, or stereotypes about, the sexes does not present a BFOQ.<sup>24</sup> For example, an employer may not refuse to hire female sales personnel on the grounds that women don't sell as well as men do. Nor may an employer claim a BFOQ simply because of the prejudiced preferences of co-workers or customers.<sup>25</sup>

The case of *UAW v. Johnson Controls, Inc.*<sup>26</sup> held that a BFOQ can exist only when the particular characteristic (e.g., sex) is actually necessary in order to enable the worker to perform her job.<sup>27</sup> In that lawsuit, women of childbearing age had been denied certain employment opportunities because of fear that lead in the workplace environment might be harmful to any fetuses those women might conceive. The Supreme Court held that an employer cannot base a BFOQ on such health concerns of the employee or the employee's family—the employer's only proper inquiry is to the employee's ability to do

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20. See *id.* § 1604.11(e).

21. 42 U.S.C. § 2000e-2(e) (1994).

22. See, e.g., *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 134 (3d Cir. 1996).

23. See 29 C.F.R. § 1604.2(a)(2) (1994).

24. See *id.* § 1604.2(a)(1).

25. See *id.* § 1604.2(a)(1)(iii).

26. 499 U.S. 187 (1991).

27. See *id.* at 206.



the work required of her.<sup>28</sup> On the other hand, the definition of exactly what constitutes the "ability to perform the job" is less clear than it might be. There have been cases involving female guards in men's prisons, where courts have held that a BFOQ exists because the reaction of the male prisoners to the female guards would make the guards' ability to perform their work materially more difficult, and would impair the functioning of the prison.<sup>29</sup>

As to the question of whether the sex-appeal of a worker qualifies as a BFOQ, the decisions are not entirely clear. I have been able to locate only two decisions that appear to actually have said, in dicta, that the employer was justified in discriminating based on sex because the job involved being sexually attractive to men. These were 1971 companion decisions of the New York Human Rights Appeal Board (an institution that was abolished not long afterwards) involving the Playboy Club.<sup>30</sup> These cases have been cited for that proposition, but the purpose of the citation has been to distinguish the case *sub judice* from the Playboy cases.<sup>31</sup> To complicate matters, three years later the appellate division upheld another decision of the appeal board, holding that sex was *not* a BFOQ for a restaurant that wished to attire female waitresses "in alluring costumes" in order to "enhance petitioner's food sales volume."<sup>32</sup>

Further, in *Wilson v. Southwest Airlines Co.*<sup>33</sup> the court rejected the similar claim that sex appeal, and therefore sex, can be a BFOQ for a flight attendant or ticket agent hired by a

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28. See *id.* For a more detailed discussion of *Johnson Controls*, including an analysis of its constitutive rhetoric, see Kenneth L. Schneyer, *Talking About Judges, Talking About Women: Constitutive Rhetoric in the Johnson Controls Case*, 31 AM. BUS. L.J. 117 (1993).

29. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (holding that being male is a BFOQ for the job of correctional counselor in a "contact" position in an Alabama male maximum security penitentiary).

30. See *St. Cross v. Playboy Club*, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Hum. Rts. App. Bd. 1971); *Weber v. Playboy Club*, Appeal No. 774, Case No. CFS 22619-70 (N.Y. Hum. Rts. App. Bd. 1971).

31. See, e.g., *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) (holding that being female is not a BFOQ for airline flight attendants and ticket agents).

32. *Guardian Capital Corp. v. New York State Div. of Human Rights*, 360 N.Y.S.2d 937, 938 (App. Div. 1974), *appeal dismissed*, 330 N.E.2d 658 (1975). One concurring justice, however, questioned whether such a decision might be inconsistent with the dicta in the Playboy cases. See *id.* at 939-40. (Reynolds, J., concurring). It should be noted that the *Guardian Capital* case involved New York state law rather than Title VII. See *id.* at 938.

33. 517 F. Supp. 292 (N.D. Tex. 1981).

commercial airline.<sup>34</sup> In *Wilson*, it appears that the company sincerely believed that female sex appeal was a device that would attract male customers and engaged in active marketing to promote that strategy.<sup>35</sup> The court, however, held that "to recognize a BFOQ for jobs requiring multiple abilities, some sex-linked and some sex-neutral, the sex-linked aspects of the job must predominate."<sup>36</sup> In the case of the airline, the

sex-linked job functions are only "tangential" to the essence of the occupations and business involved. Southwest is not a business where vicarious sex entertainment is the primary service provided. Accordingly, the ability of the airline to perform its primary business function, the transportation of passengers, would not be jeopardized by hiring males.<sup>37</sup>

The court held that sex does not become a BFOQ merely in order to enhance a marketing strategy.<sup>38</sup> The negative implication, however, of the language quoted above is that if a business could show that "vicarious sex entertainment" was the primary service it provided, then a BFOQ could be established.

In the context of the Hooters problem, it is also worth speculating about a theoretical possibility of a defense that has never been adopted by the courts. Kelly Ann Cahill, in a Note specifically discussing the Hooters disputes, has suggested that an assumption of risk defense might be successfully employed against certain claims of sexual harassment committed by the customers of a business.<sup>39</sup> The theory is that female employees who voluntarily agree to work in such capacities as, for example, topless dancers, are obviously aware that their work is unusually susceptible to sexual harassment—that is, that the risk of such harassment by the customers is higher there than in other occupations. Consequently, an employee holding

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34. *Id.* at 302.

35. *See id.* at 294–95. It should be noted, though, that the court in *Wilson* seriously doubted that the sex appeal was actually necessary for the success of Southwest's particular business. *See id.* at 295–96.

36. *Id.* at 301. This is the passage in which the court cites the dicta in the two Playboy appeals. *See id.*

37. *Id.* at 302.

38. *See id.* at 303–04.

39. *See* Kelly Ann Cahill, Note, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1144–53 (1995).

such a job who was harassed by a customer would not, in tort law, be able to recover for the injury because she voluntarily entered into the situation knowing of the risk.<sup>40</sup> A similar argument, of course, could be made about any type of discrimination: for example, if an applicant voluntarily takes a job at a location where he actually knows that members of his religion are treated badly, then it might be argued that he has assumed the risk of religious discrimination.<sup>41</sup>

I am inclined to disagree with Cahill's argument, because I believe that there is a qualitative difference between tort law and antidiscrimination statutes. The purpose of tort law is to compensate plaintiffs for injuries and sanction wrongdoers, while the purpose of Title VII is to prevent a particular sort of behavior which Congress believes to be unacceptable in interstate commerce. Consequently, the damages suffered by the plaintiff, and the question of whether she voluntarily brought them upon herself, are not really the issue.<sup>42</sup> Nonetheless, an awareness of this concept may be useful in looking at the public and popular texts created around the Hooters controversies.

## II. THE LENS: CONSTITUTIVE RHETORIC

The last quarter century has seen a revival of the traditional legal interest in literature and language. In spite of, or

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40. *See id.* at 1144–53.

41. I am indebted to Mary Becker for this observation.

42. Similarly, the Supreme Court has rejected the equivalent of a "cause in fact" argument in an age discrimination case. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 359–60 (1995). Cahill is aware of this line of reasoning and makes a policy argument favoring an assumption of risk defense on the grounds that it would result in "the recognition of the capacity of women to make voluntary choices about where they work and to take responsibility for these choices." Cahill, *supra* note 39, at 1145. Jeannie Sclafani Rhee, in her more recent article discussing sexual harassment at Hooters, considers Cahill's line of reasoning and rejects it. *See Rhee, supra* note 4, at 190–94. Rhee's rejection of the assumption of risk defense, however, is based not on the comparison between tort law and discrimination law, but on the assertion that the sale of sexual appeal is not, or should not be, congruent with the sale of sexual harassment:

The potential availability of an assumption of risk defense for sexual harassment compels women who commodify their sexuality essentially to consent to their harassment and abuse. The notion that women have the right to assert their sexuality in the public domain but must suffer all the harmful social consequences is equivalent to a denial of that right.

perhaps because of, the contemporary tendency to speak of legal issues as problems to be solved with the tools of social science, a growing number of scholars are embarking on studies that assume that law is one of the humanities.<sup>43</sup> There is no single "movement" or direction that characterizes this group of scholars other than their focus on the places where law and literature can inform one another or may benefit from similar types of analysis.<sup>44</sup>

I believe that five distinct strains can be identified. First, there are those who believe that lawyers, judges, legislators, and "law" itself need to learn the lessons that literature can teach about humanity. They find the suppositions contained in lawyers' work frequently to be too abstracted, or based too much on cultural assumptions that are problematic at best; in literature, they believe, we can see how these assumptions or abstractions fail when confronted with the experiences of people.<sup>45</sup> Second, there are those who believe that they can use tools of literary criticism to interpret such legal texts as

43. Compare JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* x-xii (1985) with Paul J. Heald, *Economics as One of the Humanities: An Ecumenical Response to Weisberg, West and White*, 4 S. CAL. INTERDISC. L.J. 293, 310-12 (1995).

44. See James Boyd White, *Law and Literature: "No Manifesto,"* 39 MERCER L. REV. 739 (1988). An interesting and different layout of this movement may be found in Robin L. West, *The Literary Lawyer*, 27 PAC. L.J. 1187, 1187-88 (1996).

45. See John Denvir, "Deep Dialogue"—James Joyce's Contribution to American Constitutional Theory, 3 CARDOZO STUD. L. & LITERATURE 1 (1991); Dmitry N. Feovanov, *Luna Law: The Libertarian Vision in Heinlein's The Moon is a Harsh Mistress*, 63 TENN. L. REV. 71, 72-74 (1995); Norman J. Finkel, *Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction*, 74 NEB. L. REV. 742 (1995); Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913, 1936 (1990); Linda R. Hirshman, *Brontë, Bloom and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177 (1988); Vanessa Laird, *Dueling Narratives in An American Tragedy and the Criminal Law*, 59 TENN. L. REV. 131 (1991); David Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato*, 54 TENN. L. REV. 279 (1987); Amy R. Mashburn & Dabney D. Ware, *The Burden of Truth: Reconciling Literary Reality with Professional Mythology*, 26 U. MEM. L. REV. 1257 (1996); Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97 (1991); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1214-18 (1992) [hereinafter Minow, *Stripped Down*]; Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VAND. L. REV. 1665, 1687-88 (1990); Amy D. Ronner, *Amathia and Denial of "In the Home" in Bowers v. Hardwick and Shahar v. Bowers: Objective Correlatives and the Bacchae as Tools for Analyzing Privacy and Intimacy*, 44 U. KAN. L. REV. 263 (1994); Elizabeth Tobin, *Imagining the Mother's Text: Toni Morrison's Beloved and Contemporary Law*, 16 HARV. WOMEN'S L.J. 233 (1993); Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867 (1988); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

statutes, cases and, above all, the Constitution. They bring their (usually postmodern) critical faculties to bear on such concepts as original intent, legislative history, and stare decisis.<sup>46</sup> Third, there are those who are interested in how law becomes represented in such cultural artifacts as literature and film: how do people see the law, and what do they think of it? What influence do legal institutions appear to have on society as a whole?<sup>47</sup> Fourth, there are those who use creative storytelling and personal narrative as a way of informing theoretical legal points.<sup>48</sup>

A fifth avenue, the one informing this Article, has been called "constitutive rhetoric."<sup>49</sup> One may look at any text as a

46. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989); INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988); Betsy B. Baker, *Constructing Justice: Theories of the Subject in Law and Literature*, 75 MINN. L. REV. 581 (1991); Kenji Yoshino, Note, *What's Past is Prologue: Precedent in Literature and Law*, 104 YALE L.J. 471 (1994).

47. See BROOK THOMAS, *CROSS-EXAMINATIONS OF LAW AND LITERATURE* (1987); RICHARD WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* 51-92 (1992); Alan D. Boyer, *Formalism, Realism and Naturalism: Cross-Currents in American Letters and Law*, 23 CONN. L. REV. 669 (1991); Michael H. Hoffheimer, *Artistic Convention and Natural Law: Didactic Treatment of Justice and Authority in the Works of Fielding, Hawthorne, and Fritz Lang*, 63 TEMP. L. REV. 483 (1990); Nancy E. Johnson, *Women, Agency, and the Law: Mediations of the Novel in the Late Eighteenth Century*, 19 HARV. WOMEN'S L.J. 269 (1996); Penelope Pether, *Jangling the Keys to the Kingdom: Some Reflections on The Crucible, on an American Constitutional Paradox, and on Australian Judicial Review*, 8 CARDOZO STUD. L. & LITERATURE 317 (1996); Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers and the Legal System in "Star Trek: The Next Generation,"* 24 U. TOL. L. REV. 43 (1992); Larry M. Wertheim, *Law as Frolic: Law and Literature in A Frolic of His Own*, 21 WM. MITCHELL L. REV. 421 (1995) (reviewing WILLIAM GADDIS, *A FROLIC OF HIS OWN* (1994)).

48. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989); Sally Frank, *Eve Was Right to Eat the "Apple": The Importance of Narrative in the Art of Lawyering*, 8 YALE J.L. & FEMINISM 79 (1996); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994). You have probably observed that these four approaches are not mutually exclusive. For example, a work of literature like *The Merchant of Venice* might be examined both for the popular perception of the legal system contained in it and for its prescriptions about humanity from which the legal system could afford to learn. For a sampling of different commentaries on *The Merchant of Venice* in legal scholarship, see Kenji Yoshino, *The Lawyer of Belmont*, 9 YALE J.L. & HUMAN. 183 (1997).

49. This term was coined by James Boyd White, who regularly uses it in his scholarship. White's own work is probably the best exposition of the analysis of constitutive rhetoric. See JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* (1994) [hereinafter WHITE, *ACTS OF HOPE*]; JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM*

conversation in which the writer or speaker is attempting to establish or maintain a relationship with the reader or listener. (I say "attempting," but I am not speaking of the subjective desires of the individual holding the pen; rather, I mean the *voice* of the author as it appears in the text itself.) This relationship also includes some sort of connection with, or attitudes concerning, any people who (or topics that) are discussed in the text. The relationships thus sketched out may be seen as a sort of "constitution," a blueprint for how these inter-relationships are going to work. How is power to be divided up? What is the role to be played by the listener? What sorts of things may the listener think about or do to the third parties who are mentioned?

Going further, the relationships or constitution created by a text may be seen as a normative statement about how the world should work. That is, by creating a set of relationships in the text, the writer makes an implied declaration that these are the sort of relationships one *ought* to create if one has the power. For example, if my text bases its *ethos* on the notion that I am a morally superior person, and therefore ought to be believed, I have impliedly said that morally superior people ought to be believed because of their moral superiority. Since the text may be taken as recommending a way of relating to the world and to other people, it can and should be critically examined from an ethical and political viewpoint. Is this text creating a *good* set of relationships? If this language were the constitution of a city-state, defining your role in it, would you want to live there?

Consider: what if one were to write a book that created one set of relationships while recommending another? For example, what if I wrote that "all persons are entitled to equal respect in their beliefs," while simultaneously using rhetoric that flatly denied respect to the beliefs of anyone but myself

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(1990); WHITE, *supra* note 43; JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973) [hereinafter WHITE, *LEGAL IMAGINATION*]; JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER AND COMMUNITY* (1984) [hereinafter WHITE, *WHEN WORDS LOSE*]; James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014 (1989) (reviewing RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)). My own work has been mostly based on constitutive rhetoric. See Kenneth L. Schneyer, *Avoiding the Personal Pronoun: The Rhetoric of Display and Camouflage in the Law of Sexual Orientation*, 46 RUTGERS L. REV. 1313 (1994) [hereinafter Schneyer, *Avoiding the Personal Pronoun*]; Kenneth L. Schneyer, *The Culture of Risk: Deconstructing Mutual Mistake*, 34 AM. BUS. L.J. 429 (1997); Schneyer, *supra* note 28.

and implied that such respect was neither necessary nor proper? In such a case, the literal meaning of the text itself would be called into question. You might conclude that I (the author's voice, not the author) did not really believe in according equal respect to all views but was lying about it. You might conclude that I did not believe in that form of recommendation but was being ironic. You might conclude that I was trying to teach you something about the nature of recommendations, of respect, or of persuasion. In any case, it would be impossible simply to take that sentence at face value; the constitutive rhetoric would change the meaning of the text. It would also lead you, at some level, to question the relationship you have with me, as reader to writer.<sup>50</sup>

The constitutive rhetoric of a text is a serious matter, especially in a legal text. What we do to people, in real life and with real power, is enabled by the relationships we imagine we have with them; these relationships are created by texts. It is no coincidence, for example, that countries at war routinely use dehumanizing rhetoric to talk about the enemy; the rhetoric creates a relationship in which doing the otherwise unthinkable—deliberately killing another person—becomes not only acceptable but commendable. Of course the weapons to wage war, and the physical strength to do it, exist anyway; but the *will* to pull the trigger comes from the ways in which people are able to think about doing the deed. In a real sense, what we say shapes what we do.

You see that I have not recommended a particular ethical system or political view as the starting place for such an analysis. This is deliberate, but for mixed reasons. First, this sort of rhetorical analysis is more of a tool for finding the ethical and political presuppositions of a text than it is for finding a set of ethical or political rules with which to appraise one of those presuppositions. To that extent, it is possible that people with contradictory ethical or political views could use rhetorical analysis to arrive at similar conclusions about what the rhetoric means, but opposite conclusions as to whether that meaning is a good one. On the other hand, I think there are *some* ethical or political viewpoints that may be impossible to view favorably using constitutive rhetoric. This is because con-

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50. At this point it is inevitable that you will begin to engage in precisely that sort of assessment of your relationship with me. That we have a relationship, and that I play a large part in shaping it, is one of the theses of this Article; that you should critically appraise that relationship is one of the things that I am arguing is desirable.

stitutive rhetoric necessarily involves looking at relationships and communities between people—this presupposes that we do have such things as relationships and communities and that they do have an ethical dimension. Consequently, a form of rhetoric in which people were tools for the use of others, or in which a rugged individual entirely disclaimed any responsibility for, or consideration of, other individuals' interests, would appear rather unattractive in this system. In that sense, this tool is probably more useful to those who believe that people should be treated as ends in themselves than to those who believe that the needs, hopes, and desires of individuals are components in a large social utility.<sup>51</sup>

### III. THE HOOTERS CASES THEMSELVES

Hooters is a restaurant chain that originated in Clearwater, Florida, in the early 1980s; in the mid-1990s it is the fastest-growing restaurant chain in America. It serves such fare as hamburgers, chicken wings, and fried fish sandwiches, as well as wine and beer.<sup>52</sup> The restaurant is supposed to simulate a "beach party" environment, with decor including bare wooden floors and walls, and tables with bar stools. The servers in this restaurant are exclusively young women, and are officially referred to as "Hooters girls."<sup>53</sup> These servers are usually dressed in a uniform consisting of a halter or tied tee shirt with the restaurant logo on the front, orange running shorts, and sneakers.<sup>54</sup> The logo on the shirt is the word "HOOTERS" superimposed over a drawing of an owl; the oversized eyes of the owl form the two O's in the name. The servers are generally instructed to be friendly with customers, including sitting at the table and talking to them.<sup>55</sup> According to the

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51. See WHITE, *supra* note 43, at 3–26, 192–212 (framing the contrast between treating people as a means to an end and treating people as ends in themselves); see also IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 35–44 (James W. Ellington trans., 2d ed., Hackett Publ'g Co. 1983) (1785). Since I obviously find this method useful, I must be one of the former rather than the latter.

52. See Bill McDowell & Charles Bernstein, *Big Guns: 1995's Hottest Growth Companies*, RESTAURANTS & INSTITUTIONS, Aug. 1, 1995, at 56; see also Jack Hayes, *Hooters Clones Scramble for Share of Florida Market*, NATION'S RESTAURANT NEWS, Jan. 13, 1992, at 1.

53. See McDowell & Bernstein, *supra* note 52.

54. See *id.*; Rhee, *supra* note 4, at 163–64 & n.4.

55. See Robyn E. Blumner, *Hooters Has a Right to Sell Sex*, ARIZ. REPUBLIC, Dec. 5, 1995, at B7; Carrie Stetler, *Where Skimpy Clothes Arrive with the Order*, STAR-LEDGER



chain's marketing information, the servers are supposed to give the impression of "cheerleaders" or the "girl next door."<sup>56</sup> The restaurant is decorated with various posters and signs of a humorous nature, many of which could be taken to have sexual connotations. The menu is replete with humor of a self-deprecating nature; for example, the restaurant history on the back of the menu suggests that the founders are amateurs who don't know what they are doing. The chain's clientele are primarily adult males, although some women and children do dine there.<sup>57</sup>

There appears to be some confusion about the restaurant's primary marketing focus. Certainly in the wake of recent legal disputes, Hooters has been claiming that it is primarily in the business of selling sex appeal.<sup>58</sup> However, at times there have been challenges, usually in zoning boards, to placing a Hooters restaurant in some communities. In those communities, Hooters bills itself as a "family restaurant,"<sup>59</sup> a term which is susceptible

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(Newark, N.J.), Dec. 4, 1995. In a conversation, however, one server told me that the restaurant would not tolerate having patrons attempt to touch the servers.

