

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 147

MAY 1999

No. 5

ESSAY

STATUS SIGNALING AND THE LAW, WITH PARTICULAR APPLICATION TO SEXUAL HARASSMENT

GERTRUD M. FREMLING AND RICHARD A. POSNER[†]

Laws aimed at sexual harassment, nudity, and pornography are usually understood to be concerned primarily, although not exclusively, with “offensive” behavior rather than with more palpable or measurable harms. The precise nature of the offensiveness, however, is unclear. We shall argue that it is connected to status through the concept of signaling. Differences in the optimal sexual strategies of men and women translate into differences in

[†] Fremling has a Ph.D. in economics from the University of California at Los Angeles. Posner is Chief Judge of the U.S. Court of Appeals for the Seventh Circuit and a senior lecturer at the University of Chicago Law School. The authors thank Sorin Feiner for helpful research assistance, and Richard Craswell, Richard Epstein, Jack Goldsmith, Dan Kahan, Daniel Klerman, William Landes, Edward Laumann, John Lott, Martha Nussbaum, Tomas Philipson, Eric Posner, Eric Rasmusen, Stephen Schulhofer, David Strauss, and participants in a Work-in-Progress Luncheon at the University of Chicago Law School, for many helpful comments on a previous draft.

actual or perceived status that, in turn, incite behaviors that create a demand for public or private regulation. Although our particular interest is status signaling, we discuss the phenomenon of status more broadly and explore a number of applications. In particular, we offer a fresh perspective on a social policy of growing importance—the provision of legal remedies against employers for sexual harassment in the workplace.

We first discuss what status is, why people have a vested interest in defending their status, and why a status interest might deserve some legal protection. Then we try to explain why, in the sexual area, it is primarily women rather than men whose status is at risk. Finally, we talk about the laws regulating sexual harassment, nudity, and pornography. Although we argue that concern with, even striving for, status is not a product of mere vanity, we also question the typical justifications for some of the legal protections of status, especially the economic justification for laws punishing sexual harassment. We develop our points with the aid of both economics and evolutionary biology. Both perspectives are often overlooked in discussions of the legal regulation of sex-related behaviors.¹

I. THE CONCEPT OF STATUS AND WHY IT IS DETERMINED DIFFERENTLY FOR MEN AND WOMEN

A. *The Economics of Status*

“Status” has been a concern primarily of sociologists, anthropologists, and historians rather than of economists; and though there is a growing economic literature on the subject,² status is still widely considered a non-

¹ For a convincing argument from the biological perspective, see Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971 (1995), which concludes that many of the differences between men and women are “produced in substantial measure by underlying biological differences that were adaptive in our evolutionary history.” On the economic approach to sex, see generally RICHARD A. POSNER, *SEX AND REASON* (1992).

² See generally, e.g., ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* (1985) [hereinafter FRANK, *CHOOSING THE RIGHT POND*] (examining the social and behavioral consequences of people’s concerns about economic status); ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* (1999) (discussing the relationship between living standards, income, and consumption); Roger D. Congleton, *Efficient Status Seeking: Externalities, and the Evolution of Status Games*, 11 J. ECON. BEHAV. & ORG. 175 (1989) (comparing individual status-seeking activities to economic rent-seeking activities); Chaim Fershtman & Yoram Weiss, *Social Status, Culture and Economic Performance*, 103 ECON. J. 946 (1993) (arguing that the sociological and economic approaches to analyzing productive capacity and the differences in social status among different occupations can be combined); Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, AM. ECON. REV., Mar. 1985, at 101 (1985) (discussing the impact on spending patterns that is created by interpersonal compari-

economic phenomenon because it cannot be purchased or traded. Status is bestowed rather than bought. A person's status is a function of beliefs that others hold about him or her, and one cannot pay someone to believe something, because belief is involuntary. Although one can invest in activities that will raise one's status, for example by publicly donating to charity, or indeed just by flaunting one's wealth, one cannot buy status directly as one can the usual good or service.

But modern economics, returning to its roots in Aristotle, Smith, and Bentham, does not limit its purview to explicit markets. There is a large and growing economic literature about reputation, and status is much like reputation. Both are forms of capital that one acquires indirectly and that once acquired enable the possessor to make (or prevent him from making) advantageous transactions in personal or commercial markets. They differ in several ways, however. One is that status is relational, or, as is sometimes said, "positional"; one's status is relative to that of someone else. We speak of higher rather than greater or better status, but we speak of having an excellent rather than a higher reputation. The emphasis is on good versus bad reputation rather than on one's place on a ladder. Granted, the "ladder" metaphor is a little misleading. Status systems are not closed at the top. The holder of the record for the fastest mile in the world might want to break his own record, since someone else might someday do so and take his place. Our essential point, however, is that a person can have a good reputation yet be of low status.

Conversely, a person can have no reputation but a high status. Reputation is dependent on what a person has done or is believed to have done; status need not be. A newborn prince in a monarchy will have a high status though no accomplishments, while a slave will have a low status even if he is highly productive. Status is predictive; the prince is expected to be someone with whom valuable interactions will be possible (and the slave the opposite), even though he has no track record (reputation) of such interactions. Status is thus the more inclusive concept; acquiring a reputation is one way to obtain status.

In the examples just given, status and power are positively correlated, but they need not be. Max Weber identified separate status hierarchies of wealth, power, and prestige.³ Elizabeth II ranks high in wealth and prestige

sons); Yoram Weiss & Chaim Fershtman, *Social Status and Economic Performance: A Survey* (Univ. of Chicago, George J. Stigler Ctr. for the Study of the Econ. and the State Working Paper No. 139, Aug. 1997) (discussing the role of social status in the economic behavior of individuals, such as saving, consumption, and occupational choice).

³ See 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 926-39 (Guenther Roth & Claus Wittich eds., 1968); see also WILLIAM J. GOODE, *THE CELEBRATION OF HEROES: PRESTIGE AS A CONTROL SYSTEM* 4 (1978) (ex-

but low in power. A mother of septuplets might rank high in prestige but low in wealth and power. A businessman might rank high in wealth but low in power and prestige, a government official high in power but low in wealth and prestige. The existence of distinct status hierarchies underscores the difference between reputation as a summary of accomplishments and status as a predictor of opportunities for desirable or undesirable interactions. A person who is wealthy by birth will have high status in the wealth hierarchy; he is someone "worth knowing" even though he has no record of accomplishments.

Another difference between status and reputation is that the determination of the former involves lower information costs than the determination of the latter. When status is not merely ascribed, as in the case of the newborn prince, it is a kind of shorthand or proxy for reputation, in the same way that reputation itself is a summary of all that is known about the character and achievements of a prospective transacting partner. A person who is reputed to be wealthy, or powerful, or virtuous may acquire by reason of his reputation a status in the eyes of people who may have no other knowledge of his reputation. A physicist's reputation might lead to his winning a Nobel Prize. This would give him status in the eyes of people unaware of his reputation. Members of a family may have no achievements or reputations yet still have status (acknowledged by deferential or generous behavior by others toward them) within the family or even in the outside world by virtue of such "accidents" as having reached a great age or having many grandchildren.

Status is not as closely tied to transactional opportunities as reputation is. People who never expect to meet Queen Elizabeth accord deference to her and sometimes to notorious criminals whom they would be afraid to meet. These are examples of "celebrity status," a phenomenon that has less to do with the market and more to do with the use of symbols to evoke and stand for complex realities. Queen Elizabeth evokes images of and stands for the glorious history rather than merely the diminished, almost parodic, present state of the British monarchy. Especially in the United States, however, wealth achieved through business success (as well as through inheritance, marriage, or winning a lottery) may confer celebrity status.