56. See Blumner, *supra* note 55, at B7; Stetler, *supra* note 55. In various articles criticizing or supporting the restaurant, there have been assertions that servers at Hooters are generally large-breasted; indeed, the word "hooters" is supposed to be a slang term for breasts. See Stetler, *supra* note 55. While writing the first draft of this Article, I visited the only Hooters restaurant in Rhode Island. If I had to characterize the servers' physiques, I would say that they were extremely thin. I did observe, however, that all the servers I saw were white, and most were blonde. Although my observations do not necessarily describe Hooters restaurants in general, it does seem fair to comment that the appearance of the "girl next door" rather depends on where you live.

57. See Deborah L. Rhode, *P.C. or Discrimination?*, NAT'L L.J., Jan. 22, 1996, at A19; Mike Rosen, *The Feds Would Do Well to Spend a Little Time Tending Bar Themselves*, COLO. SPRINGS GAZETTE TELEGRAPH, Jun. 1, 1996, at B11; Estela Villanueva, *Council Delays Action on "Hooters" Restaurant*, DES MOINES REG., Nov. 9, 1993, at 1.

58. See James E. Causey, *Giving a Hoot: Chain Takes on the EEOC*, MILWAUKEE J. SENTINEL, Nov. 16, 1995, at 1; Mark Patinkin, *Sometimes Raising a "Hue 'n' Cry" Doesn't Make Sense*, HOUSTON CHRON., Dec. 5, 1995, at 2; Rhode, *supra* note 57, at A19; Stetler, *supra* note 55.

59. See Dwayne Atwood, *Ruling Limits Hooters*, ANCHORAGE DAILY NEWS, Dec. 12, 1995, at D1 ("Owners and promoters have billed Hooters as a family restaurant."); Denise Cardinal, *Hooters Girls on Endangered Species List*, BUS. REC., Dec. 11, 1995, at 19; Joel Kurth, *Liquor Board Doesn't Give on Hooters*, GRAND RAPIDS PRESS, May 14, 1997, at D4 ("Restaurant officials [say] that they operate a 'family establishment.'"); E. J. Montini, *In Defense of 2-Edged Monikers*, ARIZ. REPUBLIC, Feb. 17, 1995, at B1 (regional director says Hooters is a family restaurant); Holly Selby, *NOW Has Bone to Pick with Hooters at Harborplace*, BALTIMORE SUN, Nov. 3, 1990, at 1A; Villanueva, *supra* note 57, at 1 ("Larry Klinghoffer, owner of the Omaha and possibly the Des Moines Hooters, touted the eatery as a casual, family restaurant with a Florida beach theme."); Jim Wieker, *Beer-less Hooters Starts Tapping Market*, GRAND RAPIDS PRESS, Apr. 22, 1997, at A12, ("Hooters managers argue it's a family restaurant that doesn't have to sell liquor to stay in business."); Teresa Wiltz, *Many Give a Hoot About*

to the interpretation that the restaurant's primary focus is not the selling of sexuality.

Beginning in the early 1990s, a number of sexual harassment lawsuits have been filed against Hooters by servers working at different Hooters locations. These lawsuits usually complain of inappropriate or aggressive sexual overtures by patrons, as well as alleging that Hooters deliberately creates an environment that encourages such harassment.<sup>60</sup> A few of the cases also allege various forms of harassment by supervisors.<sup>61</sup> So far as I have been able to determine, all of these cases (save the most recent one, which is still pending) have been settled out of court.<sup>62</sup> As noted above, these cases have given rise to speculation that an assumption of risk defense may be appropriate for some sexual harassment cases.<sup>63</sup>

In December 1993, Savino Latuga and David Gonzales, two men, filed an employment discrimination complaint in the United States District Court for the Northern District of Illinois (Chicago) against the local Hooters and the chain entity itself, alleging sex discrimination in violation of Title VII because they were not hired as servers.<sup>64</sup> The plaintiffs sued as representatives of the class of men denied employment at Hooters because of sex.<sup>65</sup> In its answer, Hooters alleged, *inter alia*, that sex was a BFOQ for the job of "Hooters girl."<sup>66</sup> This lawsuit was settled out of court in October of 1997.<sup>67</sup>

Apparently at the same time that the *Latuga* cases were proceeding, the Equal Employment Opportunity Commission (EEOC) was conducting its own independent investigation of

*Mt. Prospect Eatery*, CHI. TRIB., July 6, 1992, at 1 ("At a recent Village Board meeting, Hooters representatives described the restaurant as a 'family-style' operation that would not have a bar and would serve beer and wine only with meals.").

60. See Rhee, *supra* note 4, at 164-65.

61. See, e.g., Kevin Murphy, *Hooters Case Goes to Trial*, WIS. ST. J., Feb. 5, 1997, at 3A.

62. See Rhee, *supra* note 4, at 165. The recent, still-pending case was filed in the United States District Court in Madison, Wisconsin. See Murphy, *supra* note 61.

63. See *supra* notes 39-42 and accompanying text.

64. *Latuga v. Hooters, Inc.*, No. 93-C-7709 (N.D. Ill. filed Dec. 23, 1993). In October 1994, John Ginter and Patrick Salisbury filed a similar complaint. *Ginter v. Hooters, Inc.*, No. 94-C-6338 (N.D. Ill. filed Oct. 20, 1994). In December 1994, an amended, consolidated class action complaint was filed combining both cases. Amended Consolidated Action Complaint, Dec. 16, 1994, *Latuga v. Hooters, Inc.* [hereinafter *Class Action Complaint*]. In April of 1995, the court ordered the consolidation of the cases. See Minute Order, Apr. 6, 1995, *Latuga v. Hooters, Inc.*

65. See *Class Action Complaint*, *supra* note 64.

66. See Amended Answer to Consolidated Class Action Complaint, Dec. 5, 1995, *Latuga v. Hooters*, at 39.

67. See Adam Zagorin, *Sexism Will Be Served*, TIME, Oct. 13, 1997, at 65.

Hooters's hiring practices. The exact contours of this investigation are not public knowledge, but it is known that late in 1995 the EEOC sent a lengthy conciliation offer to Hooters. The only aspects of this offer which are known to the public are those specifically mentioned later by Hooters in its press kit.<sup>68</sup> On November 15, 1995, Hooters held a press conference concerning the EEOC investigation and commenced an advertising campaign criticizing the EEOC for the investigation.<sup>69</sup> While these advertisements have taken various forms, the central legal assertion behind all of them is that sex is an obvious BFOQ for a server in a Hooters restaurant.<sup>70</sup> As mentioned above, a very large number of newspaper editorials were written based on this press release, mostly favoring Hooters's side of the argument. Various members of Congress made public statements criticizing the EEOC.<sup>71</sup> In April or May of 1996, the Chairman of the EEOC, Gilbert F. Casellas, apparently sent a letter to a member of Congress in which he indicated that the EEOC would not be pursuing the investigation, largely due to scarcity of resources.<sup>72</sup> This letter was "leaked" to the press and caused another set of editorials to be written.

#### IV. UNDERLYING THEORETICAL ISSUES

The two different discrimination-based attacks on Hooters—the sexual harassment cases and the cases alleging discrimina-

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68. HOOTERS OF AMERICA, INC., PRESS KIT OF NOV. 15, 1995 [hereinafter PRESS KIT] (on file with the *University of Michigan Journal of Law Reform*). While Hooters has overtly and enthusiastically publicized certain aspects of the EEOC investigation, such as the length of the agency's 1995 settlement offer and some of the demands contained in it, see *Hooters Says No to EEOC Demand It Hire Hooters Guys* in PRESS KIT, *supra*, neither the EEOC nor Hooters has been willing to publish the full text of any document between them nor the details of the investigation process. Aware that the EEOC had already stated that it could not make any comments concerning the pending investigation, I contacted Hooters's attorneys to request a copy of the settlement offer. The request was declined.

69. See PRESS KIT, *supra* note 68; *infra* notes 90–96.

70. See, e.g., WASH. POST, Nov. 15, 1995, at A10.

71. See Rosen, *supra* note 57, at B11; *Hostettler Condemns Demands on Hooters*, COURIER-J. (Louisville, Ky.), Dec. 24, 1995, at 2B.

72. See Chuck Hutchcraft, *Hooters Case Won't Get a Second Look*, CHI. TRIB., May 2, 1996, § 3, at 1. At the time of my conversations with Hooters's attorneys in May of 1996, the EEOC had not made any official representation to Hooters that the investigation would be dropped or that it would decline to sue. (This was the reason for their understandable reluctance to release documents which might be relevant in a lawsuit that could still occur.) The letter from Casellas to Representative Fawell seems to be the only indication that this is the EEOC's intention.

tion against male applicants—are different legal articulations of the same underlying question: how legitimate is it to base a business on the sale of female sexuality, female sexual appeal, or female sexual services?<sup>73</sup> It could be said, for example, that the reason there may be sexual harassment problems at Hooters is because Hooters is overtly trading on the sexual appeal of its women servers, consequently causing some confusion in the minds of some patrons. The patron confuses sexual display with sexual availability, and consequently engages in harassing behavior. Absent the overt sexual display, the patron's confusion (and harassing behavior) would be reduced or eliminated. Similarly, the BFOQ argument that the job of a server at Hooters (a "Hooters Girl") can be performed only by a woman is based on the assertion that the core marketing strategy of the business is to sexually attract and titillate heterosexual males. In each case, one suspects that the plaintiffs or investigators might like to argue that a restaurant may not legitimately provide vicarious sexual services.<sup>74</sup> Yet it is difficult to make this argument within the language of any specific statute, because no statute has yet been interpreted to forbid such services *per se*, and it is difficult to see how any extant statute could be so interpreted.<sup>75</sup> Instead, opponents of Hooters couch their arguments in terms of "sex discrimination in employment" because that is all they have to work with.

However, it is worth considering whether the very nature of the sexuality-based restaurant could be construed to offend Title VII. One view of Title VII would say that such a business directly implicates the precise reasons that laws against sex discrimination are necessary. The cultural, political, and economic reasons behind employment discrimination against women were all based on assumptions concerning what women could, or should, do. Because women were perceived as

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73. Jeannie Sclafani Rhee writes that "[a]t its core, the debate over the liability of Hooters restaurants for third-party harassment of its female employees can be viewed as a proxy for the debate over the ethics of the commodification of women's sexuality." Rhee, *supra* note 4, at 180.

74. In at least one of the harassment suits, such a claim was emphatically *not* the position of the plaintiffs, who discharged their attorneys for making that claim at all. *See id.* at 186.

75. I am disregarding, here, the morass of local ordinances involving strip clubs, pornographic movie houses, and adult bookstores, as well as the complex First Amendment implications thereof. *See generally* Alfred C. Yen, *Judicial Review of the Zoning of Adult Entertainment: A Search for the Purposeful Suppression of Protected Speech*, 12 PEPP. L. REV. 651 (1985) (discussing the inherent tension between a community's right to provide for its social welfare and the individual's right to freedom of speech).

having limited roles—all related to sexual contact with men, childbirth, child-rearing, or maintaining the home—there tended to be prejudice against their working in occupations that did not directly involve them in those roles. Title VII's prohibition on sex discrimination in employment, therefore, can be seen as a direct attack on existing cultural, political, and economic arrangements concerning the proper role of women in society, the family, or the economy. This is why hostile environment sexual harassment has been interpreted to be a violation of Title VII as it was originally enacted: women who are subjected to continual sexual treatment on the job are essentially being placed back in the roles from which Title VII was supposed to free them. Title VII, it could be argued, is designed to give women a function in the workplace *other than* a function dependent on their relationship to men. It could be argued that a business whose whole purpose is to trade on those older assumptions—insisting that women be sexual objects, child-raisers, or homemakers—is engaging in and bolstering the very practices Title VII was designed to fight.

The branch of feminist legal analysis identified with Catharine MacKinnon takes a "dominance approach," rather than a "difference approach," to equality law generally and sex discrimination law in particular. The theory maintains that the key question in sex discrimination law is not whether a practice treats the sexes differently from one another, but rather, whether this practice perpetuates the subordination of women by men.<sup>76</sup> Utilizing this theory, one could argue that Hooters should be seen as perpetuating the domination of men over women because the commodification of sexuality within Western culture consistently converts the seller (nearly always female) into the servant of the buyer (nearly always male).<sup>77</sup> As Jeannie Sclafani Rhee summarizes the argument:

The construction of female sexuality is one of submission to dominance. Yet the construct is so pervasive that its inequality cannot be seen, and it is merely taken as the norm of sexuality. The problematic construct of female sexuality is what makes its objectification so harmful, and

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76. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) (describing the historic subordination of women by men and the failure of traditional legal analysis to solve the problem).

77. Edwin M. Schur discusses the fact that males are predominantly buyers, and females predominantly sellers, in the sex industry. See EDWIN M. SCHUR, *THE AMERICANIZATION OF SEX* 84–86, 89 (1988).

in turn what makes its commodification, even by women themselves, a most dangerous proposition . . . . The construction of women's sexuality is tainted to the degree that any commodification of it only acts to reify its maladrous effect on the social psyche.<sup>78</sup>

The post-structuralist feminist counter-argument, ably made by Rhee herself, is that the commodification of sexual display gives women a unique economic and social power that they have in few other venues. To forbid the existence of businesses whose purpose was to sell sexuality would deny women the opportunity to exercise that power.<sup>79</sup> Rhee goes further, saying that sexual harassment

can be recast as a man's recognition of the power that women's bodies temporarily hold over him, and the resultant attempt to possess that power for himself—literally to strip it physically away from women. The consequent attempt to redress sexual harassment ought not to assume the same form. Rather than stripping women of the power of their own sexuality, the response must prohibit men from seizing public displays of female sexuality as theirs for the taking.<sup>80</sup>

Thus, for some, the empowerment of women and women's sexuality not only permits, but demands that businesses like Hooters be allowed to exist.<sup>81</sup>

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78. Rhee, *supra* note 4, at 185. For a work by a nonlawyer making essentially this same charge against Hooters and similar businesses, see Sarah Ciriello, *Commodification of Women: Morning, Noon, and Night*, in *TRANSFORMING A RAPE CULTURE* 265 (Emilie Buchwald et al. eds., 1993).

79. See Rhee, *supra* note 4, at 185–90.

80. *Id.* at 189.

81. The difficulty, for me, in this line of reasoning is that it operates on the assumption that the servers—the “Hooters Girls” themselves—are empowered and enriched by this form of commodification. Rhee is aware that many women working in the sex industry “are commonly . . . the most marginalized and disempowered of the community such that their ‘choice’ to commodify is in essence a false choice.” *Id.* at 187. She points out, however, that the same cannot be said for highly-paid women who display their sexuality, such as film stars and models. See *id.* Certainly there are those workers in the sex industry—as in any industry—whose services are so in demand that they themselves become powerful forces within it. But such an observation cannot be useful in assessing the lot of the average worker in that industry, any more than one can judge the lot of most actors by examining the life of Harrison Ford. In the sex industry in general, and at Hooters in particular, the persons profiting from the display of sexuality are almost all men. See SCHUR, *supra* note 77, at 83–90; see also Ciriello, *supra* note 78, at 267–74. If a Hooters restaurant existed at which the servers themselves were the owners and therefore profited directly from the

On a cultural level, the debate over the ethics of commodifying sexuality is surely part of what is going on in the debate about Hooters. Many editorials begin with the assertion that Hooters is clearly offensive, but that its offensiveness does not render it illegal.<sup>82</sup> The rebuttals usually stick to the letter of Title VII, and attempt to argue about the "true" function of Hooters.<sup>83</sup> The "true function" question is a good starting place, because it is unclear that a restaurant *can* claim that sexuality is its true function if an airline such as Southwest cannot make the same claim.<sup>84</sup> Further, there is a factual question as to whether Hooters actually believes that sexual appeal is its core function. Apparently its arguments to hostile zoning boards included the assertion that Hooters's core identity is that of a "family restaurant"—yet most Americans would probably deny that the concept of a "family restaurant" can be reconciled with the overt sale of sexuality.<sup>85</sup> Yet in all of these concessions about the offensiveness of Hooters, there is very little speculation as to *why* Hooters is offensive, or what relation its offensiveness may have to the economic place of women in society.

I would argue that the editorial writers, lawyers, and others who write about these cases are actually attempting to discuss the cultural legitimacy of sexuality-based business. There is a certain reluctance to do this, both because American law pretends not to speak on cultural issues and because there is a strong libertarian streak in our culture that believes that any sort of sexually-based behavior involving consenting adults should be a private matter not subject to the criticism of others. Consequently, the language used by these writers is couched in technical terms such as

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commodification of their sexuality, then it would be much easier to accept Rhee's line of reasoning. In such a case, of course, lawsuits for sex discrimination of any kind would be impossible because the servers would not be "employees" within the meaning of the statute.

82. See, e.g., Blumner, *supra* note 55; *Judicious Retreat on Hooters*, ARIZ. DAILY STAR, May 5, 1996, at 2D; Tom Teeppen, *Hooters Case Follows Discrimination Law Out the Window*, MILWAUKEE J. SENTINEL, Nov. 22, 1995, at 14.

83. See, e.g., Mary Jane Hall, *Why a Hooters Debate? Read the Civil Rights Act*, VIRGINIAN-PILOT & LEDGER STAR, Dec. 12, 1995, at A16; Rhode, *supra* note 57.

84. See *supra* notes 32–37 and accompanying text.

85. The very notion of what should be presented to a "family" is controversial. I was surprised, for example, to learn (second hand) that the producer of a popular television series had claimed, "this is a family show, and we've learned that families like a lot of violence." (As the comment is hearsay, and as I have the permission of neither the producer [a friend of a friend] nor my source to quote it, I am disinclined to name names.)

employment discrimination, about which we can pretend that we do not have a cultural or spiritual attachment.

In an article like this one, maintaining that “good language” can be used by either side in an argument, and promising further that it will assess the language regardless of the substantive outcome, it is important for the writer to be candid about his own prejudices and predilections on substantive questions. Without such candor, the reader may justifiably suspect that an analysis of “language” is being used merely as a device to persuade the reader of the rightness of the writer’s desired outcomes. Therefore I will be explicit about where my sympathies lie on the “merits” of these disputes: I don’t like female sexuality used as a marketing tool or a business device because I think it runs counter to the notions of equality and equal opportunity that are central to the aspirations behind Title VII; I also think that it demeans both the workers and the customers. On the other hand, if I accept *arguendo* that the core of Hooters’s business is truly the sale of sexuality, then, based on the strict language of Title VII, I am not sure that I can escape the conclusion that such a business deserves to claim that sex is a BFOQ—and I am loath to do an “end run” around the legislature based merely on my own beliefs. (I actually have quite a bit of sympathy for the “dominance” approach to equality law, but I am certain that no such approach was behind the passage of any but a discrete and well-publicized group of statutes.) Finally, based on my one and only visit to Hooters, undertaken while I was writing my first draft of this article, I am not sure that I really believe that sexuality is as central to Hooters’s business as has been claimed. The sexuality, in fact, seemed rather understated when compared with much in contemporary culture, and was less interesting than the self-effacing humor on the back of the menu. You should be aware of these biases of mine when you read what follows in the Article.<sup>86</sup>

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86. As I have noted elsewhere, the act of displaying my biases is, in and of itself, a valuable rhetorical device. By displaying my prejudices, I cause you to believe that I can be trusted to tell the truth, that I am not trying to mislead you. See Schneyer, *Avoiding the Personal Pronoun*, *supra* note 49, at 1342. But is that misleading in and of itself? Could an unscrupulous writer use such a device to yet more subtly influence the reader to adopt his substantive views? I hope not. What I hope I am doing is teaching you about language by pointing out that even one’s own rhetoric is subject to scrutiny. You should assess my rhetoric just as I am assessing the rhetoric of those texts discussed in this Article. I suppose that it might be possible for me to do this myself—that is, stand outside of my own language and analyze it. But I don’t think I



V. QUASI-OFFICIAL SPEECH:  
PUBLIC STATEMENTS OF THE "PARTIES"

Judicial and quasi-judicial proceedings, such as litigation or administrative enforcement, are political acts taking place in a political context. It is axiomatic and, perhaps, passé to say this, but it is sometimes easy to forget that civil disputes take place in a government context. The statutes at issue are created, the judges or administrators are appointed, and the structure of the entire system is developed and amended through the political process. Parties frequently worry as much (or more) about the popular perception of their dispute as the formal judicial or administrative result.

One reason is that popular or political pressure can affect the outcome of a proceeding; this is not supposed to happen, but judicial and administrative officers are human beings, prone to as much self-doubt and ambiguity as the rest of us. Only the most robust of us can remain truly convinced, in the light of lopsided, vitriolic criticism, that we are right. In the alternative, popular sentiment may succeed in changing the very laws around which the dispute revolves. Further, in disputes involving business, the bad publicity associated with a lawsuit can be as damaging to the company as any legal or equitable remedy provided by a court or agency—or the *good* publicity may substantially increase profits. The same can be said of political figures, whose careers may be ruined by the existence of the dispute even if their side of the argument is entirely vindicated by the outcome. In criminal law as well, an accused person is not necessarily "off the hook" simply because she is found "not guilty."<sup>87</sup>

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trust myself to carry out such an exercise with any kind of dispassionate distance, nor can I think of a way to convince you that I am capable of it.