One should distinguish status not only from reputation but also from the concept of human dignity, an egalitarian philosophical concept that is central to Kantian ethics. Status is a hierarchical concept. Kantians believe that people are worthy of being treated with respect and concern simply by

plaining Weber's distinctions between these three elements, and providing examples of how an individual can rank high in one category but not necessarily in either of the other two).

virtue of being human. Even if this is true in some sense (although we do not see how one could show it to be true, or, for that matter, false), it would not bear on the phenomenon of status competition. It is possible to think people equal in some sense yet recognize that they are unequal in other senses, including their location on status ladders.

Because status is a capital good, a change in it can produce a large change in subjective utility, even though in a sense nothing has changed. Greater swings in utility are caused by changes in future prospects than by fluctuations in current consumption of material goods, because a change in those prospects may alter the present value of one's entire future consumption. Getting into the "right" university increases one's future prospects, and if the present value of that expected increase is large, and you know it, your current utility will jump. Status is a kind of ever-shifting index to one's future opportunities. This is another reason why the highest-ranking person in a status distribution has an incentive to increase his status even more.

Based as it is on belief, the value of one's status capital depends on the recognition of one's status by other people. That may be why a person is offended if others signal a belief that he is of lower status than he claims, as when a low-status person calls a high-status person by the latter's first name or uses the intimate form of the second person (*du* or *tu* versus *Sie* or *vous*), signaling that he thinks (or thinks others might think) that their status is equal. Since status is relational, the offense is not negated by the possibility that the low-status person is trying to signal that he is really a high-status person rather than that the other person is a low-status person like himself.

Even a *very* important person may be deeply offended by being called by his first name by an unimportant person, unless obviously uninformed or incompetent—a child, for example. If the difference in status is both obvious and large, the inference that the mode of address is a calculated insult rather than a misunderstanding of the status relation will be inescapable. And the "offense" is magnified by the value of what is harmed—the lofty status of the very important person—in the same way that stealing a person's wallet does more harm if it contains \$250 than if it contains \$5. The offense of calling a higher-status person by his first name is less when done in private, since without an audience there is no signal to third parties.

Low-status people sometimes "ape" high-status people, for example by buying cheap knockoffs of expensive goods, such as a perfume that smells like Chanel No. 5 or a synthetic diamond indistinguishable from the real thing. Although imitation is said to be the sincerest form of flattery, the benefit of being flattered may be offset by the increased costs of finding a way to signal status credibly. The costs are twofold. Some people will

doubt the status of the high-status person, thinking him one of the apes. And to the extent that aping is successful, it will create the impression that there are more high-status people than there really are, and this will dilute the status of the true high-status people.

Trademarks provide some protection against aping.⁴ This may or may not be a good thing. Status competition, like competition in other positional goods, can be socially wasteful. Every expenditure that raises one's own status imposes an external cost—the reduction in other people's status. If the others respond by expending resources on increasing their status, the result may be a restoration of the original status hierarchy, and so the competitive expenditures will have been wasted. But the effect of legal protection of status on this competition is uncertain. On the one hand, it increases the costs of the competitors, the "apers" as we are calling them. On the other hand, it increases the incentive to obtain marks of status in the first place, for example by conspicuous consumption. The net effect is unclear, and even if it were clear, the welfare implications would be ambiguous. For it is not the case that status rivalry is always a zero-sum game and therefore should be discouraged. In a dynamic society, such as that of the United States, the desire to enhance one's status is generally a spur to socially beneficial rivalry. People in a society that is open, mobile, and competitive usually cannot attain high status without achievements, so status rivalry motivates people to work harder than they would otherwise. Unless they can appropriate the entire social product of their harder work, they confer external benefits. Status rivalry may also generate external benefits by increasing the amount of charitable giving. Very little charitable giving is anonymous, suggesting that people derive status from others' knowledge of their generosity.⁵

Although reputation, and hence status, are instrumental goods, they are also—status particularly—consumption goods. People derive satisfactions from having a high status that are distinct from the competitive advantages

⁴ See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 308–09 (1987) (explaining the economic reasons for anti-dilution laws).

⁵ On the importance of recognition as an incentive for charitable donations, see Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019, 1020–21 (1996), which analyzes data indicating that charitable gifts are made in part for signaling purposes. See also William M. Landes & Richard A. Posner, *Altruism in Law and Economics*, 68 AM. ECON. REV. PAPERS AND PROCEEDINGS, May 1978, at 417 (analyzing the law of rescue in economic terms); Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 574 n.17 (pointing out that "charitable gifts are rarely made anonymously"). The positive welfare effects of status rivalry are emphasized in Congleton, *supra* note 2, at 179–81.

that status confers.⁶ One's self-esteem is enhanced by the approbation of others, since the opinion of others is a more objective measure of value than one's personal and inevitably biased self-assessment. Higher-status people derive pleasure from the envy they inspire, because envy provides credible evidence of their superior status.

The *instrumental* value of status, and the utility that is derived from being envied, may explain the phenomenon of "conspicuous consumption."⁷ The *intrinsic* value of status may explain the curious fact that status is valued even when it is not signaled, as when a wealthy person wears clothes or jewelry that look ordinary but in fact are extremely expensive. The contrast between appearance and reality reminds the person of how special he is. There is also satisfaction from fooling other people. Imagine how foolish a person would feel who treated a poorly dressed individual in a supercilious manner, only to realize later that he had been condescending to a wealthy person who had been "slumming." Making another person look foolish in such circumstances is likely to increase one's self-esteem.

It seems impossible to say which external effect of status rivalry, the negative or the positive, predominates without considering specific domains and methods of that rivalry. But when such rivalry is not shown to be, on balance, socially wasteful, government should not intervene. If the best estimate of the expected benefits of intervention is that they are zero, because of uncertainty and the fact that the benefits of intervention can be negative as well as positive, the net expected social cost must be negative since intervention always involves some cost.

B. *Status As Gendered*

Status competition has traditionally⁸ taken different forms for men and for women. Men struggle with each other for position in social hierarchies of wealth, power, and prestige. The result is that men predominate at both ends of these hierarchies—they are the richest and the poorest, the leaders and the prison inmates, the heroes and the outcasts. Failure to consider both

⁶ Elias L. Khalil defines "symbolic goods" as goods that increase utility without satisfying any wants. See Elias L. Khalil, *Symbolic Products: Prestige, Pride and Identity Goods* (unpublished manuscript, on file with authors). Status, when enjoyed "for its own sake" rather than as an instrument for obtaining other goods, is an example of a symbolic good in Khalil's sense. For evidence that status indeed increases an individual's sense of well-being, see FRANK, *CHOOSING THE RIGHT POND*, *supra* note 2, at 23–38.

⁷ THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 68-101 (New ed., The Modern Library 1934) (1899).

⁸ By "traditionally," we mean until the dramatic changes in gender roles that began in the 1960s.

ends of the status ladder creates an exaggerated impression of male status relative to female. The lowest status rung is occupied by insane and mentally retarded people, criminals, and beggars, and in all of these groups men outnumber women.

Because a woman's status was until recently (and is still to some extent) derivative from that of men—the males in her family before marriage, the husband after marriage, and eventually her sons—status competition among women consisted largely of the woman's emphasizing her family's status and displaying the qualities that made her a superior daughter, wife, and mother. But derivative status need not signify low status. Traditional "women's work" takes place within the household and thus is not easily observed and evaluated by outsiders. Given positive assortative mating, however, husband and wife will tend to have similar levels of capability in their different spheres of work, so the husband's observable performance will be a proxy for the wife's unobservable performance. In more intuitive terms, since the "best" men tend to marry the "best" women, being married to a good "catch" signals that a woman ranks highly on the women's status scale. Hence the status of women as a group need not be lower than that of men merely because women's status tends to be derivative from men's.