87. This fact—that the public perception of a civil or criminal case can be more important than the case's technical outcome—has always been well known and exploited by authors of literature. Consider the following plea of a defense attorney in a famous mystery novel:

On my client's behalf—on Miss Vane's behalf, my lord, I beg your lordship's indulgence for a few words. A charge has been brought against her, my lord, the very awful charge of murder, and I should like it to be made clear, my lord, that my client leaves this court without a stain upon her character. As I am informed, my lord, this is not a case of the charge being withdrawn in default of evidence. I understand, my lord, that further information has come to the police which definitely proves the entire innocence of my client. I also understand, my

As a result, we frequently see concerted efforts, especially in cases involving prominent persons or entities, to affect public opinion. The parties or their representatives regularly make public statements about the case, not only in response to reporters' questions but spontaneously, in lengthy interviews or press conferences. They develop public personae that may (or may not) be entirely different from those they adopt in court.

Because this is rhetoric directly aimed at public opinion, it may be overtly constitutive: the speakers are aware that they are addressing a broader community, appealing to its self-conception and aspirations. In this sense, litigants speaking to the public have more in common with political speechmakers than with lawyers in a lawsuit. They deliberately define a collective identity in order to mobilize it.<sup>88</sup>

As described above, the EEOC's investigation of Hooters resulted in a conciliation offer which Hooters found unpalatable. Hooters responded, on November 15, 1995, by holding a press conference and engaging in an expensive advertising campaign criticizing the EEOC for its investigation. This section of the Article is devoted to an examination of the public statements made by Hooters in this conference and campaign, and by the EEOC in reaction to it. In this discussion, I wish to pay particular attention to the type of community Hooters and the EEOC appear to be envisioning in their exhortations.

### A. *The Hooters Press Kit*

The press kit distributed at the time of the press conference on November 15, 1995 contains a number of separate items: a

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lord, that a further arrest has been made and that an inquiry will follow, my lord, in due course. My lord, this lady must go forth into the world acquitted, not only at this bar, but at the bar of public opinion. Any ambiguity would be intolerable . . . .

DOROTHY L. SAYERS, *STRONG POISON* 340–41 (Garland Publishing 1976) (1930). Despite the wholehearted support of the prosecutor and the judge in this effort, it appears in later Sayers novels that the accused has been anything but acquitted "at the bar of public opinion." See DOROTHY L. SAYERS, *HAVE HIS CARCASE* (1932); DOROTHY L. SAYERS, *GAUDY NIGHT* (1936).

88. For detailed examinations of the constitutive rhetoric of some political speeches, see WHITE, *ACTS OF HOPE*, *supra* note 49, at 275–302. See also Dan F. Hahn, *Ask Not What a Youngster Can Do for You: Kennedy's Inaugural Address*, 12 *PRESIDENTIAL STUD. Q.* 610 (1982); Schneyer, *Avoiding the Personal Pronoun*, *supra* note 49, at 1339–40.

press release;<sup>89</sup> a "question & answer" sheet;<sup>90</sup> a "backgrounder" on the dispute;<sup>91</sup> a "fact sheet" about the chain;<sup>92</sup> statements by Mike McNeil (Hooters's vice president of marketing),<sup>93</sup> Cheryl Whiting (director of training for Hooters of America),<sup>94</sup> and Meghan O'Malley-Barnard (a self-described "Hooters Girl")<sup>95</sup> as well as their biographies;<sup>96</sup> articles from the *National Law Journal* lampooning the EEOC<sup>97</sup> and the *Latuga* case;<sup>98</sup> a recent trade journal article describing fast-growing food service companies;<sup>99</sup> a summary of Hooters's charitable giving;<sup>100</sup> and a list of Hooters locations.<sup>101</sup> While these documents are different in type and quality, they display an instructive uniformity in tone and content. They were clearly drawn by the same hand for the same purpose.

Probably the most significant document in the press kit is the press release, entitled "Hooters Says No to EEOC Demand It Hire Hooters Guys: Restaurant Chain Says Federal Agency Needs Common Sense."<sup>102</sup> This release is the document most likely to be read, quoted, or used as the basis of an editorial. It contains about 500 words, primarily quotations from Mike McNeil's statement. Like most press releases, it is designed so that a verbatim transcription could be used as a traditional newspaper article. It is written in the third person, attributes all of Hooters's positions to McNeil or Whiting, and is cast so as to appear to be an objective report of the facts. Essentially the only facts it contains, however, are summaries of Hooters's opinions and position.

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89. *Hooters Says No to EEOC Demand It Hire Hooters Guys*, in PRESS KIT, *supra* note 68.

90. *Questions and Answers About BFOQs and the EEOC*, in PRESS KIT, *supra* note 68.

91. *Backgrounder: EEOC Complaint Against Hooters*, in PRESS KIT, *supra* note 68.

92. *The Hooters Companies: Fact Sheet*, in PRESS KIT, *supra* note 68.

93. *Statement by Mike McNeil*, in PRESS KIT, *supra* note 68 [hereinafter *McNeil Statement*].

94. *Statement of Cheryl Whiting*, in PRESS KIT, *supra* note 68 [hereinafter *Whiting Statement*].

95. *Statement of Meghan O'Malley-Barnard*, in PRESS KIT, *supra* note 68 [hereinafter *O'Malley-Barnard Statement*].

96. *Biographies*, in PRESS KIT, *supra* note 68.

97. Gerald D. Skoning, *Employment Law's "Top Ten" List for '94*, NAT'L L.J., Jan. 9, 1995, at A21.

98. Gerald D. Skoning, *Employment Law's Ten Best of '93*, NAT'L L.J., Jan. 31, 1994, at 15.

99. McDowell & Bernstein, *supra* note 52.

100. *Hooters of America Charitable Giving*, in PRESS KIT, *supra* note 68.

101. *Hooters Locations*, in PRESS KIT, *supra* note 68.

102. *Hooters Says No to EEOC Demand It Hire Hooters Guys*, *supra* note 68.

Here are the opening paragraphs of the press release:

**HOOTERS SAYS NO TO EEOC DEMAND IT HIRE  
HOOTERS GUYS**

**Restaurant Chain Says Federal Agency Needs Common  
Sense**

Washington, D.C.—The Hooters Restaurant chain said today that it will resist EEOC demands that it hire men to work as “Hooters Girls,” a proposal that Hooters officials and franchise owners say would drive them out of business.

Hooters of America Vice President Mike McNeil said that conciliation talks between Hooters representatives and the EEOC floundered because Commission demands would have imposed unmanageable financial and practical burdens on every one of Hooters’ 170 stores.

“The issue isn’t sex discrimination. It’s common sense,” McNeil told a press conference at which he announced a grassroots campaign to convince the EEOC to leave Hooters alone and direct its energy toward genuine discrimination problems.

“The EEOC has a backlog of about 100,000 cases. It’s hard to believe that forcing Hooters to change its business concept by hiring ‘Hooters Guys’ should be one of its top priorities,” McNeil added.<sup>103</sup>

Throughout this document, the use of a reportorial, third-person voice has a powerful effect. First of all, it sounds dispassionate: it is hard to remember that we are not seeing the observations of a disinterested, outside party. This is all the more striking when we consider that newspapers frequently print press releases, with no alteration, as stories. Indeed, as noted above, that is precisely the function the press release is designed to serve. Were a newspaper to use this press release in that way, the reader of the resulting newspaper story would have no way of knowing that the sentences were drafted by Hooters representatives with the specific intent of influencing public opinion.<sup>104</sup> In this sense, the press release

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103. *Id.*

104. Naturally the journalists reading the press release itself know, as I know, that it is a manipulative device; consequently, the misleading character of the release does not apply to them. Indeed, the overtly manipulative character of this particular

creates a kind of rhetorical lie: the newspaper reader is cued to receive a verified, reasonably removed report of the actual facts, when in fact every word has been crafted as a device to influence the reader. How much more on our guard would we be if the press release simply said, "We are Hooters and here is our opinion"?<sup>105</sup>

Second, the reportorial voice disassociates itself from its own views. The phrases, "Hooters says," "McNeil said," or similar language appears over and over again. Yet in actual fact, as we know, this document was drafted by Hooters itself, its public relations firm, its attorneys, or possibly even by McNeil. The impact of this disassociation is striking, because Hooters's views are actually given more prominence by this device. It is one thing to say, "I want to tell you my views"; it is another to say, "I want to tell you what Schneyer said about his views." In the latter case, we are impliedly told that the views are so noteworthy as to motivate the first listener to repeat them. We repeat the views of others less often than we express our own; typically we do not engage in such repetition unless there is something worthwhile, or at least interesting, about what was said. At a minimum, saying "I want to tell you what Schneyer said about his views" tells the listener that at least two people are interested in this topic: Schneyer and the speaker.

Third, the reportorial voice—whose typical function is to recount events as they occur—makes it appear that something has actually *happened* here. In fact, all that has really happened is that Hooters has expressed its opinion; but the reporting of that opinion as an event ("The Hooters Restaurant chain said today that it will resist . . .") gives one the

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press release makes it less likely that it will be used in its current form as the actual text of a story. My point, however, is that if it *were* so used, the reader would be misled. In this sense we might hold the newspaper ethically responsible for failing to sufficiently edit the release before putting it in print. But since Hooters knows that releases are used as stories and it is trying to create such a story, the use of such deliberately manipulative rhetoric is worthy of comment. As to the argument that one can be as manipulative as one likes to people who know that one is trying to manipulate them, see *infra* note 131 and accompanying text.

105. Of course, critical theory in general and feminist theory in particular have long recognized that claims of objectivity are frequently tools for the dominant class to legitimate its own perspective as the "real" one. This claim of objectivity, therefore, might be seen as an inherently patriarchal device. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1742–45 (1976); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1376–80 (1986).

impression that one is seeing a play in a sporting event or a battle in a war. It is not merely speech; it is action. The reportorial style of the press release, then, serves to give the reader the impression of an objective report of an important event, rather than of an entirely instrumental, persuasive device that reports nothing but what its writer believes. In this sense, its language is fundamentally dishonest.<sup>106</sup>

The headline and sub-headline of the release are clearly aimed at ridicule. Hooters is cast as the firm parent (it "says no"), disciplining the absurd and stupid EEOC that wants Hooters to hire "Hooters Guys," a phrase that is clearly designed to call up a ridiculous image of a man in a "Hooters Girl" uniform.<sup>107</sup> Hooters diagnoses the EEOC's problem (as parents frequently do) as a lack of "common sense," something Hooters apparently is supposed to have in abundance.

The first sentence is designed to cast the EEOC in the role of the aggressor. The agency is making "demands" designed to "drive" Hooters "out of business," while Hooters is only "resisting." The choice of the word "resist" is instructive, because unlike other appropriate verbs ("oppose," "deny," "refuse," "decline," "reject," "spurn," or "balk"), that word has strong heroic connotations, invoking resistance to tyranny, resistance to oppression, and the Resistance to Fascism and Nazism. Not only is the EEOC the aggressor, then, but Hooters is the valiant warrior holding back the behemoth; the biblical image of David and Goliath<sup>108</sup> is almost inescapable. In addition, the EEOC, here and throughout the release, is referred to in the singular, without reference to any particular human being or group of people associated with its viewpoint. Hooters, on the other hand, is consistently mentioned in connection with groups of individuals: "Hooters officials and franchise owners," "Hooters representatives," "Hooters Girls," and so forth. This gives the impression that the EEOC is inhuman and monolithic, while Hooters is made up of people whose views are important and influential in the Hooters organization.

The various documents in the press kit repeatedly refer to the BFOQ defense in almost the same words. Close facsimiles

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106. As will be seen, the EEOC press release responding to Hooters entirely avoids any pretense of reportorial style, but is a frank expression of opinion. In this sense it must be considered more honest, although it has problems of its own. See *infra* notes 117–20 and accompanying text.

107. As will be seen, Hooters published an advertisement in which exactly that image appeared. See *infra* notes 121–31 and accompanying text.

108. See 1 *Samuel* 17.

of the sentence, “a French restaurant has the right to hire only French waiters, and a women’s exercise gym may choose to hire only female locker room attendants,” appear no less than five times in the different parts of the press kit.<sup>109</sup> One of these is the statement by Cheryl Whiting, director of training for Hooters of America, Inc., who apparently started “in 1987 as a Hooters Girl,” but nonetheless “has more than ten years of management experience . . . in the food and beverage industry.”<sup>110</sup> Whiting’s biography does not indicate that she has ever attended college (while it does indicate McNeil’s college education),<sup>111</sup> but her statement, which is devoted to the view of “working people” towards the dispute, contains the following sentence:

Besides, the law recognizes that some jobs require unique qualifications: to be a waiter in an authentic French restaurant, you can be required to be French. It follows that to be a Hooters Girl, you have to be female.<sup>112</sup>

It is surely plausible that a high school graduate, especially one with extensive management experience, would have some familiarity with the BFOQ defense;<sup>113</sup> but it is unlikely that she would spontaneously and independently arrive at the same example (the French restaurant) used by McNeil and all of the other papers in the press kit. We can hypothesize, therefore, that a deliberate decision was made to use the BFOQ and the French restaurant example in as many different documents as possible, in order to maximize the probability that it would find its way into news stories and editorials.<sup>114</sup>

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109. See PRESS KIT, *supra* note 68.

110. See *Biographies*, *supra* note 96. Since Whiting’s biography was released in 1995—only eight years after 1987—her “ten years of management experience” imply that she began as a “Hooters Girl” after having acquired management experience in another food service establishment. I point this out because it is unexpected that someone who has previously worked in management would then begin working as a server in a restaurant—a job that is usually thought of as having limited wages, authority, and prestige. One suspects that there is some story not being told here.

111. See *id.*

112. *Whiting Statement*, *supra* note 94.

113. My own undergraduate students usually have never heard of it, but they may not be a typical sample.

114. Some restraint seems to have been shown, however, in the name of verisimilitude. The line was apparently drawn at having Meghan O’Malley-Barnard, a 27-year-old dancer and acting student, mouth Title VII case law. See *O’Malley-Barnard Statement*, *supra* note 95; *Biographies*, *supra* note 96.

In this light, it is interesting to observe the nuances of grammar and structure used in the Whiting statement. Whiting's version of the BFOQ, using the colloquialisms such as "besides" and the impersonal second person, is clearly less formal than the other versions of that concept, which use more complex sentence structure and sophistication than Whiting's. McNeil's statement, for example, puts it this way:

And, I think you should know that the Civil Rights Act of 1964 explicitly allows businesses to establish hiring rules that take into account factors such as gender or ethnicity when these factors are necessary to maintain the essence of a particular business. For example, a French restaurant has the right to hire only French waiters, and a female exercise club could decide to hire only female locker room attendants. We are convinced that this same standard allows Hooters to hire only women for jobs as Hooters Girls.<sup>115</sup>

If one were writing a play or novel in which different characters explained the same concept, it would be only natural to show them explaining it in different ways; but in that case the particular differences given to the characters would be highly significant.<sup>116</sup> Given that they received their information about BFOQs from the same source (and, indeed, that the same source probably wrote much of both statements), there has been a decision to have them express themselves differently. McNeil, the male, college and business school-educated Vice President in charge of marketing, speaks in complex and sophisticated sentences; Whiting, the female, high school-educated former "Hooters Girl," expresses the same concepts in simpler, unsophisticated language and with less reliable logic. In the community imagined by this text, male executives have a strong command of language and logic; female ex-"Hooters Girls" have less—although they appear to have access to more information than, say, the

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115. *McNeil Statement, supra* note 93.

116. One could, indeed, rest the entire literary core of the work on the differences between those explanations. In this way, the varying rhetoric creates the texture of the characters and their significance in the work. Shakespeare is justly famous for this. For a look at the differing sorts of rhetoric used by different Shakespearean characters in the same play, see WHITE, *LEGAL IMAGINATION, supra* note 49, at 51–56. For a look at this powerful device used by Shakespearean characters in a political context, see WHITE, *ACTS OF HOPE, supra* note 49, at 47–81.



average person on the street, who probably would not even be aware of the BFOQ defense.

### *B. The EEOC Press Release*

On December 21, 1996, six days after the Hooters press kit was distributed, the EEOC issued its own, short press release:

#### EEOC COMMENTS ON HOOTERS' PRESS OFFENSIVE

Washington—Any legally sophisticated employer such as Hooters is well aware that the EEOC is prohibited by law from publicly discussing any pending investigation. As a result, we can neither confirm nor deny the existence of an ongoing investigation against Hooters or any other employer. The EEOC, therefore, cannot respond to the public relations offensive recently initiated by Hooters.

We feel it important to point out, however, that a private class action lawsuit—in which the EEOC is not a party—was brought in December 1994 by individual men who believe that they were discriminated against by Hooters' hiring practices. The case is pending in federal court in the Northern District of Illinois (Chicago).

Given the pendency of this private action, we fail to understand what Hooters is seeking to accomplish through this expensive, well-orchestrated campaign other than to intimidate a federal law enforcement agency and, more importantly, individuals whose rights may have been illegally violated.<sup>117</sup>

The contrasts between this press release and the Hooters press release are striking. In light of my earlier discussion, the first thing that stands out is the complete lack of any pretense of objectivity or reportorial style. *This* press release does not appear to tell the facts as a reporter would—it is openly stating the Commission's own views. In this sense the EEOC release is more rhetorically honest than the Hooters release,

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117. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMMENTS ON HOOTERS' PRESS OFFENSIVE (Nov. 21, 1995), available in 1995 WL 854490.

insofar as the reader might be misled by the implied objectivity of the latter.

Next most striking is the position from which the EEOC chooses to make its remarks: it will not comment on the substance of the dispute, as it says is forbidden to do, but instead will comment on the fact of the Hooters release and subsequent advertising campaign. This raises the interesting question of why the EEOC bothers to comment at all if it cannot comment on substance; surely no negative consequences would ensue from its silence on this subject.<sup>118</sup> Yet this release does contain something very close to commentary on the substance. For example, there are three reasons for the EEOC to mention the *Latuga* case: To point out that the EEOC is not alone in its skepticism concerning Hooters's hiring practices; to suggest that Hooters's ire is misdirected, since the initial complaint came from private individuals; and to cast suspicion on Hooters's motives for launching its public relations campaign. This is a vivid contrast to McNeil's statement, in which the *Latuga* litigation is mentioned in order to suggest that the EEOC's investigation of Hooters's practices is entirely unnecessary, since "men are going to get their day in court—without intervention by federal bureaucrats."<sup>119</sup>

Just as the Hooters press release cast the EEOC as the aggressor, so the EEOC press release casts Hooters as the aggressor. The difference, though, is that the aggression the EEOC sees in Hooters is entirely contained in Hooters's public relations efforts. Hooters is a "legally sophisticated employer" engaging in a "press offensive," "public relations offensive," or "expensive, well-orchestrated campaign." The choice of words here is designed to portray Hooters as a wealthy, powerful, and well-informed manipulator of the media. This contrasts with Hooters's portrayal of the scene, in which Hooters was the collection of gallant individuals fighting the faceless colossus represented by the EEOC.

Further, the EEOC implies that Hooters is not just powerful, but crafty. The press release suggests that Hooters's motives in engaging in its public relations efforts are to intimidate government agencies and individuals in order to prevent them from engaging in their legitimate legal pursuits.

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118. Indeed, the EEOC release seems to have had just about as much effect as silence; few of the editorials written about this subject display any awareness that such a release was even distributed.

119. *McNeil Statement, supra* note 93.

Further, the Hooters press release exploits the EEOC's legally mandated silence by making a loud noise when it knows the EEOC cannot respond.

The agency itself, by contrast, is portrayed as an even-handed dispenser of justice. It calls itself a "federal law enforcement agency," piously and demurely reminds Hooters of its legal inability to speak, and points out that the Commission's responsibilities apply not only to Hooters, but to "any other employer." The EEOC emerges as a straight-faced, calm, and "untouchable" cop that will neither allow itself to be drawn into accusations of unfairness nor stoop to respond to ridicule of its actions or motives.

The reader is clearly imagined to be allied with the EEOC against the manipulative tactics of Hooters, sympathetic to the hopes of Latuga and his co-plaintiffs, and trusting of law enforcement officers to do their duty. Notably, the reader is not supposed to be a passive receiver of truth from the mouth of the EEOC; the agency deliberately avoids giving substantive information that could be taken as truth.<sup>120</sup> From this point the reader's role is to engage in further investigation and testing: to look at the court case in Chicago, to look into Hooters's motivation and tactics, to see the whole scene anew.

In this sense, the EEOC document may be seen as coming much closer to approaching an ideal of "dialectic" than the Hooters documents. Where Hooters consistently and repeatedly hammers away at the same substantive points, ridiculing the EEOC's efforts and pointing out the absurdity of the situation in objective-sounding language that is designed to be wholly believed, the EEOC leaves the reader in a position where she *must* engage in further thinking and investigation and cannot take the EEOC's words at face value. The EEOC makes no rhetorical claims of objectivity and points out that Hooters is not objective either, creating a deliberate imbalance that opens a discussion without closing it.