Some feminists, mistakenly assuming that the only status hierarchy is male, disparage household production in order to encourage women to devote more time and effort to working in the market to increase their status. Yet older women have considerable status in poor black communities in the United States because of the importance of child care by grandmothers.

Moreover, the limiting factor in the growth of a society's population is the number of women, not the number of men. Shielding women from harm may therefore reflect their value as child bearers rather than an attempt to "put them down" as being too weak to defend themselves. At the same time, the higher women's status as child bearers and child rearers by virtue of a social goal of increasing the population size, the less access women will have to the male status ladder, because they will be fully occupied in pregnancy and child rearing. This produces the paradox that the more valuable women are in one dimension (the bearing and raising of children), the less social status they will *seem* to have if status is mistakenly assessed solely by the status criteria for men. A further paradox is that high status may be conjoined with low welfare. This is true of women in poor societies because of the risks and burdens of child bearing, as well as of soldiers in embattled societies.

The growing participation of women in all parts of the labor force and in politics complicates the determination of female status. Female lawyers, business executives, and politicians participate in the same status systems as

their male counterparts, but also continue to participate in the traditional female status systems, in which marriageability and husband's status figure importantly. As a result, the same woman, for example, Madeleine Albright, the current U.S. Secretary of State, may have a different status depending on which status system is applied. The wife of a president has an exalted status, dependent largely or even entirely on marriage, that may exceed that of a female cabinet member. Men are less likely to derive status from their wives except in the wealth hierarchy.

Weber's threefold division of status systems is thus too simple, if only because he was not interested in women's status. Women can obtain prestige in competition with men by doing traditional men's work, but they can also obtain prestige in the traditional female roles of wife and mother, and sometimes of daughter and grandmother.

The distinctively female status system, revolving around sex and marriage, is itself differentiated because of the diversity of goals and opportunities among women. Postmenopausal women, and younger women who do not want or cannot have children, may still be interested in marriage, but not as a method for obtaining financial and other forms of protection for their future children. Less obviously, this may also be true of a fertile but wealthy woman, who, not requiring a man's financial resources to support her children, may prefer to have sex without marriage, for pleasure; or to have sex, with or without marriage, with men whom she believes to have good genes. Conversely, fertile men may be attracted to wealthy women in order to obtain resources for the children these men already have (or might have in the future) by other women. A fertile woman who is neither wealthy nor poor is likely to pursue the canonical female sexual strategy, which involves seeking marriage with a man who will be a good provider for her children. Poor women on welfare may be like wealthy women in having their own resources for child support and so may not be dependent on men, while middle-class women may have good incomes that are dependent, however, on their participation in the labor force. That participation is likely to be interrupted or curtailed if they have children, and so they will still depend on men to a degree. The poorest women, if unable to attract a marriage partner or find a well-paying respectable job, may turn to prostitution, exchanging sex for financial resources but without the continuity provided by marriage.

Independently wealthy women do not necessarily forfeit their status by promiscuous behavior. Their status, being based on wealth as well as marriageability, may enable them to obtain high-status husbands despite the paternity anxiety that a reputation for promiscuity will engender. In contrast, prostitutes, demonstrating low marriageability by their choice of occu-

pation, are invariably of low status in modern cultures. The status of a woman who follows the canonical female sexual strategy of “snagging” a husband well able to support her is much higher than that of the prostitute, but is still somewhat precarious, as feminists emphasize. Her sexual attractiveness and her ability to bear children will decline with age, and her husband may have the resources to be able to replace her with a younger woman. The wife of a poor man and the wife who has market skills—which decline much less rapidly with age, and indeed up to a point may increase with it—are less likely to be replaced.