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120. Again, it is worth noting that although the EEOC stands by its obligation to remain silent as to the substantive issues in a pending investigation, it could have chosen to remain entirely silent. Its choice to provide the reader with enough information to wonder about Hooters's tactics, but not enough information to reach a final decision, is instructive.

### C. A Hooters Advertisement

As part of the advertising campaign that began simultaneously with its press conference, Hooters took out a number of full-page advertisements in national newspapers. Each of these advertisements was designed to show, in a humorous way, the apparent absurdity of the EEOC's position: in legal terms, each was asserting the existence of a BFOQ for female servers at Hooters. I will discuss one such advertisement here.

The central image in the advertisement, located at the left side of the middle of the page and taking up about half its total height, is a photograph of a large, muscular, mustached man wearing a blonde wig, a large bra (apparently padded), a Hooters tank top and running shorts. He is staring into the camera with a wild-eyed, open-mouthed grin, as though singing a long note on the word "hey." In his right hand he carries a plate of food, apparently chicken wings; his left hand is raised to mid-waist, and the index finger is bent as if beckoning. The top third of the page is taken up with the large-print, boldfaced headline, "The *Latest* From / THE FOLKS WHO / Brought You the / \$435 HAMMER." To the right of the man's image, the following text appears:

Government bureaucrats come up with some pretty crazy ideas—like paying \$435 for a hammer or spending \$1.8 million researching blueberries. Almost everybody in America agrees it's time to rein them in.

But some federal bureaucrats still don't get it. How else to explain the equal employment regulators' demand that Hooters restaurants begin hiring "Hooters Guys?"

*For a restaurant chain whose essence is the "Hooters Girls," the regulators' ideas are a recipe for business disaster. Here's just some of the things Washington bureaucrats want Hooters to do:*

- \* Teach Hooters employees to be more sensitive to "men's needs" by providing sensitivity training.
- \* Establish a scholarship fund to enhance job or education opportunities for men.

- \* For the next five years, require Hooters' owners to have key business decisions approved by a federally mandated "administrator," who must report to the EEOC.

The government has a 100,000 case backlog of job discrimination claims. It's hard to believe that replacing "Hooters Girls" with "Hooters Guys" is one of the EEOC's top priorities.<sup>121</sup>

Beneath the man and the text, a medium-sized footer appears: "COME ON, WASHINGTON—*GET A GRIP.*" Beneath that, the Hooters logo appears, followed by the words, "It's time for a little common sense." Finally, at the very bottom, in the smallest print on the page, appear the words, "Paid for by Hooters, Inc., Hooters Management Corp., and Hooters of America, Inc.," with the address following.<sup>122</sup>

This advertisement operates on many different levels at once, employing a variety of rhetorical devices. First and most obvious is the photograph of the man in the wig and outfit. The expression on his face, together with the surrounding text, show that he is supposed to be an absurd parody of the EEOC's position. The significance of this particular image—the cross-dressing man—should not be underestimated. A man dressed as or impersonating a woman is a signal, to many, of male homosexuality. Its representation cannot but produce an emotional response in a large number of viewers, particularly the heterosexual males who are Hooters's target clientele. Images of male homosexuality can be profoundly threatening to the identity of heterosexual males whose self-concept may depend on the maintenance of a strong masculine persona.<sup>123</sup> The almost psychotic look of desperate glee on the man's face, combined with the beckoning left hand, invites the viewer to believe that he is being asked to participate in a gender-bending activity of identity-crushing proportions. Further, the

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121. Hooters, Inc., Advertisement, WASH. POST, Nov. 15, 1995, at A10.

122. See *id.*

123. I have made this argument at more length in Schneyer, *Avoiding the Personal Pronoun*, *supra* note 49, at 1323–25. Eve Kosofsky Sedgwick has explored the related notion of "homosexual panic" in EVE KOSOFSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* 19–21 (1990). Sedgwick also speaks of how sexuality implicates those who hear about it (in a way that race and religion do not). See *id.* at 75–82. Kenneth L. Karst has spoken of the way in which traditional sex roles have powerful influence over our identities in Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 459–60.

particular man in this picture, muscular and mustached, is a far cry from the stereotypical image of an effeminate male—a distinction that is threatening for two reasons. First, if it could happen to him it could happen to you; second, he might be powerful enough to compel you. This, the picture seems to say, is the end result of hiring men at Hooters: your own sexuality is at risk.

But the photograph rests on unstated, unproven, and possibly false assumptions. Why imply that men hired by Hooters would wear the same uniform as women? If they did wear a similar uniform (tank tops, tee shirts, and running shorts are essentially unisex clothing), why assume that the men would wear bras and wigs? Why, indeed, assume that any sort of gender-bending, non-heterosexual, or ambiguous result would come at all? If the women are dressed to sexually titillate men, then it might be logical for the men to be dressed to sexually titillate women.<sup>124</sup> In the alternative, the women could continue to serve the function of sex appeal while the men would not. The advertisement's assumptions come from Hooters's underlying assertion: that its survival depends on the "Hooters Girl" concept, and that any dilution of that concept would be fatal. Consequently, since the only kind of server Hooters has is a Hooters Girl, it follows that any man hired would be hired as a Hooters Girl; hence the absurd, threatening picture.

By using this picture as the centerpiece of its advertisement, Hooters creates a link between its marketing strategy and American male identity. The government's attempt to alter Hooters is presented as tantamount to an attempt at wholesale emasculation. We cannot be real American men unless Hooters is allowed to be Hooters.

The two most prominent pieces of text in the advertisement, the only ones that can be read at more than arm's length, are the header "The *Latest From* / THE FOLKS WHO / Brought You the / \$435 HAMMER," and the footer "COME ON WASHINGTON—*GET A GRIP*." The header, which is clearly linked to the photograph (the man in the picture is "the latest from the folks") associates the well-known Defense Department

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124. A number of editorials (on both sides of the discrimination issue) made precisely this suggestion, going so far as to say that a new restaurant ought to be started with men dressed for the entertainment of women. The most commonly suggested name for this restaurant was "Buns." See, e.g., Donna Reynolds, Editorial, *Men Wouldn't Allow Restaurant About Them*, POST-STANDARD (Syracuse, N.Y.), Dec. 1, 1995, at A19; Joan Vennoch, *Who Gives a Hoot?*, BOSTON GLOBE, May 28, 1997, at D1.

spending debacles of the early 1980s (in which disproportionately large amounts of money were paid for cheap tools and supplies) with current EEOC anti-discrimination policies. This analogy is striking because there is no real connection between the two. They occurred in two different agencies, following different procedural rules, in different situations. More significantly, the Defense Department problems originated not in the crazy ideas of government regulators, but in the dishonest billing practices of private defense contractors; the government's sin was the failure to catch the billing practices because of its own poor or outdated purchasing practices.<sup>125</sup> Contrary to the text of the advertisement, "paying \$435 for a hammer" was never an "idea" of "government bureaucrats." In a way, then, Hooters is drawing our attention to the opposite of the real events: it implies that the EEOC's *attempt* to control private business is congruent with the Department of Defense's *failure* to control private business. Since this is obviously wrong, then why make that connection?

The key here, as in many of the texts discussed in this article, is the concept of "common sense." The "Hooters Guy" and the "\$435 hammer" are presented as similar in that they both are things with which the ordinary person would disagree. In the text of the article, the reference to "spending \$1.8 million researching blueberries"—a transition between the "\$435 hammer" and the idea of hiring men at Hooters—is designed to bolster the notion that the federal government generally offends common sense. The transition works this way: the first case presents government officials who do not have the common sense to rein in spending; in the second, government officials do not have the common sense to know that a study of blueberries is not worth \$1.8 million; in the third, government officials do not have the common sense to know that Hooters must hire only women. The first two deal with spending, the third does not; but the last two both involve things approved of (not merely neglected) by government officials.

In this way, all odd things done by the government are conflated into a single, massive loss of common sense. The advertisement plays on the general sense of alienation late

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125. See generally James J. Graham, *Suspension of Contractors and Ongoing Criminal Investigations for Contract Fraud: Looking for Fairness from a Tightrope of Competing Interests*, 14 PUB. CONT. L.J. 216 (1984) (examining the way "present practices, regulations, procedures, and judicial opinions attempt to fairly accommodate the various interests in the context of an allegation of fraud and the use of suspension during the pendency of the criminal investigation").

twentieth-century Americans have about their institutions in general and the federal government in particular, as well as the age-old distrust of the average citizen for the intelligentsia and the professional classes. It may well be, for example, that spending \$1.8 million on the research of blueberries turns out to be a useful thing, when one has considered the reasons behind the research and its probable benefits. But the ordinary person, who generally would know neither the reasons nor the benefits, would never consider such a thing. Stated baldly, without any of the supporting information, the expenditure simply looks foolish. Yet if those in power are routinely doing foolish things, then all of us are in jeopardy. Hooters presents itself as a victim of the random, unpredictable silliness of radical, isolated intellectuals and bureaucrats who wield dangerous amounts of power. The advertisement suggests that what happened to Hooters is waiting to happen to all of us unless something is done. Consequently, the footer, urging "Washington" (a single entity) to "get a grip" (an easy thing to do), is designed to be the cry of all outraged citizenry at all government shenanigans. A restaurant chain is everyman.

The text of the advertisement, like several documents contained in Hooters's press kit,<sup>126</sup> refers to four specific requests apparently made by the EEOC in its conciliation offer: compensation for displaced victims, employee training, scholarship funds, and EEOC supervision. In discussing these four references, it is important to remember, first, that the whole conciliation offer was apparently many times longer than these three items: various documents in the press kit suggest that it was 80 pages long, including appendices.<sup>127</sup> Second, we should remember that no one, including Hooters, has made the conciliation offer public. All we know about the offer is the very small amount that Hooters has made public in its press kit and advertisements.

This presents Hooters with a common problem in rhetoric: how to be a trustworthy reporter of facts that are known, in detail, to the writer, but which the writer can recount only in heavily digested form. This is a problem I faced myself in an earlier article, when I was discussing documents in a lawsuit that were available only to those who actually went to the courthouse to find them. In response to that problem, I said:

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126. PRESS KIT, *supra* note 68.

127. See generally PRESS KIT, *supra* note 68.



[T]o speak about a document in this case, I must be careful to explicate its text and context clearly, since my reader will not (generally) be able to verify my claims. For example, I am about to recite the basic facts of the case. To do this, I am relying on the fact summaries appearing in the summary judgment papers filed by the parties. I will try to avoid stating any fact that is disputed, or I will point out a dispute where it occurs, but you are in the (possibly uncomfortable) position of relying on me to do this job well.<sup>128</sup>

Hooters is in the identical position with regard to the conciliation offer. It has exclusive access to the document, and is able, in a brief advertisement or press release, to give us only small pieces of it. Consequently, we must rely on Hooters to give us a fair representation of what that offer contained.

But to what extent, if at all, does Hooters present itself as a trustworthy reporter of that information? We know, after all, that Hooters has an axe to grind in this matter; does it also give us reason to believe that it is giving us a fair presentation anyway? It does not do the obvious thing, that is, make the entire conciliation offer publicly available for inspection. Such a publication would have tremendous rhetorical value, because it would demonstrate Hooters's willingness to let the public judge the facts for themselves, without filtering. Alternatively, Hooters could make explicit the fact that it is merely summarizing nonrepresentative samples of a much larger and more complex offer. In a sense Hooters does do this, saying in the advertisement that the bullets represent "*just some of the things Washington bureaucrats want Hooters to do,*" and repeatedly referring, in the press kit, to the length of the conciliation offer. Yet that phrasing makes it appear that the samples are representative and that the rest of the offer is

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128. Schneyer, *Avoiding the Personal Pronoun*, *supra* note 49, at 1347-48 (footnotes omitted). You should notice that I stand in precisely the same position with regard to the Hooters press kit: While it is probably easy for you to obtain various newspaper articles and editorials heavily based on the press kit, the kit itself is something to which I have access and you do not—unless you care to make your way to the editorial offices of the *University of Michigan Journal of Law Reform* in beautiful Ann Arbor and look at their copy yourself. Consequently, as in the lawsuit reported in my earlier article, I must be very careful to show you where my information comes from and the extent to which I am summarizing it. In a footnote of that earlier article, I point out that the very act of telling you about this rhetorical problem creates an enhanced level of trust between us. *See id.* at 1348 n.111. Note the similarity between this argument and the one made in *supra* note 86 and accompanying text.

similar in tone, intent, and strategy. Of course we have no way of knowing whether this is the case, but it seems unlikely. A third possibility would be to make an explicit attempt to present the EEOC's position in addition to Hooters's own. There is no such attempt.

Consequently, the relationship of the reader to Hooters is clear and, indeed, familiar. This is advertising, and we are supposed to buy what is sold. We are given no opportunity to make an independent evaluation of the dispute because evaluation is not our role. The advertiser has decided which version of the facts is the most effective message, and its hope is that we will believe that version. This is either highly respectful or highly disrespectful of the reader. The general claim of advertisers is that consumers are presumed to be mature, intelligent, and able to see an advertising pitch for what it is; consequently, balanced information in advertising is not necessary—indeed, it would be presumptuous and paternalistic to include such a balance, because it would imply that the consumer is not able to take care of herself.

If we believe the underlying claim, then the advertisement holds the reader in high esteem, because it expects the reader to deconstruct it. The same, presumably, could be said of all advertising.

Such an interpretation is flawed, however. While any text may be torn apart by a reader who is sufficiently alert, or who does enough research to find its contradictions, it is inaccurate to say that a text *invites* such dissection unless there are clues within the text itself signalling the reader that the information is incomplete.<sup>129</sup> I found the flaws in the advertisement because I was looking for them and spent many hours refining my thoughts about it, but it would be unrealistic to say that the advertiser expected me to do so. On the whole, it would be more accurate to say that advertising in general and this advertisement in particular expects the reader *not* to engage in such ruminations; indeed, since the advertisement is designed to be effective with the broadest practicable range of viewers, presumably, it would be counterproductive to aim at only those who have the leisure to engage in more in-depth research.<sup>130</sup>

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129. I argue that exactly such signals appear in the EEOC press release, *supra* notes 117–18, 120 and accompanying text, and in the commentary by Laura Archer Pulfer, *infra* notes 209–10, 213–14, 217 and accompanying text.

130. In the securities field, of course, this is precisely the target audience required by federal law. The advertisement itself is essentially useless without the prospectus, which must be separately obtained. The theory is that investors can indeed make

On the contrary, while the reader may have the intrinsic *ability* to critique them, most advertisements are designed in the expectation, indeed the hope, that that ability will not be exercised. They are designed in the hope that their deliberate omission of facts will not be noticed. Therefore, it would be disingenuous to claim that such omissions are respectful because they assume that intelligent readers will take advertising with a grain of salt.<sup>131</sup> Advertising in general and this ad in particular treat their readers as means to an end.

## VI. LAWYERS TALKING TO EACH OTHER: THE DEBATE IN THE *ABA JOURNAL*

For more than ten years, the *ABA Journal*, published monthly and distributed to all members of the American Bar Association, has printed an "At Issue" column, in which current controversies of interest to the legal profession are debated. The column customarily poses each controversy as a leading question (e.g., "Should contingency fees be abolished?") and contains one article arguing the affirmative and one arguing the negative. Each article is about 500 words long, and is written by a lawyer, law professor, judge, or similar legal professional who has some expertise in the area. Typically each author is, or has been, engaged in litigation or advocacy favoring the result for which she argues. Although these articles often involve policy questions, occasionally they involve the interpretation of the law.

This format is reassuringly familiar to the lawyers who read the column—it resembles the type of appellate brief we were taught to write in law school. Its distillation of an issue into a single question with either a positive or negative answer, its insistence on brevity, and its choice of writers predisposed to argue in favor of one side or the other all serve to remind lawyers of their own view of how disputes should be discussed. This

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intelligent decisions, but only when they are provided with accurate and complete information. See J. Robert Brown, *Corporate Secrecy, the Federal Securities Laws, and the Disclosure of Ongoing Negotiations*, 36 CATH. U. L. REV. 93, 93 n.2 (1986); Richard S. Hardy, *The New Gold Rush: The Last Frontier of the Securities Laws?*, 29 SANTA CLARA L. REV. 359, 364-65 (1989).

131. The irony here is similar to that in Burton Lane and Alan Jay Lerner's famous song, *How Could You Believe Me When I Said I Love You When You Know I've Been a Liar All My Life?* The most well-known version of this song may be seen and heard in the film *ROYAL WEDDING* (Metro-Goldwyn-Mayer 1951).

is the world the way lawyers know it; consequently, we automatically appreciate this way of talking, and are led to believe both that it expresses something meaningful about disagreements and that it gives us a good basis for making decisions.

Yet there is much that can be said against such a model. For one thing, few controversial issues are so simple that they can profitably be posed as a single "yes/no" question. Such a method inevitably avoids the complexities involved in difficult questions, causing both reader and writer to imagine that the issues are considerably less difficult than they are.<sup>132</sup>

In its February 1996 issue, about two months after Hooters held its press conference, the *ABA Journal* published an "At Issue" column with the title, "*Sex Discrimination: Does Refusing to Hire Men as Food Servers Violate the Civil Rights Act?*"<sup>133</sup> The column specifically concerned the EEOC investigation of Hooters (probably prompted by the press coverage), and the introductory paragraphs preceding the two articles specifically mentioned BFOQ as the core legal issue. The affirmative argument was written by Mary Becker<sup>134</sup> of the University of

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132. I remember a seminar in law school in which students were assigned the task of writing in support of, or against, the argument propounded by a scholar in a law review or other academic journal. About midway through the term we rebelled against this practice, saying that our reactions to the articles were far more complicated than could be expressed as support or opposition and that, further, asking us to be "advocates" of theoretical positions without recourse to our own feelings or reactions was unrealistic. I should add that this was a seminar in feminist approaches to legal theory, and we felt that our reaction to the process reflected a valid critique of legal thinking and legal method generally. The professor running the seminar entirely sympathized with our concerns, and permitted us to begin writing rigorous "reactions" to the pieces that did not necessarily support or refute them.

133. *Sex Discrimination: Does Refusing to Hire Men as Food Servers Violate the Civil Rights Act?*, A.B.A. J., Feb. 1996, at 40 [hereinafter *Sex Discrimination*]; Mary Becker, *Yes: Discrimination Helps Companies Trade on Women's Sexuality*, A.B.A. J., Feb. 1996, at 40; Patricia A. Casey, *No: A Business Has a Right to Choose Its Own Character*, A.B.A. J., Feb. 1996, at 41. I do not discuss the meanings of the titles of the two position papers because the titles were supplied by the editors of the *ABA Journal* without consultation with the authors; consequently, they can be looked at as separable texts. Having said that, there is still an argument that the titles should be included in the analysis anyway. First, the reader of the articles would not necessarily be aware that the titles were supplied, although it is a common editorial practice, and anyone with experience in writing for newspapers or magazines would be aware of it. Most readers (even most lawyer-readers) are not in that category, and would think of the title as part of the piece. Second, regardless of whether the reader actually knows that the editor supplied the title, nevertheless the title appears, in large, boldface type, at the top of the article, and it may be the only part of the article many readers see. While these are compelling arguments, my own awareness of the different source of the titles makes it difficult for me to think of text and title as an organic whole.

134. Professor Becker's interests in both employment law and feminist jurisprudence are longstanding and public. See Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303 (1993); Mary

Chicago Law School, while the negative was written by Patricia A. Casey of Akin, Gump, Strauss, Hauer & Feld, who is Hooters's attorney<sup>135</sup> and presumably had some advisory role in the planning of the press conference.

*A. The Essay by Mary E. Becker*

Here is the first paragraph of Becker's article:

In the 1970s, Southwest Airlines dressed its stewardesses in hot pants and go-go boots, and ran an ad campaign with the theme, "Fly me." Southwest argued that sex was the essence of its marketing to male business travelers, and that its females-only hiring policy was "necessary for the continued success of its image and its business."<sup>136</sup>

The first thing to strike the reader about this paragraph is that it concerns neither Hooters nor food servers. It is a narrative, telling the story of a series of actions by another company that apparently occurred twenty years ago. A nonlawyer reading this passage might wonder what relevance that story has to this dispute, although there are similarities to the Hooters scenario.

But this paragraph is written by a lawyer for other lawyers, who will recognize the intent of the narrative: this is going to be an argument by analogy, probably an argument from precedent. Even if the particular lawyer-reader is not aware of *Wilson v. Southwest Airlines Co.*,<sup>137</sup> she can guess how the argument will proceed. Probably Becker is going to tell us about a court decision that found Southwest Airlines to have violated Title VII, and probably she is going to argue that the Hooters scenario is similar to the Southwest scenario. This form of argument is so familiar to lawyers that we intuitively recognize the classic introductions to it and can comfortably guess at what is coming next. By using this format, Becker places

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Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996); Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201; Mary Becker, *Reproductive Hazards After Johnson Controls*, 31 HOUS. L. REV. 43 (1994).

135. See *Sex Discrimination*, *supra* note 133, at 40.

136. Becker, *supra* note 133, at 40.

137. 517 F. Supp. 292 (S.D. Tex. 1981); see *supra* notes 33–38 and accompanying text.

herself squarely within the community of lawyers, and informs us that it is within that community that she intends to make her case. Moreover, she is saying that this is the sort of controversy that ought to be resolved by those who talk like lawyers, rather than those who talk like politicians or marketing directors. Legal reasoning, and especially the ancient common law tradition of argument from precedent, is a good and proper way to think.<sup>138</sup>

Of course there are many different ways to introduce a controlling precedent. One could simply open by saying, "This case is squarely controlled by *Wilson v. Southwest Airlines Co.*," or "the facts presented by the Hooters scenario are slightly more exotic versions of facts presented in earlier cases." I think that Becker would agree with both of these statements, and both are consonant with the intent of her article. Why, then, does she start by telling the story of Southwest's business practices and its arguments for maintaining them?

I think that this strategy serves two functions. First, by telling a story, Becker places herself in that class of lawyers who know that "the life of the law is experience."<sup>139</sup> The first thing she knows about *Wilson* is what events took place, and why they took place. All lawyers, and especially academic lawyers, run the risk of giving the impression that they are so interested in theory that they neglect the mundane facts of life and the realistic concerns of people, especially people in business. We are, indeed, routinely accused of this.<sup>140</sup> But Becker knows not only what Southwest did, but why Southwest did it: she understands the marketing motivation behind the business practice. Although she has defined herself as a lawyer among lawyers, she also shows that she knows what nonlawyers (particularly businesses) do.

Second, this particular story emphasizes the purpose of Southwest's practices. By the time we finish reading this paragraph, we understand that Southwest really was trying to use sex as a marketing strategy, and really did feel that it was essential to its business. This makes Southwest look a great deal like Hooters, particularly because of the motivation behind the action. Before we even get to the second paragraph,

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138. For a resonant hymn to the complexities of precedent, see WHITE, ACTS OF HOPE, *supra* note 49, at 153-83.

139. "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

140. See, e.g., PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994); Schneyer, *supra* note 28, at 155-57.

we are probably feeling that these two cases are parallel in important respects.

Is this a good way to proceed? Any lawyer would try to stress similarities in helpful precedent, and Becker is putting those similarities at the front. But is this particular way of doing it distracting or beguiling? Is Becker camouflaging the facts that are more difficult to reconcile with *Hooters*? After all, there are certainly differences between the airline industry and the restaurant industry, and between the two marketing approaches. Is Becker leading us to miss them? I think not; the fact that *Wilson* involves stewardesses rather than waitresses, and the manner of the advertisements, are explicitly discussed at the very beginning. Far from hiding them, Becker starts with them.

As anticipated, Becker's second paragraph continues with a summary of the court's basic holding in *Wilson*, including the crucial language that "sex does not become a bona fide occupational qualification merely because an employer chose to exploit female sexuality as a marketing tool, or to better [e]nsure profitability."<sup>141</sup> She points out that Southwest later found another marketing device. Then she produces a third paragraph that is designed to mirror her first one:

Now, a restaurant chain is arguing its business is not food but the ambiance and entertainment created for men by Hooters "girls." These women usually wear tight short-shorts and tank tops or half-tees with a large-eyed owl on the front; some shirt backs read "More than a mouthful."<sup>142</sup>

The parallel construction here is remarkable. Becker emphasizes the similarity in the uniforms ("hot pants" vs. "tight short-shorts") and marketing strategy ("Fly me" vs. "More than a mouthful"), as well as the similarity between the arguments of the companies ("sex was the essence of its marketing to male business travelers" vs. "business is not food but the ambiance and entertainment created for men by Hooters 'girls'"). The effect of this well-rendered analogy is to persuade the reader that the important parts of the cases are identical, and that the holding in the one should apply to the other. Yet all of this is accomplished in narrative form, without resort to overt

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141. Becker, *supra* note 133, at 40 (quoting *Wilson*, 517 F. Supp. at 303).

142. Becker, *supra* note 133, at 40.

logical argument; the story makes the argument all by itself. This is a powerful rhetorical device, because the reader is led to believe that his own intelligence is drawing the parallels. Also, notice the pattern of the paragraphs: facts-law-facts. We are shown how one set of facts led to a legal conclusion, and then shown another set of facts that closely resembles it. Our tendency to form patterns leads us to conclude that a similar legal conclusion would follow the similar facts. Again, the fact that we are lawyers is key: Lawyers believe in this common-law style of reasoning; Becker is fully invested in that style and thinks that we should be too. Becker's fourth, single-sentence paragraph fulfills our expectations: she tells us that to find in favor of Hooters would require us to abandon the legal rule set forth in *Wilson*.<sup>143</sup> This is something against which our common law respect for precedent rebels, and besides, we are already invested in the rightness of the *Wilson* decision.<sup>144</sup>

Becker then switches her focus and begins to talk about policy—specifically, policy concerning women. She points out that the defeat of Hooters would mean that some women might lose their jobs, and that it's even possible that Hooters would go out of business, hurting more female employees. How, then, is this good for women? She responds by denying that Hooters will go out of business, and then identifying three advantageous characteristics of a changed Hooters following such a court decision: "reasonable, comfortable uniforms" for female employees, a reduced frequency and severity of sexual harassment due to the changed environment, and increased job security for women who cease to appear sexually attractive as currently defined by culture.<sup>145</sup> She admits that

in a world without a discriminatory Hooters, women will not be able to trade their youth, beauty and sex appeal for a job with good wages and (often) a lot of sexual harassment. But the woman who does get the

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143. *See id.*

144. At this point it should be noted that Casey's legal assumption about the case does not match Becker's. Casey believes that finding in favor of Hooters is consistent with *Wilson*, because sexuality really is the essence of Hooters's business, while it wasn't the essence of Southwest's. *See Casey, supra* note 133, at 41. This distinction is found nowhere in Becker's piece, and it is clear from the way her article is written that she doesn't believe in it. *See Becker, supra* note 133, at 40.

145. *See Becker, supra* note 133, at 40.



job will have greater job security, as well as better working conditions.<sup>146</sup>

What is interesting about this passage is that the policy issues Becker discusses are the grounds for neither the EEOC investigation nor the current *Latuga* litigation, both of which have focused on discrimination against men. Becker seems to be saying that discrimination against men is not the real or important issue—indeed, her article does not mention the interests of male plaintiffs at all. Instead, she is concerned with the negative effects the Hooters environment has on its female employees. The environment she speaks of is not the discrimination in hiring per se, but rather the sexually exploitative nature of the business. She is saying that a Hooters without discrimination—by which she apparently means a Hooters without the “Hooters Girl” concept—will be better for women.

By thus changing her focus, Becker defines herself in two ways. First, she is interested in policy in general, something she will reinforce in her last paragraphs, in which she speaks of the “broad societal” consequences of a victory or defeat for Hooters. Second, she is interested (and believes that Title VII should be interested) primarily in the status of women in the workplace. Her chief concern, which takes up the majority of the article, is the effect of the case on women. Indeed, the direction and tone of the article reflect the “dominance” approach, rather than the “difference” approach, to equality law.<sup>147</sup> Within this approach, the plaintiffs are disregarded because they suffer no real harm; no one really thinks that any specific men, or men in general, have suffered any genuine loss because of sex discrimination at Hooters.

The combination of these two definitions is, in one sense, quite resonant: we want people to think more broadly than the individual case, and we want them to take into consideration the interests of those who might be “hurt” by the result. Yet, by making the question of subjugation, rather than equal treatment, the center of her attention, Becker makes it seem that Title VII itself, and the way it has been judicially interpreted, do not matter that much after all. Amazingly, it is not the interests of Hooters that vanish in this article; it is the interests of the male plaintiffs. The future benefits to female employees about which Becker speaks so glowingly are, after all, entirely

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146. *Id.*

147. Becker is a proponent of this school of thought. See *supra* note 134.

hypothetical. We do not know that Hooters will change its focus or its policies in response to a loss, other than by hiring men; presumably it could exploit women just as much and still satisfy the statute. This aspect of the essay is troubling, because in losing sight of the actual plaintiffs involved in the case, Becker falls prey to a criticism routinely made of lawyers, notably academic lawyers, and especially feminist academic lawyers: that we are more interested in changing the world to suit our beliefs than we are in the fate of specific individuals.<sup>148</sup>

Finally, Becker speculates on the consequences of a win by Hooters in this case. She returns to her earlier assertion that finding in favor of Hooters requires abandoning *Wilson*:

Think of the jobs that could become part of the sex industry were employers simply free to add female sexuality to any job description: all customer-contact jobs in transportation, restaurants, sales, marketing, service industries, etc.

What would be the result of a Hooters victory if other employers followed the lead? Those in so-called women's jobs would have little job security and be subject to higher levels of harassment. I suspect women might earn even less per hour than they do today.<sup>149</sup>

Now the stakes are higher. Earlier, she was concerned with the effects on workers at Hooters itself; now, she is talking about the future of women in the American workplace. Previously we might have thought that following the *Wilson* logic was simply a matter of respect for precedent. Now, though, it

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148. See Cahill, *supra* note 39, at 1145–47; see also *supra* note 140 and accompanying text. You will note that I use the word “we” to refer to feminist academic lawyers, overtly including myself in that group. By doing this I remind you of my biases, and simultaneously try to form a community including both myself and Becker. Do I also create the impression that you, the reader, ought to include yourself in this community of feminists?

It might be argued that Becker's position does take the fate of specific people into account—notably the specific women who work at Hooters now and are the victims of this exploitation. Yet how can one make this argument without dismissing the apparently subjective views of the servers themselves as “false consciousness”? See Rhee, *supra* note 4, at 185–87.

149. Becker, *supra* note 133, at 40. In this context, however, it is important to note that servers at Hooters apparently earn considerably more in tips than their counterparts at other restaurants. See Rhee, *supra* note 4, at 186–87; Joe Sonneman, Letter to the Editor, *Hooters' Real Bias Is Against Some of Its Patrons*, NAT'L L.J., Apr. 1, 1996, at A18; Stetler, *supra* note 55.

seems that abandoning *Wilson* would be more than rejecting a precedent; it would be opening the floodgates for sex-specific jobs, all of which would be degrading and oppressive to the women who would be called upon to fill them. Becker now defines *Wilson* as the finger in the dike holding those waters back. Hooters itself, and even the future of women workers at Hooters, now shrink into insignificance. We are talking about the very nature of sexual equality, about whether we will turn back the clock on the cultural meaning of Title VII itself.

But this begins to seem overwrought. Becker's prediction reads like a dissenting opinion in an appellate court decision: these are the dire consequences of the court's decision today.<sup>150</sup> While some dissenting opinions turn out to be prescient,<sup>151</sup> most are exaggerating in order to make a point. Further, this tactic by dissenting judges never seems entirely trustworthy; either they are being careless in the way they calculate future outcomes, or they are evidencing a reckless disregard for the truth. Why should we believe that Becker is right about the consequences of abandoning the logic of *Wilson*?

But perhaps I demand too much of a text. Becker, like me, is a professor who is used to putting careful, detailed arguments into lengthy, excruciating articles. A 500-word essay is an entirely different matter, in which a detailed argument cannot be made. It is difficult to be persuaded by the logic of a 500-word essay, because the author does not have the space in which to show all the steps in the proof. Such a short piece must succeed based as much on its *ethos* and *pathos* as on its *logos*; claims of authority and tugs at the heartstrings are part of the whole. Yet, at the same time, what a writer chooses to omit from such an essay is a valid criterion for evaluating the *ethos* she creates.

Becker's rhetoric is admirable, in my view, because of reliance on a shared history with its audience, its implied belief that legal culture and legal tradition can and should protect the rights of the oppressed.<sup>152</sup> She shows herself to be

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150. See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 525–43 (1993) (Souter, J., dissenting); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60–71 (1982) (Rehnquist, J., dissenting).

151. The two that spring immediately to mind are *Lochner v. New York*, 198 U.S. 45, 65–76 (1905) (Holmes, J., dissenting) and *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

152. I am aware of the dangers of this particular kind of rhetoric. It is "liberal," in the sense that it treats the procedures of contemporary legal culture, which have been designed by, and serve to perpetuate, the existing power structure as fit devices for undermining, humanizing, or leveling that structure. Such a set of assumptions has

(and insists that her readers should be) concerned with overall justice rather than with the needs of the moment. However, she fails to acknowledge the validity of the concerns of Hooters and she distances herself too much from the actual or potential litigants. She sounds, indeed, like a professor: talking about the best aspirations of the legal system and its effect on overall population, but not overly concerned with the actual individuals involved in particular disputes.

### B. *The Essay by Patricia A. Casey*

Here is the first, single-sentence paragraph of Casey's article:

The EEOC's charge of sex discrimination against Hooters restaurants invites observers to muddle the legal and political issues.<sup>153</sup>

This sentence accomplishes many things. First, it makes an implied claim (never expressly argued in the article) that there is a distinction between legal and political issues. Second, it defines Casey as someone who knows the difference between them and can explain it to others. Third, it implies that this distinction is an important one about which the reader should be concerned. Fourth, it defines the EEOC as someone who does not understand, is not concerned with, or refuses to be forthright about that distinction. Fifth, it defines the reader as someone who, because of the EEOC's actions, is either already confused, or is in serious danger of becoming confused, about that distinction—in other words, someone who needs instruction by Casey.

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been sharply criticized by an entire generation of legal scholars. See MARK KELLMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 3–4 (1987); Kennedy, *supra* note 105. Nevertheless, Becker's article is addressed to the members of the American Bar Association, an organization made up of people firmly entrenched in the legal culture. When addressing such a group, the writer has a choice. On the one hand, she can point out the inherent flaws and contradictions in the audience's underlying culture, in the hopes that audience will abandon aspects of that culture in favor of something better. James Boyd White has written an entire book describing superb canonical examples of just such a strategy. See WHITE, *WHEN WORDS LOSE*, *supra* note 49. On the other hand, the writer can attempt to teach her readers that they can, and should, use the power given to them by their culture to help others. If the members of the culture come to believe that it is supposed to serve these functions, that may serve as a marginal alteration of the culture itself.

153. Casey, *supra* note 133, at 41.

She has also altered the terms of the discussion: we are not really talking about whether what Hooters did violated the law, nor whether “refusing to hire men as food servers violate[s] the Civil Rights Act”<sup>154</sup> (the question posed by the *ABA Journal*), but whether legal and political issues have been confused. This would be a very different sort of debate, concerned less with the interpretation of the law and more with the nature of thought and argument itself and the character of those involved in the debate. In other words, Casey has turned the focus away from Hooters and towards those talking about Hooters: herself, Becker, the EEOC, and, of course, us.

Casey’s second paragraph is a mixture of law, opinion, and innuendo:

Under the law, an employer may hire on the basis of gender (or national origin or religion, but never race) if sex “is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business.” For Hooters, the real issue turns on statutory construction and common sense: Do you have to be female to perform the job of a Hooters girl? I say yes. Politically incorrect it may be, but unlawful it is not.<sup>155</sup>

This is a remarkable construction. The first sentence is a precisely correct recital of the rule, indeed resorting to the actual wording of the statute. This is powerful because it appears to promise that Casey’s argument is going to be based on the wording of the law itself—she is going to draw her authority from the legislature’s own words and her own ability to interpret. If, as she has suggested, the debate is really about the distinction between law and politics, she is going to show that she understands the legal side very well.

But take a closer look: this formulation is actually *too* complete. Why does she bother with the parenthetical explanation of the different characteristics that may be the basis of a BFOQ? More importantly, why does she bother to remind us that race is never the basis of a BFOQ? Hooters’s press kit included the same explanation, including two separate references to the fact that race cannot be a BFOQ.<sup>156</sup> This is interesting, since apparently no one has argued that

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154. *Sex Discrimination*, *supra* note 133, at 40.

155. Casey, *supra* note 133, at 41.

156. See PRESS KIT, *supra* note 68.

race (or religion or national origin) has anything to do with this case. The mention of race serves to remind us that Title VII, by its own terms, appears to find something particularly heinous about race discrimination. This is important because it gives the appearance of reducing the importance of sex discrimination: if Congress would allow BFOQs for sex but not for race, sex discrimination must not be as bad as race discrimination. The implication is that even if Hooters has committed sex discrimination, that's not such a terrible thing.<sup>157</sup>

The second sentence of this paragraph alters the focus slightly: now that we know the law, we have to interpret it. But statutory construction by itself, apparently, is not sufficient; in addition we must use something called "common sense." This is an odd thing for a lawyer to say to other lawyers. How is common sense separate from statutory construction? Surely common sense is one of the many tools normally used in construing statutes.<sup>158</sup> Casey, however, implies that some people (the EEOC, for example) fail to use common sense in statutory construction. But more than this, by conjoining these two words with the word "and," she implies that common sense has a separate status that may be of equal standing with that of statutory construction. There are, in other words, non-lawyerly skills that are necessary to arrive at the right outcome. If lawyers have lost the habit of using common sense, as she implies, then we may be *less* qualified than the ordinary person to interpret the meaning of the law. Fortunately we have Casey, who knows what common sense is and how to use it.<sup>159</sup>

In asking whether "you have to be female to perform the job of a Hooters girl," Casey subsumes an important point in her

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157. Such a sentiment would correspond to the historical development of cultural consciousness about discrimination in this country. See *supra* note 5 and accompanying text.

158. On the other hand, it has been pointed out that the rules of statutory interpretation are many and mutually contradictory. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Interpreted*, 3 VAND. L. REV. 395, 401-06 (1950). Thus, the rule "Words are to be taken in their ordinary meaning unless they are technical terms or words of art," *id.* at 404, which corresponds to the statement in the text accompanying this footnote, is countered with the rule, "Popular words may bear a technical meaning and technical words may have a popular signification and they should be so construed as to agree with evident intention or to make the statute operative," *id.*, which may belie the use of common sense in this context.

159. Not coincidentally, the documents in the Hooters press kit also make repeated references to "common sense" as the determining factor; they say that "[t]he issue isn't sex discrimination. It's common sense." PRESS KIT, *supra* note 68.

construction. We know that since *Johnson Controls* BFOQs must be specifically linked to the employee's ability to do the job,<sup>160</sup> by defining the job as "the job of a Hooters girl," Casey takes the company's marketing strategy as part of the definition of the position. One does not find "Hooters girl" among the occupational categories listed in the Department of Labor indexes, nor in the classifications made by newspapers or employment agencies. Those entities would probably have defined the position as "waitron," "server," "bartender," or "maitre d'hotel." The way she asks the question imposes the answer. Her response—"I say yes"—has a simple power just because of her clear reliance on her own judgment. It sounds very much like the sort of thing a person relying on "common sense" would say. Further, it sounds more like the beginning of a political speech than like a legal argument, participating in the confusion Casey identifies between law and politics in this case.

The paragraph's final sentence, though, is a loaded weapon. In the last decade or so, the words "politically correct" have been used almost exclusively by those who wish to deride the thing they describe. Practically no one uses the term to describe himself. People have built entire careers out of using the words "political correctness" to flagellate their colleagues, their political opponents, or anyone else with sympathies leaning to the political left.<sup>161</sup> In popular usage, this term has come to denote the rigid adherence to a dogmatic code of conduct in speech and thought, mandated by the hypersensitivity of all those who might conceivably benefit from Title VII or other antidiscrimination statutes.<sup>162</sup> "Political correctness" is routinely compared to Nazi book-burnings, Soviet intellectual dogmatism, and the red-baiting of the McCarthy era. To call an idea "politically correct," therefore, is to call it narrow, mindless, and intolerant. By contrast, by saying that her own answer about Hooters—which she has not yet explained or defended—may be politically *incorrect*, Casey has already defined herself (I am not bound by dogmatism or silly conventions) and her opponents (anyone who disagrees with me is

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160. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991).

161. Dinesh D'Souza springs to mind as one whose career has been so enhanced. See DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991). D'Souza and Stanley Fish actually engaged in a series of touring debates on the subject. See Geoffrey W. Castello, *Almost a Pragmatist*, 26 SETON HALL L. REV. 967, 968-69 (1996) (reviewing STANLEY FISH, *PROFESSIONAL CORRECTNESS: LITERARY STUDIES AND POLITICAL CHANGE* (1995)).

162. See, e.g., D'SOUZA, *supra* note 161.

like a Nazi or a McCarthyite). Further, she has revived the distinction between law and politics in a more sinister way. Earlier, when she said that one risked muddling legal and political issues, we might have believed that the "politics" she was describing was the politics of honest people of goodwill disagreeing about matters of principle. Now, however, we see that she means the politics of the crazy left as opposed to the rest of America, including herself in the latter. The "politically correct," she is telling us, are at odds with the law.

It is not until the third paragraph that Casey's actual argument begins. The core of this argument is an idea of considerable legal and intellectual merit, namely that a business does not have a single and exclusive "core" essence but is more complicated. Consequently, to say that the "food" aspect is more important than the "sex" aspect of Hooters, and therefore is the primary relevant determinant of what constitutes the "job" of a server at Hooters, is to greatly oversimplify an intricate problem. She compares Hooters to *Playboy* magazine and the Rockettes dancers: in each case there is a non-sexual aspect to the business which might conceivably be called primary or essential, but Casey implies that focusing exclusively on such an aspect at the expense of the obvious sexual intent of the enterprise would be ludicrous.