C. *The Biological Dimension of Status Competition*

Status differentiation, insofar as it is related to sexual competition, appears to have a biological component or origin. The fact that most other primate species (and many nonprimate species as well) display status hierarchies suggests, but does not prove, this proposition.⁹ A woman’s inclusive fitness—the prevalence of her genes in subsequent generations—usually is maximized by her obtaining for herself and her offspring the protection of a man who has the resources to ensure, so far as possible, that her offspring will prosper and reproduce. If human infants did not require prolonged and extensive protection in order to survive to reproductive age, women would maximize their inclusive fitness by mating with the most genetically fit men, as signaled by factors such as health and size, and the only significance of a man’s resources would be as proxies for health, size, intelligence, and other desirable genetic attributes. But because human infants, at least in the prehistoric times in which we evolved to approximately our current biological state, required male protection, it is plausible to expect that women are genetically predisposed to find men who appear to have ample resources for such protection particularly attractive.

So men compete to acquire resources, and success in that competition greatly influences their rank in the male status hierarchy. Women compete for the high-status men, and the women who are successful in this competition will have a high female status. Promiscuous women will tend to lose out in this competition because men’s inclusive fitness is reduced if they expend resources on protecting other men’s children, unless the other men are close blood relatives. The risk is not trivial. Paternity tests reveal that

⁹ See, e.g., PRIMATE SOCIETIES 385-412 (Barbara B. Smuts et al. eds., 1987) (relating dominance and status hierarchies to sexual competition).

even today, a significant fraction of babies have a father different from the one claimed by the mother.¹⁰

Male promiscuity will enhance a man's inclusive fitness unless the increased reproduction that it enables is offset by a reduction in his ability to attract and protect a high-status woman and her offspring. There is evidence for the "double standard," in which promiscuity may actually raise male status but almost always lowers female status.¹¹ Male promiscuity does not raise *all* men's status, however. It is a risky strategy, not only because it is time consuming, increases the risk of contracting a sexually-transmitted disease, and can provoke lethal reactions from other men, but also because the promiscuous male may be spreading his support so thinly over his offspring (or not supporting them at all—he may not even know who they are) that the chances the offspring will survive to reproductive age are greatly reduced. This in turn may make him less attractive to women, although the advent of the welfare state and the rise in women's job opportunities have reduced women's dependence on men for the support of children.

Biologically-engendered status competitions are likely to persist in modern life because preferences that are "hard-wired" in the brain during the course of human evolution will continue to influence behavior even in social settings in which these preferences are currently nonadaptive or even dysfunctional. These tendencies, including the "double standard," are reinforced by the fact that the principal costs of an unwanted pregnancy still are borne by the woman. Thus, we do not deny the importance of cultural factors in human marital and sexual behavior. But the influence of biology on the behavior of modern people, both general evolutionary behavior and the specifics of reproductive behavior (in particular, the fact that only women become pregnant), has been underrated, and cultural and biological factors interact.¹²

¹⁰ See R. ROBIN BAKER & MARK A. BELLIS, *HUMAN SPERM COMPETITION: COPULATION, MASTURBATION AND INFIDELITY* 200 (1995).

¹¹ See, e.g., David M. Buss, *The Evolution of Human Intrasexual Competition: Tactics of Mate Attraction*, 54 *J. PERSONALITY & SOC. PSYCHOL.* 616, 617 (1988) (noting that "[p]oor mating choices typically are more costly to females than to males in the currency of reproductive success"); David M. Buss & David P. Schmitt, *Sexual Strategies Theory: An Evolutionary Perspective on Human Mating*, 100 *PSYCHOL. REV.* 204 (1993) (discussing long- and short-term mating strategies for men and women).

¹² See ROBERT BOYD & PETER J. RICHESON, *CULTURE AND THE EVOLUTIONARY PROCESS* 4-18 (1985) (explaining the dual inheritance model, in which genes, culture, and environment intersect).