More than this, she argues that this is really a dispute over *who* should be entitled to define the essence or defining characteristic of a business. To Casey the answer is obvious: "Don't these businesses have the right to decide exactly what products to offer on the market?"<sup>163</sup> While at some points she suggests that the question is so amorphous that *no one* knows what the essence of the business actually is, she wants there to be deference to businesses. It will be noted that such a rule, if taken literally, would have an odd effect in discrimination cases: if any business has the right to define what its primary, essential aspects are simply by saying so, and if government regulators and courts ought to defer to that determination, then businesses can create BFOQs at their convenience whenever faced with a lawsuit. This position taken by Casey actually lends credence to Becker's earlier warning (which had seemed so overwrought) that the wrong decision in this case could create an army of new, artificial BFOQs.

Casey's argument concerning the authority to speak about the essence of a business has another agenda, however: to

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163. Casey, *supra* note 133, at 41.



discredit the opinions of the EEOC. Consider the following chain of statements about the agency:

The EEOC seems to believe that a business can have only one defining characteristic, or "essence." . . . And who is the EEOC to say that only one of the many elements of Hooters is the essential, defining one?

. . . .

Hooters' case demonstrates the limitations of the EEOC's expertise—quite simply, the agency lacks the business acumen necessary to determine what elements are "essential" to an enterprise. Indeed, it currently is making a similar mistake in a case against the Lillie Rubin clothing stores, in which it is asking the women's store to hire men as well as women to assist patrons in the dressing rooms. (According to an EEOC spokesperson, women might "love" to be fitted by male attendants.)<sup>164</sup>

In this string of quotations I have omitted the details of Casey's legal argument in order to highlight the non-legal, rhetorical position she is staking out. She is arguing not merely that the EEOC has reached the wrong result, but that it has no business arriving at any result, because it is not competent to judge what is "reasonably necessary to the normal operation of that particular business."<sup>165</sup> What constitutes the normal operation of the business is a business decision, and isolated ("politically correct"?) government bureaucrats are in no position to second-guess those decisions. Worse, these bureaucrats are so separated from the rest of "us" that they have lost any ability to use "common sense."

The Lillie Rubin anecdote, and especially the isolated, parenthetical, decontextualized quotation from an anonymous "spokesperson," are designed to show that the judgments of the EEOC are untrustworthy because they do not reflect what ordinary people would recognize from ordinary experience.<sup>166</sup>

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164. *Id.*

165. 42 U.S.C. § 2000e-2(e) (1994).

166. This particular criticism of government regulators is becoming increasingly popular. See, e.g., HOWARD, *supra* note 140. Aside from whatever basis this criticism may have in fact, it may be a symptom of the increasing feeling of remoteness that many people associate with government in general and the federal government in particular.

Of course the Lillie Rubin and Hooters scenarios are not parallel. If the EEOC has made a mistake with Lillie Rubin, it is a mistake that relates to understanding the needs of gender-related privacy. This mistake, though arguably more fundamental, is of a different character than misapprehending the essential nature of Hooters's business. In this sense, using the EEOC's judgment in the Lillie Rubin case as a way of discrediting its judgment in Hooters is not entirely honest. Yet it permits her to create a general picture of the EEOC that is helpful to her position: she defines the agency as unrealistic, pig-headed, isolated, inexperienced, and fundamentally stupid. Add to this the implied charge that the EEOC is "politically correct" (dogmatic, narrow, fanatical), and the reader wants to conclude that its judgments are worthless.

This is, perhaps, the sort of picture a contemporary politician might paint of an opponent in a campaign speech; in fact, it closely resembles the pictures several politicians have recently painted of several government agencies.<sup>167</sup> It is also the sort of picture a litigator might paint of an opposing party or an unfriendly witness in a closing argument to the jury.<sup>168</sup> Is this a legitimate way of talking, though? Does it foster the kind of thinking we would like to have or the kind of community we would like to create? I am inclined to be skeptical of this use of language. Casey is writing about a difficult and subtle point in discrimination law that can have tremendous consequences for the employer, the employees, and potential applicants. She is describing the agency charged with enforcing discrimination law, whose supposed argument, though possibly incorrect, would certainly be legitimate and well-taken. The logic of her own substantive argument shows that a sense of the complicated and the ambiguous is absolutely necessary to sort out this dispute, which belies her earlier assertion that "common sense" is at the core of the problem. Yet she treats the EEOC as if it were missing the obvious and the simple, as though this really is a matter of common sense. In Casey's version of the story, the agency and its lawyers are not intelligent minds who are to be taken seriously. This conversation is not designed to be a

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167. See, e.g., 141 CONG. REC. S5534-01 (1995) (statement of Sen. Hutchison); 141 CONG. REC. E285-04 (1995) (statement of Sen. Cunningham).

168. I have commented elsewhere on the difficult rhetorical position of the litigator and the pitfalls of misleading language. See Schneyer, *Avoiding the Personal Pronoun*, *supra* note 49, at 1345-46.

dialogue, or, if it is, the EEOC is not going to be the one with whom Casey speaks.<sup>169</sup>

Also, what does it mean to say that an issue depends on "common sense," while demonstrating that it actually depends on a subtle understanding of the shifting definitions of the identity or essence of an enterprise? On the one hand, declaring that one is going to use common sense begins to build a community with the reader, because the reader, who imagines that he has common sense, feels that he will be participating in the problem-solving that is about to begin. On the other hand, if common sense is what's needed, which all of us (except perhaps the EEOC) have, then why do we need Casey to explain the matter to us? Does she have more common sense than we do? Of course, she does not really believe in the use of pure common sense here, and her reasoning is, as I have said, rather subtle and, in places, elegant. The device of claiming the mantle of common sense while engaging in subtle analysis has the effect of causing the reader to believe that Casey's difficult conclusions are not difficult at all. It is, at least to that extent, dishonest.

Casey's last paragraph changes the subject, and contains her only mention of the *Wilson* precedent:

And don't tell me about flight attendants unless you are prepared to argue that sexiness is just as important as safe and timely travel to your next business trip. Hooters can argue that its patrons care as much—or more—about being in the presence of the Hooters girls as they do about the burgers and beer.<sup>170</sup>

The difficulty with this argument is that Southwest Airlines presumably could have made, and apparently did make, the same case for its passengers. One has only to harken back to 1960s jokes about stewardesses (most of them explicitly using the "Fly Me" slogan) to postulate that male business travelers selected Southwest in those days specifically because of the sex appeal of the flight attendants. The argument is misleading in another way: by comparing sexiness to safety, Casey presents the illusion of an unanswerable argument. Of course,

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169. Elsewhere I have criticized judges for engaging in the same sort of implied annihilation of the intelligence of the other. For me, this particular sort of rhetoric is always bad, because it forecloses the possibility of productive conversation between two or more independent minds. See Schneyer, *supra* note 28, at 142–44.

170. Casey, *supra* note 133, at 41.

no one would knowingly fly on an unsafe airline just to see attractive flight personnel. But it is equally true that no one would eat in an unsafe restaurant (with food of questionable wholesomeness, or where gang wars were known to erupt) just to see attractive servers. But safety was never the issue with Southwest, just as it is not with Hooters: neither business marketed itself as especially safe.

The syntax of this paragraph is also worth comment. For one thing, it is flip: "And don't tell me about flight attendants . . ." The tone of the sentence suggests that flight attendants are just an annoying afterthought that no reasonable person would discuss. Yet flight attendants involve the most important court precedent for this case: their jobs have many similar functions to those of servers, and they too have been used as deliberate sexual objects by their employers. The cases seem to be very close. This, too, is less than a perfectly forthright form of argument: Casey takes the precedential argument that is most harmful to her case and treats it as though it is not even worth considering. This form of argument would not be useful to her if she were writing to a judge who was familiar with the precedent: then she would have to argue about *Wilson* seriously. This passage, then, is aimed at a comparatively ignorant audience—yet this is the very audience whose "common sense" Casey praises elsewhere.

Further, the form of this sentence—do not discuss X unless you are first willing to say Y—imposes an artificial limitation on debate. It cuts off the speech of the other—whether that other be Becker, the EEOC, or the reader. The imposition of silence is another example of what I would call "bad rhetoric," especially in the context of a point that is being blithely tossed off as an afterthought. Casey does not want to engage in a discussion of this issue in its full complexity, even as she demonstrates the skill with which she can handle complex issues. Dialectic—that is, the give-and-take of minds involved in honest disagreement—is not valued in this world. And if the reader is not supposed to speak, and is supposed to use "common sense" only to the extent and only in the precise way that Casey wants, what is the role of the reader here? Not, surely, an "end in herself." We, like the EEOC, are means to Casey's end. This lawyer is a litigator, and winning is what counts.

The Becker and Casey essays, then, provide us with two different ways in which lawyers might talk about sex discrimination.

Becker's presentation is that of a professor; Casey's is that of a litigator. Becker bases her position on argument from analogy and common law reasoning, while Casey (who also uses argument by analogy) bases her position on common sense and a political notion of the proper way to make decisions about business. Becker's position is rooted in public policy, but it is the public policy designed to help women, the traditional victims of sex discrimination, rather than the men who are supposedly the victims here. Casey's position is rooted in the notion of competence and a belief that government agencies are not competent. It is also based on a skepticism of left-leaning, academic thought (such as Becker's). It does not concern itself with the interests of women, nor with those of men who are the victims of discrimination, but rather with the economic efficiency of business. Finally, while Becker's argument invites the reader to engage in the same sort of analysis from precedent that she does, Casey's seems to demand a sort of unconditional acceptance.<sup>171</sup>

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171. For the last three years, the *A.B.A. Journal* has printed photographs of the authors of its "At Issue" columns along with the text of the articles. Consequently, while drafting this section I had the faces of Mary Becker and Patricia Casey smiling at me as I wrote. Did that make a difference?

An illustration by John Schmelzer accompanies these two articles. See *Sex Discrimination*, *supra* note 133, at 41. In the illustration, an artist at a drawing board (presumably Schmelzer himself) is attempting to sketch two different pictures of restaurants, one called "Classic" and the other apparently called "Nouveau." The "Classic" picture shows a scene that seemingly represents Hooters as it is now, with young women in shorts and tank tops carrying trays; a picture of a "Hooters Girl," which the artist has evidently used as a model for the waitresses, is pinned up on the wall next to him. The "Nouveau" picture shows young men waiters in shorts and tee shirts with the words "Nouveau" printed on them, and one more traditional, overweight male bartender. However, in a style reminiscent of M.C. Escher's *Reptiles* (1943) or *Drawing Hands* (1948), the figures in the sketches are refusing to stay there. They emerge from the pictures to engage in fierce, finger-pointing, fist-shaking arguments with each other and with the artist himself, who has stopped drawing in dismay. Two of the figures have obtained erasers with which they are purposefully approaching the drawing board. This illustration demonstrates the potential for constitutive rhetoric in nonverbal representations. How is Schmelzer defining himself? How is he defining the controversy and the people in it? What does he expect of his viewer? What are his notions of right and wrong in this context? For the Escher drawings mentioned, see M.C. ESCHER, *THE GRAPHIC WORK OF M.C. ESCHER* plates 28, 69 (1967).

VII. PEOPLE TALKING:  
EDITORIALS IN THE POPULAR PRESS

Lawsuits and other legal disputes generate waves and ripples in their communities. Journalists, commentators, novelists, dramatists, and poets create rich bodies of literature inspired by famous trials. This literature creates a textual community of its own, distinct from (but interactive with) the rhetorical constitution of the lawyers, judges, and parties themselves. As noted above, there is an entire field of scholarship devoted to examining the way law and legal disputes are represented in literature and popular culture.<sup>172</sup> Ed Cohen has ably demonstrated how the journalistic accounts of a trial can completely alter the nature of the dispute and the community's relationship to it.<sup>173</sup> Even without this scholarship, a cursory observation of the texts concerning the recent trials of O.J. Simpson would convince any of us that the justice system and the media exist in close symbiosis.<sup>174</sup>

The many editorials written in the month following Hooters's press release show a remarkable variation in style, sophistication, and insight. Some analyze the issue in great detail, some joke in single-sentence bullets, some engage in extended displays of irony.<sup>175</sup> Among so many, the choice of any

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172. See *supra* note 47 and accompanying text.

173. See Ed Cohen, *Typing Wilde: Construing the "Desire to Appear to Be a Person Inclined to the Commission of the Gravest of All Offenses,"* 5 *YALE J.L. & HUMAN.* 1 (1993).

174. O. J. Simpson, a well-known athlete and actor, was tried for the murder of his ex-wife and her friend in 1995. The trial, which lasted for many months and ended in Simpson's acquittal, received constant and intense attention from the media, especially television. The many discourses created around this event involved the value of criminal trial procedure, the place of race in American culture, the interaction between racial identity and factfinding, the concept of credibility and truth, and, of course, practically endless scrutiny of the role of the media itself.

175. In a resonant passage from C.S. Lewis, an in-house writer has been assigned the task of manufacturing editorials commenting on events taking place at his own place of business. See C.S. LEWIS, *THAT HIDEOUS STRENGTH* 146 (1946). One, destined "for one of the most respectable of our papers," begins this way: "While it would be premature to make any final comment on last night's riot at Edgestow, two conclusions seem to emerge from the first accounts (which we publish elsewhere) with a clarity which is not likely to be shaken by subsequent developments." *Id.* The second, written "for a more popular organ," *id.*, begins: "What is happening at Edgestow? That is the question which John Citizen wants to have answered. The Institute which has settled at Edgestow is a *National* Institute. That means it is yours and mine." *Id.* at 148. In Lewis's work, the complacency with which the writer manufactures these two

single editorial upon which to comment is nearly random. One could find meaningful and interesting things to say about almost all of them. I have selected, therefore, two which seem to me to have been written by especially talented commentators, appearing in influential publications or venues, and on opposite sides of the question.

### A. *The Editorial by James Bovard*

One of the most influential editorials appeared in the *Wall Street Journal* on November 17, 1995, two days after the Hooters press conference.<sup>176</sup> The *Journal's* actual news coverage of the press conference, printed November 16, was essentially nonexistent; it consisted of a three-sentence summary on page twenty.<sup>177</sup> Consequently, the 1,000 word editorial by James Bovard contained the only detailed information the newspaper's readers received about the dispute between the EEOC and Hooters. This editorial was widely read and widely commented on; it resulted in an apparent flood of mail.<sup>178</sup>

Bovard is a well-known journalist and commentator who has written several books, all of them highly critical of the federal government.<sup>179</sup> His work generally reflects a distaste for regulation, protectionism, and most other government action that impacts on the free market or the internal workings of business.<sup>180</sup> It is not surprising, therefore, that he disagrees with the EEOC's position. How he goes about telling us this, however, is surprising.

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different articles is taken as a sign of how far he has been corrupted and how badly he needs reclamation.

176. James Bovard, *The EEOC's War on Hooters*, WALL ST. J., Nov. 17, 1995, at A18.

177. *Hooters Won't Hire Men*, WALL ST. J., Nov. 16, 1995, at A20.

178. See *Letters to the Editor: Hootin' and Hollerin' Over Hooters*, WALL ST. J., Dec. 5, 1995, at A21. Several of my students in the Winter 1995-96 term independently decided to write papers based on the Hooters discrimination scenario; in all cases they had been motivated by reading the Bovard editorial.

179. See JAMES BOVARD, *THE FAIR TRADE FRAUD* (1991); JAMES BOVARD, *THE FARM FIASCO* (1989); JAMES BOVARD, *LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY* (1994) [hereinafter BOVARD, *LOST RIGHTS*]; JAMES BOVARD, *SHAKEDOWN: HOW THE GOVERNMENT SCREWS YOU FROM A TO Z* (1995).

180. He is not, for example, especially fond of the Fair Labor Standards Act of 1938. See BOVARD, *LOST RIGHTS*, *supra* note 179, at 91-96 (describing supposed effects of the Fair Labor Standards Act in a section entitled "Destroying Jobs In Order to Achieve Fair Labor").

Here is the opening of Bovard's editorial:

"Hi there. My name is Bruce and I'll be your Hooters Girl tonight." This could be the script for the Equal Employment Opportunity Commission's latest civil rights triumph.

The EEOC is on the verge of destroying the persona of one of America's fastest-growing restaurant chains. It is demanding that Hooters restaurants—home of the notorious "Hooters Girls"—impose a hiring quota, guaranteeing that at least 40% of all the servers, bartenders and hosts hired are male. The EEOC claims that Hooters owes at least \$22 million in back pay to guys who never even worked at its restaurants. And it also is demanding that the restaurant chain revise the concept of Hooters and make it gender-neutral.<sup>181</sup>

The opening paragraph is satirical, reminiscent of the Hooters advertisement discussed earlier; indeed, the *Wall Street Journal* page containing the editorial also contains a small copy of the photograph that is so central to the advertisement.<sup>182</sup> We are asked, again, to imagine that the EEOC's position results in an absurd picture, the male "Hooters Girl." Further, as in the advertisement, there are cues implying a threat to male sexuality: the juxtaposition of a male name and the term "Hooters Girl" creates the same tension.<sup>183</sup> By calling this a "civil rights triumph," Bovard implies that the goal of the EEOC is to create exactly this sort of environment, in which sexualized gender roles are confused or reversed.

The second paragraph purports to be a summary of the EEOC's proposals concerning Hooters, beginning with a sentence using the interesting phrase, "destroying the persona." Despite its awkwardness (it would have been easier simply to say that the EEOC is about to destroy the restaurant chain itself) the phrase has a special impact. "Persona" refers to something beyond the mere economic success of the business: A persona is an identity, perhaps a soul; it is something

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181. Bovard, *supra* note 176, at A18.

182. *See id.*; *see also supra* note 121 and accompanying text.

183. For obscure reasons, the name "Bruce" has been associated with male homosexuality for several decades. I have been unable to find scholarly analysis of this phenomenon, but I think that it is so pervasive as to warrant "judicial notice." *See, e.g., Metro Desk—The State, L.A. TIMES*, July 16, 1989, at 2 ("a man named Bruce, who was probably 'a limp-wristed queer' or 'faggot'").



intimate and, well, personal.<sup>184</sup> Its destruction seems like a more complete and spiritual sort of loss than the loss of revenue. Further, destroying a persona is clearly something we would not want a government to do: it represents government interference with the individual on a fundamental level.

The second paragraph also contains a number of cues or signals defining the tone, *ethos*, and politics of Bovard's voice. The term "hiring quota," for example, is this decade's code for government unfairness and left-wing radicalism; it is used by conservatives (as the term "political correctness" is used) as a way of characterizing their political opponents. This quota is to be "imposed," implying interference, hostility, and tyranny. The phrase, "guys who never even worked at its restaurants" serves a double purpose: First, the deliberate informality of the words "guys" and "even" cues the reader to imagine that the common people are on Hooters's side. Second, this phrasing gives a sharper impression of the unfairness of the demand: someone will be receiving something for nothing. The word "demanding," used twice in this short paragraph, casts the EEOC as being unwilling to compromise or negotiate in good faith; reasonable people don't make demands. This is at least an exaggeration, since a conciliation offer is, at most, a bargaining position rather than a demand.

The bulk of Bovard's editorial, taking up thirteen of its seventeen paragraphs, is devoted to a narrative of the investigation and negotiation process between the EEOC and Hooters. The use of narrative gives the editorial (like the Hooters press release) the feeling of reportage rather than opinion. When I tell a story, naturally I give my own slant on it, but the act of saying "this came before that" may lead you to believe that I am giving you the unvarnished truth.<sup>185</sup> Similarly, Bovard is telling a story which has the earmarks of a simple recitation of facts, although it is located in the editorial section of the newspaper, is framed on both ends by his opinions, and (as shall be seen) involves an unbalanced view of the facts. It allows him to present himself as someone who is telling us what happened, rather than trying to convince us of something—indeed, it contains the implied message that we can be convinced simply by being told what

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184. This is an interesting rhetorical device, since a corporation is not a human being and has neither intimacy nor soul. See Schneyer, *supra* note 28, at 141 n.80.

185. Consider the first sentence of the paragraph containing this footnote, in which I purport to tell you how much of the editorial is devoted to narrative; it looks like a simple statement of objective fact—but is it?

happened. This is a tempting message, because it is based on the emotionally appealing notion that there are perceptions about the world that we all share, so that given the same information we would all respond in the same way. Bovard places himself and the reader in a community that is so unified that the mere telling of a story leads them to the same conclusions—what a satisfying destruction of boundaries!<sup>186</sup> He places the EEOC squarely outside this community.

One of the interesting aspects of Bovard's narrative is the amount of detailed, apparently inside information that it includes. There are details—specifics of Patricia Casey's negotiations with the EEOC, names of officials involved in the investigation, quotations from the conciliation offer—which do not appear in any of the documents released by Hooters or the EEOC, and which cannot be found anywhere else in the news reports or editorials written on this subject (except in those articles that explicitly refer to Bovard as their source). I infer that Bovard interviewed someone inside Hooters (possibly Casey, whom he quotes directly) and received access to negotiation documents or at least some detailed summaries of their contents. This gives him yet another mark of authenticity and believability: he knows things that the rest of us do not know. By reading Bovard's piece, I learned things that I did not find anywhere else, because nowhere else did I have access to the information. Because of the respect we tend to give to the opinions of experts and others who have superior information, it is only natural that we want to believe Bovard. Yet nowhere does he tell us how he came to know so much, nor does he point to documents we could review in order to come to our own conclusions—although we can infer, from other comments he makes, that he has conducted phone interviews. As suggested above, such a voice does not invite the reader to have an independent, intelligent mind; we are not given the opportunity to reach conclusions different from Bovard's.

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186. The wish for the destruction of boundaries between people is known to be a deeply felt, and perhaps universal, human desire—although it has been frequently seen as essentially infantile. See generally HARRIET GOLDHOR LERNER, *THE DANCE OF ANGER* (1985); M. SCOTT PECK, *THE ROAD LESS TRAVELLED* (1978); DAVID SCHNARCH, *PASSIONATE MARRIAGE* (1997). This is not the same sort of thing, however, as the somewhat similar device used by Mary Becker in her essay. In Becker's piece, the use of the storytelling form invoked a community that was already shared by the readers, namely the community of lawyers familiar with the notion of argument from precedent. See *supra* notes 136–38 and accompanying text. It is the difference between showing someone a form of argument he recognizes and telling someone that no argument is really necessary.

Here is the first paragraph of this long narrative:

The EEOC's anti-Hooters vendetta began not in response to any complaint from a disgruntled male job applicant but solely to an Oct. 22, 1991, charge by EEOC Commissioner Ricky Silberman. EEOC regulations allow any commissioner to accuse any company of discrimination, after which EEOC investigators seek supporting evidence. Ms. Silberman, now the executive director of the Congressional Office of Compliance, did not return repeated phone calls seeking comment.<sup>187</sup>

At the outset, we are told that this was not a real investigation or law enforcement operation, but a vendetta—that is, a private war or feud. Before we learn what the EEOC actually did, or how it went about it, we are told that its action was a grudge against Hooters rather than anything legitimate. Also, notice that the word “vendetta” is so placed as to avoid the necessity of proving that there *was* a vendetta; in order to get to the verb and object of the sentence, the reader assumes that the vendetta exists. In evidentiary terms, the sentence “assumes facts not in evidence.”<sup>188</sup> Further, this paragraph tells us that the entire project was internal to the EEOC, initiated by an accusation by a commissioner of the agency (no reasons are suggested for *why* Silberman might have made such a charge) who essentially ordered investigators to go out and seek evidence supporting the accusation. In this text the entire process seems fundamentally unfair: law enforcement officers are supposed to investigate and *then* accuse, not the other way around. The process, as Bovard describes it, sounds like that of the Inquisition or the Star Chamber.

Also note how the entire matter is made personal: it was the grudge of one particular person, Ricky Silberman, that started all this. By then telling us that Silberman has left the EEOC and that she has not returned his phone calls, Bovard makes it appear that she started the fire and then ran away to let it burn without her; he paints her as both vindictive and irresponsible. She also appears cowardly, as the line about the phone calls implies that she fears to face the light of public

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187. Bovard, *supra* note 176, at A18.

188. James Boyd White has shown how the opening sentence of the Declaration of Independence performs a similar function, by causing the reader to unwittingly assent to major assumptions within it. WHITE, WHEN WORDS LOSE, *supra* note 49, at 233.

criticism.<sup>189</sup> Near the end of the article, Bovard quotes an unnamed “former high-ranking EEOC official” as saying, “The women attorneys [at the EEOC] are hot to do this case because they want to bust up a sexist restaurant chain. They . . . want to get at this wicked institution.”<sup>190</sup> Bovard also compares the EEOC action to “the way temperance movement sisters wielded their axes a hundred years before.”<sup>191</sup> The anonymous testimony, the picture of the temperance sisters, and the image of the vindictive Silberman at the beginning of the editorial create a picture of crazed, fanatical women, devoid of common sense, abusing the law to get their way. The word “hot” suggests a sexual passion behind the fanaticism. Interestingly, then, part of this editorial’s power rests on its caricature of the motives, abilities, and rationality of women professionals.<sup>192</sup>

The next two paragraphs of the narrative describe the arguments Hooters made, early in the investigation process, to dissuade the EEOC:

Hooters informed the EEOC early on in the agency’s investigation that only women were hired for these positions because the “primary function” of the Hooters Girls was “providing vicarious sexual recreation.” The Girls’ “uniforms are designed to tempt and titillate, consisting of short shorts and either low cut tank tops or half shirts, which are to be worn as form fitting as possible, and the Girls are expected to enhance the titillation by

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189. Nowhere else in the editorial does Bovard allude to either his methods of obtaining information or the level of his success in getting it.

190. Bovard, *supra* note 176.

191. *Id.*

192. Note, though, how this strategy differs from the technique used in the Hooters press release. There, the EEOC appeared to be a faceless, soulless, monolithic entity that acted without regard to human consequences but had real effects on the lives of people. See *supra* text accompanying notes 107–09. Here, by contrast, the EEOC, as a law enforcement entity, is almost erased altogether in favor of its individual employees, whose personal agendas dominate the proceedings. This pair of extremes—in which the EEOC is either bad because it is impersonal or bad because it is too personal—is reminiscent of the classic contrasts between law and equity, or between statutes and common law. We fear that the law without mollification or adjustment by human sympathy will be coldly destructive in its indifference to human diversity and idiosyncrasy, yet we fear that giving increased discretion to judges or executive officers will result in radically unequal and unfair treatment of people because of those individuals’ personal prejudices and agendas. We hate the tyranny of the individual’s whim, but we hate being governed by thousands of uniform rules too. See, e.g., HOWARD, *supra* note 140; Minow, *Stripped Down*, *supra* note 45.

their interaction with customers. They are to flirt, cajole and tease the patrons.

### Sex Appeal

Hooters lawyer Patricia Casey wrote to the EEOC: "The business of Hooters is predominantly the provision of entertainment, diversion, and amusement based on the sex appeal of the Hooters Girls." The Civil Rights Act of 1964 specifies that a company can discriminate among job applicants based on Bona Fide Occupational Qualifications (BFOQ). The Playboy Club won repeated court victories in the 1970s and 1980s when sued over its female-only Bunny policy. But throughout the EEOC's investigation of Hooters, the agency ignored the company's hiring rationale.<sup>193</sup>

Here Bovard moves from (1) Hooters's description of itself and its business, to (2) Casey's legal interpretation of that business, (3) the BFOQ standard, (4) the parallel example of the Playboy Club, and (5) the EEOC's alleged reaction. The first three steps move in the opposite direction from that of a legal argument, in which we would expect to begin with the statute, then move into the facts and their legal meaning under the statute. Indeed, it is interesting to note that the BFOQ, the entire legal basis of the dispute, does not appear until the fifth paragraph of the editorial, not only after Hooters's and Casey's arguments, but also after the innuendo concerning Ricky Silberman and the more flagrant of the EEOC's proposed remedies. Thus Bovard implies that the law itself is less important than the relief sought, the conspiracy behind the investigation, and the way Hooters operates. He shows us a dispute which apparently is really about a battle between individuals in the agency and Hooters's marketing strategy, in which the law is merely a tool or weapon used in that dispute. Further, by placing the BFOQ after two quotations stating the "primary function" of the Hooters Girls and the predominant business of Hooters, Bovard seems to show the statutory defense growing *out of* those descriptions: having been told what Hooters is and does, the reader is led to see the

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193. Bovard, *supra* note 176, at A18. Owing to the industry-wide practice of newspapers and magazines to add section headings that were not originally included by the author, we can speculate that Bovard himself did not contemplate the boldface words "Sex Appeal" where they actually appear in the article.

statute as a label or explanation of those facts. By contrast, had Bovard started with the BFOQ, the reader would then be led to weigh whether the Hooters Girls fit its definition.

The reference to the Playboy Club poses an example of the BFOQ that appears to support Hooters's case, rather than mentioning the *Wilson* decision that would probably appear to undermine it. In Bovard's world, the primary, perhaps the classic, concrete example of a BFOQ is that of the Playboy Bunny, a job that appears to be substantially identical to the Hooters girl. Yet, as discussed earlier, the "repeated court victories" of the Playboy Club led to only two published decisions, by tribunals having essentially no precedential authority, in tandem with another decision that would seem to severely undermine them.<sup>194</sup> To refer to these cases as if they were the last word in BFOQ jurisprudence is less than honest.

To end these paragraphs with the assertion that the EEOC "ignored" Hooters's rationale is a powerful device. Bovard has sketched a transition from Hooters's rationale to the law and its application. By shifting immediately to the EEOC's reaction, and characterizing it in such an extreme way (surely the EEOC performed more analysis than merely to "ignore" Hooters's argument for three years), Bovard implies that the EEOC has ignored not only Hooters's hiring practices, but the statute and precedents as well. He has so structured his description that the law, the reader, and Bovard himself are all allied in support of Hooters's position; abruptly, the EEOC, through either malice or stupidity, is outside of that alliance.

In these paragraphs we also see Bovard's access to documents from the negotiation process itself. They contain exact quotations from letters by Hooters and Casey to the EEOC; they remind us both that Bovard has a lot of information behind him and that we have access to none of it. They also give prominence to Hooters's arguments in this dispute. By contrast, while devoting a lot of text to the remedies proposed by the EEOC (which he believes to be absurd), Bovard says almost nothing about the legal or factual rationale for its position. The EEOC's entire argument is summarized in one sentence: "In September 1994, after sampling an unknown number of happy hours and Buffalo wings, the EEOC decreed that the business of Hooters was food, and that 'no physical trait unique to women is required to serve food and drink to

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194. See *supra* notes 30–32 and accompanying text.

customers in a restaurant.’”<sup>195</sup> This characterization makes it appear that the EEOC is acting peremptorily, without reason or attention to facts that should be obvious. By giving detailed reasons for one side but not the other, Bovard gives the impression that only one side *has* reasons.

In the remaining eight paragraphs of this narrative, Bovard focuses all his attention on the various conciliation offers and Hooters’s and Bovard’s own responses to them. He describes, in what I must call fascinated detail, different elements of the remedies proposed by the EEOC and how specific amounts are to be calculated and allocated. The remedies and procedures he describes occur in this order: (1) assembling a list of men alleged to have been victims of discrimination; (2) setting up a settlement fund for those victims; (3) the method of calculating the amount of award for each victim; (4) advertisements by Hooters to inform alleged victims of the availability of claims; (5) the EEOC’s method of verifying claims; (6) altering the balance of males and females in Hooters’s workforce; (7) establishment of a fund to enhance skills, opportunities, and education of males; and (8) Hooters’s objections to the settlement fund and the EEOC’s response with specific numbers.<sup>196</sup>

Bovard has essentially nothing good to say about the EEOC’s position, methods, or attitude related to any of the remedies. His central substantive argument, either made expressly or implied in the syntax used to describe the EEOC’s positions, is that the EEOC has based nearly all of its remedies on unwarranted or false factual assumptions. Different versions of this substantive argument appear repeatedly throughout the narrative. For example, he quotes Patricia Casey as saying:

“They just wanted to see every single application that had a man’s name on it—even though many of the applications could have been for kitchen jobs, such as cook or dishwasher. If the guy wrote at the top that he would accept any position, or wrote nothing in that space, then the

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195. Bovard, *supra* note 176, at A18.

196. *See id.* I have phrased the preceding list in what I hope is a dispassionate and “sanitized” tone, giving essentially no details and leaving out all of the commentary that pervades Bovard’s work. But is my tone really dispassionate? In trying to avoid adopting Bovard’s highly opinionated syntax, have I gone so far in the other direction as to take the EEOC’s side?

EEOC officials" ludicrously concluded he was applying for a females-only position.<sup>197</sup>

Elsewhere, Bovard says that the EEOC "effectively assumed that after a guy applied for a job at Hooters he applied nowhere else and sat by the phone for over half a year, waiting for a Hooters call."<sup>198</sup> In describing the suggestion that Hooters advertise to alert men who unsuccessfully attempted to apply for jobs to the availability of damages, Bovard says:

Since most restaurants do not keep job applications for longer than one year, the EEOC-mandated campaign will provide a windfall for perjurers. It would be cheaper and more honest simply to require that Hooters restaurants open their cash registers and invite men off the street to come in and grab a handful of bills.<sup>199</sup>

Bovard says that the EEOC's method of verifying the authenticity of claims will be "[p]rimarily by checking the postmark, to make sure that it was mailed before the deadline for the claims."<sup>200</sup> In describing the method used to calculate the size of the proposed claims fund, Bovard says that the EEOC "laboriously concocted an 'average male shortfall' for each Hooters restaurant—based on the convenient assumption that half of the hires should have been male."<sup>201</sup>

The argument underlying these express and implied comments—that the EEOC's factual assumptions are not supported by known facts—is the sort of valid criticism that can and ought to be made. Yet we would normally expect to see such an argument couched in terms of the refuting evidence. For example, in the passage referencing Casey's comments above, Bovard could have said something like this: "The anecdotal evidence suggests that many applications by men which do not specify a position are for non-server positions; in fact, as many as 40% of men apply for 'back-of-the-house' jobs."<sup>202</sup> Where he criticizes the assumptions concerning how long an applicant would have

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197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Since I do not, myself, have access to any such data, I have made these numbers up. This sentence, as well as the two other examples following it, are designed to show a style and method of argument, not any factual information.



remained unemployed, he might say, "In fact, the average man who applies for a restaurant position applies for several such positions, and is typically able to find employment after a few weeks of searching." Where he disbelieves the assumption that half of Hooters's employees would or should be male, he could suggest that "a more reasonable assumption, given what we know of male and female employment rates in the restaurant industry, would be that a lower percentage of the Hooters workforce would be male." Even if Bovard lacked access to any of the hard data on these points, he could still make conjectures as to what a rigorous study of the information would show. He might, for example, say, "Although I do not actually know the number of restaurant jobs for which the average out-of-work man applies, I'll bet that an actual study would reveal that such men apply for an average of four or five jobs." He could then criticize the EEOC for any failure to conduct such an actual study. I infer that Bovard believes that the evidence, if gathered, would support something like the propositions I have outlined. Yet, remarkably, his express and implied criticisms of the EEOC's assumptions contain no refuting facts at all, nor any conjectures as to what those facts probably are. What are we to make of this?

The editorial omits the facts refuting the EEOC's assumptions because the existence or nonexistence of those facts is unimportant to the rhetorical community being created by this text. If we were supposed to care about the evidence, then the evidence would be supplied. But this editorial isn't really about proof or disproof, any more than it is really about interpreting the law. It is about a fundamental division imagined to exist between two discordant segments of society: the feminists, bureaucrats, and academics on the one hand, and the common people, Hooters, Casey, and Bovard on the other. All of the descriptions of the EEOC's suggested remedies define the agency as being without the habits of mind that ordinary, sensible people have—the agency, and all those who support it, are outside of the "normal" community.

The concluding paragraphs of the editorial contain clear expressions of Bovard's opinion. As I have indicated, one of his last paragraphs compares the EEOC to temperance sisters smashing up a bar. Finally he says:

Civil rights crusades have gone from allowing blacks to sit at lunch counters to allowing government employees to dictate the cup size of the person who serves lunch.

The EEOC's attack on Hooters is a direct attack on the First Amendment's Freedom of Association. Hooters, which has been characterized as a "Playboy Club for Rednecks," does no harm and the Hooters Girls receive much larger tips than waitresses at many other restaurants. Yet, because a handful of EEOC officials believe it is reprehensible for a restaurant to use titillation to sell beer and greasy food, the weight of the federal government is falling on Hooters' head.<sup>203</sup>

This last paragraph has a complex system of meaning, and works on several levels at the same time. The comparison between the civil rights battles of four decades past and contemporary discrimination disputes is common; generally, as here, the writer is trying to suggest that contemporary civil rights efforts are less noble and less sensible than older ones.<sup>204</sup> The word "crusades," in this context, ironically suggests how the mighty have fallen: once we were crusaders, now we're measuring brassieres. But look at the particular comparison being drawn: allowing blacks to sit at a lunch counter vs. controlling the "cup size" of the person who serves the lunch. A moment's reflection will reveal that both were contained in the original version of the Civil Rights Act; that is, discriminating based on sex in the hiring of servers was forbidden from the start. Indeed, the protection for employees was broader than for patrons, since Title VII forbids sex discrimination while Title II does not.<sup>205</sup> Further, one might argue that protecting employees is more important than protecting patrons, since the former protects people's livelihoods while the latter protects only their convenience. Also, the core of the criticism contained in these two sentences—that government officials should not dictate who can work in a restaurant, and that the policy infringes on the freedom of association—are precisely the criticisms that could be, and indeed have been, made of Title VII and Title II themselves.<sup>206</sup> Yet Bovard's phrasing suggests that he is criticizing some *new* development

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203. Bovard, *supra* note 176, at A18.

204. Many people, for example, have angrily denounced any comparison between efforts to eliminate discrimination based on sexual orientation and efforts to eliminate discrimination based on race. See, e.g., Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda"*, 1 AFR.-AM. L. & POLY REP. 33 (1994).

205. See 42 U.S.C. § 2000a (1994).

206. See Nancy E. Dowd, *Liberty vs. Equality: In Defense of Privileged White Males*, 34 WM. & MARY L. REV. 429 (1993) (reviewing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992)).

not contemplated by the original statute, because his grammar implies that evolution has taken place.

The last two sentences of the paragraph take Bovard in a slightly different direction. From an argument decrying our fallen values and pointing out a possible constitutional argument, he now turns to what appears to be a practical or moral argument. First we are told that Hooters does no harm and has some benefit for the workers;<sup>207</sup> then we are told that all of the trouble is caused by the agendas of a few isolated officials. These two points both have resonant and powerful roots. To say that someone “does no harm” touches our belief that the law should control that which is harmful, not that which is simply distasteful or unpleasant. The sentence also contains a deprecating reference to Hooters—a “Playboy Club for Red-necks” is surely a small, unimportant thing that should be beneath the law’s notice. The wording of the law, and its interpretation by the courts, vanishes altogether; what’s important is that this is a small and harmless thing.

The last sentence refers to the important argument, alluded to earlier in the editorial and discussed in this Article, that the *real* issue is whether the selling of sexuality is legitimate in a culture that has tried to outlaw sex discrimination in employment. Bovard suggests, here and elsewhere, that the EEOC is masking the real motivation behind its investigation because an honest reading of Title VII does not show any overt prohibition on such businesses, and, indeed, the existence of the BFOQ defense suggests that such businesses may be expressly permitted by the statute. It is an odd way, though, to end an editorial whose main text has concerned the EEOC’s remedies and calculation methods. Bovard could have written a very convincing editorial about the dangers of hiding the real issue, about the need to have an explicit debate about the underlying problem, and predicting the result of such a rigorous debate. But this is not his argument, nor is it the intent of this sentence. This sentence, like most of the editorial, is designed to show the alarming behavior of a small group of isolated bureaucrats intent on furthering their own fanatical beliefs. Indeed, the whole paragraph serves that purpose: The first two sentences show how unworthy current EEOC officials are

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207. The size of the tip, however, is not the only criterion in determining whether workers benefit from a certain kind of employment. At least one commentator has suggested that the price paid for this particular kind of exploitation is worth more than the increased tips. See Ciriello, *supra* note 78.

to fill the shoes of their forbears; the third shows that they are so unrealistic and obsessed as to pick on a harmless insect; the last shows that they will stop at nothing to get their way.

Although this editorial is entitled "The EEOC's War on Hooters," its true subject is a war that odd, radical lawyers are supposedly waging on all of us. The true battleground here is the question, "What is the mainstream, and who is in it?" This rhetoric defines EEOC lawyers as being out of the mainstream, and defines Bovard and Hooters within it. Bovard asks the reader to join him in this mainstream community, and to reject and ostracize those outside it. As in other texts we have seen, the basis for joining his community is not facts or law, but common sense, a quality imagined to exist in all people and independent of education or reflection. We are asked to join Bovard because the over-educated have taken control of the government and are about to do horrible things to all of us. We are not expected to form our own opinions, and are not given the information with which to do it; what is important is whose side we are on. This is war, after all.

### *B. The Radio Commentary by Laura Archer Pulfer*

So effective was the advertising campaign launched by Hooters that of the dozens of editorials published immediately after the press release, only a few supported the EEOC's position.<sup>208</sup> I have selected a short radio commentary by Laura Archer Pulfer both because it was broadcast nationally and because it involves some rhetoric that is substantially different from that appearing in the other pieces I have discussed.

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208. You will observe an assumption underlying this sentence. By stating that the dearth of editorials supporting the EEOC was due to the success of Hooters's advertising campaign, I am assuming that the EEOC's position was strong enough to have merited more support without that campaign. A reader who supports Hooters could reply that the reason behind the strong editorial support for Hooters is simply that Hooters was obviously in the right. Hooters may have been in the right, but given the disparity in resources devoted to convincing the public (Hooters spent a great deal of money on it, while EEOC spent essentially nothing), it is impossible to attribute the lopsided editorial support simply to the strength of the arguments. Of course, editorial writers might have been just as outraged had the EEOC also spent a million dollars on advertising, but my instincts tell me otherwise. Naturally, my instincts are personal; yours may tell you differently. To a certain extent, this sort of supposition can be verified or refuted using those aspects of the scientific method that are open to social scientists.

The two major news programs on National Public Radio (NPR), *Morning Edition* and *All Things Considered*, have a practice of inviting short commentaries on current events by people who do not normally appear on such broadcasts. These commentaries usually do not present the party line of one of the familiar sides of an existing conflict, but add some new twist not previously seen in the straight news reporting. Pulfer, a columnist for the *Cincinnati Inquirer*, read her Hooters commentary on *Morning Edition* on November 29, 1995, twelve days after Bovard's editorial was published.<sup>209</sup> Her commentary is considerably shorter than Bovard's, only about 350 words to his 1,000. This is partially due to the medium in which she is working—radio commentary necessarily must be shorter than newspaper editorials covering the same ground.

Here is the opening of Pulfer's commentary:

OK, so now the government is back to work. There's a lot to do and nobody really wants them to use a bunch of their valuable time on a certain restaurant chain. After all, the whole concept is all in fun. First, and I know this is petty of me, but I'm not going to use the official name. Here's a hint—the company logo is an owl with very large eyes. They're already getting millions of dollars of free publicity because four Chicago men have filed suit against them. Let's just call this place Redneck Slang for Women's Breasts.<sup>210</sup>

The most striking thing about this paragraph, and indeed, the whole commentary, is its tongue-in-cheek informality. In Bovard's editorial, informality was used as a specific device in specific places, while elsewhere the syntax was technical and sophisticated. Here, the entire piece is written in a conversational, irreverent, and amused voice. The effect of the informality, as in Bovard's case, is to invoke the common people, but Pulfer's constant use of it is more successful in achieving that end. Further, that voice emphasizes what is made clear at the outset: that this is Pulfer's opinion, pure and simple, and that she doesn't take her own opinion very seriously. We are not going to be treated to any revelations of new facts, nor is Pulfer claiming to have access to more or better

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209. Laura Archer Pulfer, *Morning Edition: Hooters Patrons Must Not Care Much About Food or Women* (National Public Radio broadcast, Nov. 29, 1995).

210. *Id.*

information than we do, nor will there be a logical argument about the law or the facts. On what basis, then, are we invited to be convinced?

The first sentence is a reference to the notorious shutdown, in November and December 1995, of most of the federal government, occasioned by the temporary inability of the Congress and the President to agree on a budget. Other commentators on the Hooters controversy alluded to the government shutdown, using the dispute to suggest ironically that the government should never have been allowed to reopen.<sup>211</sup> In this commentary, however, Pulfer begins with the assertion that we do want the government to reopen, that its work is important, and that, in fact, we are all in general agreement that Hooters is not a worthy topic for its attention. This stance is interesting because it is evident, from the tone of Pulfer's writing and the rest of what she says, that she thinks Hooters is in the wrong. When she says, "the whole concept is all in fun," she leaves the referent unclear: is she referring to Hooters's marketing strategy, the government shutdown, the idea that the government's time is valuable, or what?

She goes on to focus on something which she calls, and initially appears to be, petty: whether to mention Hooters's name. She gives us a "hint," suggesting that this is some sort of game—and it really is a game, since it is obvious that anyone who will understand anything about her commentary will *know* whom she is talking about from the very start. Then she suggests that the restaurant is receiving free publicity from the *Latuga* case, and she does not want to provide any more by naming it. Suddenly the significance of the controversy is reversed—the EEOC investigation is not a threat to Hooters's life; it is the biggest boon the chain could have received. The dozens of editorials written about Hooters, we now realize, must have piqued the curiosity of thousands who would never have set foot in the place otherwise.<sup>212</sup> The thought abruptly crosses our minds that the entire controversy could be a publicity stunt.

In this amused, ironic, mocking, and self-mocking observation, Pulfer shows us who she is and why we should believe in

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211. See, e.g., Jim Haynes, *Hooters Exposes Other Wrongs to Redress*, ARIZ. REPUBLIC, Dec. 10, 1995, at H3; *Hooting for the Shutdown*, RICHMOND TIMES-DISPATCH, Nov. 16, 1995, at A26; *Who Gives a Hoot?*, COURIER-J. (Louisville, Ky.), Nov. 18, 1995, at 14A.

212. Including me. See *supra* notes 55–56.

her. Her *ethos* is based on the fact that she sees things differently from other people—not because she’s any smarter or better informed, but precisely because she is quirky. By looking at things through a funhouse mirror, she is able to put together facts in new combinations that most people do not bother to see. Consequently, she is able to think creatively and arrive at new truths. Such a claim is strong in our culture: it is the claim of the shaman, the mystic, and the poet. Such a voice is devoted to truth, but truth unsullied by formal logic, politeness, or conventionality. When she calls the place “Redneck Slang for Women’s Breasts,” she is being rude and insulting—because she is speaking what she believes to be the truth without caring what anyone thinks.

Pulfer deliberately limits her audience. By refusing to name Hooters, she necessarily is talking only to those who already know the facts of the dispute and the basic arguments on both sides. She is refusing to tell us these things, and giving us her own odd perspective instead. As a result, we understand that this is a conversation for people who have already done their homework and are ready to hear a new and possibly bizarre outlook. In academic terms, this is not an undergraduate survey course on the Hooters controversy, but a graduate seminar. Obviously, this elevates the status of the listener, who is assumed to be an active, and hopefully skeptical, participant in this process.

The second paragraph focusses on Hooters’s advertising campaign:

The EEOC says the policy of hiring only women amounts to sex discrimination. Now, here’s what the company’s doing. They’re handing out thousands of postcards with a guy with a mustache wearing skimpy shorts and a tank top, asking “What’s wrong with this picture?” I wonder why they picked this big, hairy man. Was RuPaul on another gig? We’re supposed to send these to our Congressman asking Washington to “get a grip.” I think I’ll send the card they gave me to Patricia Shroeder. She seems very alert. I’m sure she’ll be able to figure out what is wrong with this picture.<sup>213</sup>

Here, maintaining her strongly ironic and humorous tone, Pulfer’s focus is entirely on the Hooters advertising campaign;

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213. Pulfer, *supra* note 209.

again it is the publicity, rather than the substance of the dispute itself, that interests her. She observes the EEOC's position without commenting for or against it—and rightly so, because in this text the outcome of the dispute is not important or relevant. She then makes the same observation that I made earlier, namely that the type of model chosen for the advertising photograph bears some examination.<sup>214</sup> By naming RuPaul, Pulfer reminds us of the broad variety of models for gender-bending roles and situations, implying that we should question why this particular picture should have been chosen—although, again, only those who already know who RuPaul is will get the joke.<sup>215</sup> Similarly, Pulfer ridicules the instruction to lobby Congress by suggesting that Representative Patricia Schroeder—a prominent feminist legislator who has repeatedly challenged unequal treatment of the sexes—would be an ideal person to read the advertisement.

Throughout this paragraph, Pulfer suggests arguments without making them, and, indeed, causes us to wonder exactly what argument she's making. Hooters might have picked RuPaul instead of the model they did pick—and therefore what? Patricia Schroeder will be able to discern what is wrong with the picture—and what will she conclude? What, exactly is wrong with the picture anyway, and from what point of view? In each case, Pulfer changes the perspective on the issue without following through with a conclusion; she leaves it to the listener to draw conclusions from the twist she has applied. Were a first-year law student to talk this way, the professor might worry that the student was unable to take an argument through all of its necessary steps. But law professors themselves *do* talk this way in class, precisely when they are trying to inspire students to make logical connections. The students call it “hiding the ball” and find it enormously frustrating, but practitioners of the so-called “Socratic method” believe that it

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214. See *supra* text accompanying notes 123–24. I made my observations and reached my conclusions concerning the photograph before reading Pulfer's commentary. (But why do I find it necessary to tell you this? Does it increase the veracity of my own observations that I made them independently? Or, to the contrary, does the fact that Pulfer and I agree with one another actually discredit any praise I give her rhetoric?)

215. RuPaul is the professional name of RuPaul Andre Charles, a prominent singer, film actor and television/radio personality, whose trademark is his superb ability as a “drag queen.” See RUPAUL, LETTIN IT ALL HANG OUT: AN AUTOBIOGRAPHY (1995). I admit that, although I suspected what she meant, I did not get the joke at first; I had to look it up.



gives students the ability to think creatively on their feet.<sup>216</sup> This is a deeply dialectical approach. Not only does Pulfer permit us to think for ourselves, she insists on it, while at the same time pointing out the discontinuities that should inspire our ruminations.

The next paragraph moves in an utterly different direction:

Hamilton Jordan has been retained to make sure they get a fair shake. That sounds about right. Mr. Jordan has had some practice in dealing with delicate matters of, shall we say, a mammary nature. He was Jimmy Carter's chief of staff in 1978 when he denied a *Washington Post* report that he spit amaretto down the front of a woman's blouse. The year before that, Mr. Jordan denied a report that he peeked down the blouse of the wife of the Egyptian ambassador.<sup>217</sup>

What is this passage doing here? It appears to be an *ad hominem* attack on Hooters's particular choice of associates,<sup>218</sup> and a very strange sort of attack at that. Hamilton Jordan, who Pulfer says has been "retained" by Hooters, is known for many things, including his successful battle with cancer, his unsuccessful campaign for the United States Senate, his chairmanship of the Association of Tennis Professionals, and his work for third-party presidential candidate Ross Perot.<sup>219</sup> It seems odd to focus on two disputed accusations occurring at least seventeen years in the past; even if these accusations against Jordan were justified, what possible connection do they have to the case at hand? By noting not that they happened, but merely that Jordan denied them, Pulfer lets us know just how uncertain all of this is. What function does this conspicuous *non sequitur* serve, other than as a sort of "cheap shot"?

The only link seems to be a metaphorical one: the centrality of female breasts as an object of staring or other activities in

216. I have, however, sharply criticized the Socratic method elsewhere. See Kenneth L. Schneyer, *Bully Pulpit: Effective Teachers Face Their Power over Students Honestly*, L. TCHR., Spring 1996, at 1; see also Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1577 (1990).

217. Pulfer, *supra* note 209.

218. I have not, as yet, been able to find news articles indicating that Hooters has retained Mr. Jordan in any capacity.

219. See Iris Cohen Selinger, *Hamilton Jordan: Ex-Carter Aide Plunges into Book Marketing at Whittle*, ADWEEK, Mar. 18, 1991 (Eastern ed.), § 1 at 12; see also *Carter Aide Jordan to Run for Senate*, CHI. TRIB., Dec. 2, 1985, at 22.

American culture generally. Just as the restaurant is named for a “Slang for Women’s Breasts,” just as looking at breasts appears to be the primary entertainment provided by Hooters, so was this prominent, important man apparently engaged in rude and offensive actions involving women’s breasts. The topic is not sex discrimination against men, nor sexual harassment *per se*, but a cultural obsession with the female anatomy. That is the issue, and that is what we should be talking about. What bothers Pulfer, as implied by the earlier paragraphs, is that the *Latuga* case, the EEOC investigation, and the ad campaign only serve to pique the public’s curiosity about Hooters and perpetuate this very cultural obsession. By constructing her voice in the way she has done, Pulfer tells us not that these things are true, but that we should seriously consider thinking the way she does and wondering whether they are true.

Her final paragraph attacks the discrimination question directly—or almost directly:

The official company line is that if they have to hire men, it will put them out of business. That sounds just like what women were being told 30 years ago when they wanted to be stockbrokers and lawyers and bankers. These places have a purpose. They’re places for people to eat who don’t care much about food and who really don’t care very much about women, except, of course, for their breasts. As for the rest of us, if we don’t stay away in droves, then the joke’s on us.<sup>220</sup>

Again, Pulfer changes the perspective of the argument. Hooters’s BFOQ argument is not the same as arguments made against bringing women into lucrative and powerful professions—except that it is. The old bankers and lawyers were not talking about the employee’s ability to do the job—or were they? Hooters is not trying to maintain gender-specific hiring because of outdated prejudices in the profession or its clientele—or is it? Could it be that all of these arguments are about the same thing—the oppression and exploitation of women? Pulfer steps back from the technicalities of the question and focuses, again, on the broad cultural implications, not by making the connections directly nor putting

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220. Pulfer, *supra* note 209.

together a logical argument, but by forcing us to frame and defend a denial of her beliefs.

By talking about the “purpose” of Hooters, Pulfer would seem to be admitting the strength of the BFOQ argument: Hooters has a purpose, and that purpose is sexual—that is, breasts. But to Pulfer this does not work in Hooters’s favor; instead, it raises the broader cultural question of what a BFOQ should be, and what it really means when we say that sex is really a job qualification. Does this mean she’s challenging the statute, our interpretations of it, or something else? Again, to Pulfer, this doesn’t matter—however we frame the argument, a business based on breasts is a bad idea. Her advice is that we refuse to patronize it, lest we be duped by the very publicity associated with the dispute—indeed, she implies that we betray our own abilities if we fail to stay away.

In the world created by this text, Pulfer is an idiosyncratic teacher who teaches by suggesting difficult contradictions and weird perspectives, and asks her students to reason their way out of them. The reader is seen as knowledgeable, intelligent, and responsible for making both policy analysis and real-world decisions. Hooters is seen as conniving and manipulative, while the EEOC seems thick and possibly irrelevant.

The problem with this highly dynamic, indirect rhetoric is that it makes it too easy to simply write Hooters’s genuine concerns right out of the argument. Isn’t there something real involved in this dispute? And if the EEOC’s position were enforced, isn’t there some evidence suggesting that Hooters’s business would be damaged? Is she saying that this business deserves to be damaged, and that the same is true of all similar businesses? Because of her style of argument, Pulfer does not have to address these questions directly, if at all. Because she refuses to deal in technicalities, she leaves the most difficult legal questions unanswered and possibly unanswerable. This method of talking is a fine way to begin a conversation, but it seems a poor way to end one.

## VIII. SOME CONCLUSIONS

With such wildly contrasting universes created by the rhetoric of these texts, I am left wondering whether those universes and their implications are inevitably dictated by the parties’ substantive positions, or whether they could have adopted

each others' positions while retaining their constitutive rhetoric. Clearly I approve of the rhetoric used by the EEOC and disapprove of the rhetoric used by Hooters's press release; I go so far as to call them "honest" and "dishonest," respectively. I find that the EEOC's rhetoric invites the growth and critical capacities of its readers, while the Hooters rhetoric, both in its press kit and its advertisement, seems to invite naught but unquestioning belief—and this while pretending to fight for the little guy against a giant. As I suggested before, I have been inclined to think that "good rhetoric" can appear even in a "bad" substantive text, and vice versa. These documents do not modify that view; indeed, the EEOC gives very little indication of its substantive position at all, and it is very easy to imagine that Hooters could, with its substantive views, adopt a very different rhetorical stance.

The Casey and Becker essays raise another, but equally disturbing reflection: gender is either everything, or it is nothing. In Becker's language, the concept of sexual difference, the use of sexuality to degrade, and the societal oppression of women loom so large that the plaintiff and the defendant and all of their mundane concerns seem to evaporate. In Casey's language, gender oppression and the concept of exploitation never arise at all. Casey, too, ignores the male plaintiffs, but the only mention of any sort of actual problems created by gender are in her ironic reference to Lillie Rubin. What she cares about is freedom and good decision making and, above all, winning.

The Bovard editorial and the Pulfer commentary present two radically different forms of rhetoric. Bovard reports facts, while Pulfer assumes that facts are known; Bovard provides no opportunity for the reader to form her own opinion, while Pulfer insists that the reader form an opinion with little or no help from Pulfer; Bovard is in a war against the intellectual elite, while Pulfer seems to be critiquing our culture as a whole. The two pieces do share a common rhetorical thread, though: neither of them bears a close resemblance to legal rhetoric or legal writing. The law is not important, nor even a rigorous analysis of the facts; these two writers seem much freer to ride the tides of emotion, outrage, quirkiness, or humor than, for example, either Casey or Becker. Yet something is lost, here—neither Bovard nor Pulfer ever reaches the core difficulties of the substantive issues, nor the hard questions of precedent or statutory interpretation. Their words can be very satisfying, but in another sense, empty.

While the texts I have gathered in this article vary considerably in their form, tone, and content, they share some commonalities that shed light on the kind of dialogue being created by the chorus of voices speaking about the Hooters controversies. Of the seven different texts sampled, four support Hooters's position, while three support the EEOC's. The four texts supporting Hooters share a strong, common thread: a perceived gap between EEOC officials, academics, and feminists on the one hand, and ordinary people and Hooters on the other. In all four of those texts, the notion that Hooters's hiring practices violate Title VII is imagined to be something of which only a mind divorced from everyday reality could conceive. Those who can conceive of it are defined to be outside the realm of normal people that always includes both the writer and the reader. The texts assume that common sense, routine experience, and an understanding of the way business and sexuality operate would naturally form an opinion that would place Hooters's marketing strategy and hiring practices outside the realm of what can reasonably be regulated. Anyone who believes otherwise is, well, crazy.

But remember that the Hooters controversies are the surface of a deeper, more troubling issue: the extent to which sexuality is an appropriate commodity for trade. Numerous commentators have criticized the commodification of women's bodies, suggesting both that it fosters the continuation of a cultural practice of treating women as objects or instruments to be used for the benefit of men, and that it has the practical effect of encouraging increased sexual abuse or violence.<sup>221</sup> Some of these have named Hooters itself as an important contributor to a culture of sexual violence.<sup>222</sup> Among the writers I have discussed, only Becker and Pulfer come close to attacking this cultural issue at all, and in each case one wants to hear more of it. Most of the other writers seem to assume, indeed, that the cultural question is not really a valid one. Elements of the Hooters press kit, as well as some of Hooters's other public statements, speak repeatedly of "wholesome, all-American sex-appeal" as if to be worried about the objectification and domination of women is un-American.<sup>223</sup>

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221. See Ciriello, *supra* note 78, at 273-74; Rhee, *supra* note 4, at 180-85. For a feminist analysis that resists the logic of the anti-commodification approach and instead analyzes the "degradation prohibition," see DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY & SEXUAL HARASSMENT* (1995).

222. See Ciriello, *supra* note 78, at 273-74.

223. See PRESS KIT, *supra* note 68.

When stepping back and looking not only at the rhetoric of these texts, but also at the rhetoric of this Article, one is moved to ask the extent to which my own prejudices have influenced my view of the rhetoric. I presented those prejudices early on, in order to attempt to prevent such pollution. Yet it is clear that I have tended to see value in the rhetoric of those who oppose Hooters in one way or another, while seeing dishonesty and manipulation in those who support it. Of course this is not uniformly true, and I have found both praiseworthy and troubling rhetoric in almost every piece I have examined. Yet still, since I am praising those whose substantive views I endorse, you may wonder whether I would have said the same things if identical rhetoric had been used to make contrary arguments. I don't know. I hope so. It seems to me that someone like Pulfer might have easily engaged in the same sort of "bad" rhetoric I see in the Hooters advertisement; I am even more strongly convinced that a pro-Hooters case could be made with what I would call good rhetoric.

Of course, the term "prejudice" here is broader than strong views on mere substantive issues. I am a lawyer, and an academic lawyer at that; I have a certain training and a certain background, and I have come to appreciate certain kinds of language—specifically that which raises an awareness of complexity. Someone like me tends to deplore language that erases complexity and causes us to think that all things are straightforward; for example, there is very little advertising of which I approve. These prejudices are systemic, and are present not only throughout this Article, but also in all of my published writing. Perhaps they are simply my views of what rhetoric should be.

These prejudices lead me in a certain direction when I consider what a "better" debate about this issue might look like. As a partisan of complexity and someone who is convinced that both law and talk about law are aspirational expressions that attempt to express the ideal community, I would want the debaters to put the difficulties of the BFOQ defense squarely before them, inquiring into why Title VII bans discrimination based on sex in the first place (many know that it's wrong, but would be hard-pressed to articulate their reasons). On each side, there would need to be an acknowledgment of the strengths of the other's position: Hooters would concede both that sexual entertainment is not completely consistent with equal opportunity for the sexes and that there are some troubling parallels with

*Wilson*, while its opponents would concede Hooters's genuine business interests and the probability that Title VII's drafters did not intend to eradicate sexual entertainment.

Eventually, inevitably, each writer would argue over the frankly difficult question of sexual entertainment in a society that has adopted an intolerance for sex discrimination. For Hooters, I think that this probably means arguing that *Wilson* was wrongly decided, as well as stating, once and for all, whether it views itself as a family restaurant or a place of sexual titillation, and, if both, why the two are not inconsistent. Its opponents, on the other hand, probably must argue that it is necessary to go beyond Congress's intention in adopting Title VII, while clearly saying how much, if any, commercial leeway should be given for sexual self-expression. Vital to both sides is an overt expression of which people or ideas are entitled to authority, which interests and opinions are entitled to respect, and why. In my most ideal debate, there would be an underlying assumption—or at least a clearly stated hope—that both sides are part of the same community and consequently share the goal of arriving at a just solution to a complex problem.

When we argue about an issue so vexed as the proper place of gender and sexuality within the commerce and politics of a society, we inevitably face both deeply entrenched beliefs and nearly intractable subtleties. To acknowledge complexity and encourage critical, independent analysis seems essential if we are to escape the platitudes, fanaticism, and unconsidered opinions and practices that gave rise to the dispute in the first place. We rely on easy metaphors and common sense to our peril.