II. SEXUAL HARASSMENT

A. Causes, Incidence, and Character

Sexual harassment in the modern workplace consists overwhelmingly of male harassment of females of reproductive age, rather than male harassment of other men or of older women, or female harassment of males.¹³ Although these other types of harassment are not unknown, we shall concentrate on the first type.

1. Men Harassing Women

Among the more common forms of male sexual harassment of young female employees are threats by supervisors intended to extract sexual favors from subordinates, sexual solicitation by coworkers (including supervisors), and verbal or other displays of sexual hostility toward or contempt for women (for example, decorating the workplace with nude pinups). The first form of harassment is easy to understand. The second and third present puzzles, such as why a sexual solicitation should be resented and why the characteristic forms in which male coworkers attempt to express contempt for or hostility toward female workers should offend the latter. Why should anyone be bothered by receiving an offer she is free to refuse—don't we all want to have as many choices as possible? And why should women be offended by pictures of nude women? Another question is, why should men be hostile toward female coworkers in the first place?

The focus of our discussion of sexual harassment will be on verbal or pictorial forms of harassment, which if they involve any touching at all involve only pats or squeezes rather than more severe forms of violence.¹⁴ The intention usually is to solicit the woman for sex, but not all sexual solicitations count as harassment. The law tries to distinguish between consensual dating, courtship behavior, and off-color banter, on the one hand, and seriously offensive solicitation on the other hand. A polite marriage proposal would ordinarily not count as harassment even if it were resented

¹³ See DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* 160 (1994) (finding that “[w]omen over forty-five are far less likely than younger women to experience sexual harassment of any type”); David E. Terpstra & Susan E. Cook, *Complaint Characteristics and Reported Behaviors and Consequences Associated with Formal Sexual Harassment Charges*, 38 *PERSONNEL PSYCHOL.* 559, 562 (1985) (discussing a study in which 94% of individuals filing sexual harassment charges were women while only 6% were men).

¹⁴ For evidence that behavior that approaches rape in severity, menace, or coerciveness causes extreme distress, given the optimal female strategy, see BUSS, *supra* note 13, at 145-47.

by the recipient because it was made by a man of low status. We shall largely ignore the evidentiary difficulties, which are considerable, of drawing the line between the permitted and the forbidden. The basic idea is clear enough: Circumstances may make a sexual solicitation so unwelcome to a woman as to poison the workplace for her. An example is when the woman is married and has given no indication that the marriage is troubled or that she has a taste for adultery, yet she is nevertheless repeatedly pestered for sex by one or more of her coworkers.

A rule flatly forbidding dating between coworkers would minimize offensive solicitation, and by doing so would maximize the protection of women's status. But it would do so at the cost of destroying an increasingly important part of the courtship market. With most women now entering the workforce before marriage, the workplace is an important site for courtship¹⁵ and also a cheap one, since people can learn a lot about each other as a byproduct of their ordinary work without having to go out on a date. And given the ambiguous implications of status protection for social welfare, it is far from clear that the law should want to give status as much legal protection as would result if it forbade all dating between coworkers.

In the case of solicitation by a supervisor, the obvious explanation for why the "offer" is resented is that it often carries with it an implied threat to fire or otherwise discriminate against the woman if she refuses. The resentment may be a product of the threat rather than of the solicitation per se. But the solicitation too may be resented, as signaling a refusal to recognize that the woman is of high rather than low status. A high-status woman, with good opportunities in the marriage market (perhaps already married or involved with a high-status boyfriend), would generally have little to gain and much to lose from engaging in casual sex with her supervisor. A woman of low status, however, would be more willing to consent to such a relationship. The solicitation is thus resented for much the same reason that a person might be offended to receive a cash gift from a friend. The making of such a gift would imply a belief that the person was hard up financially and therefore was of low status in our society, in which money is an important determinant of status.¹⁶ It does not matter whether a woman who is solicited for casual sex is averse to it. Even if she is not, she may still be of-

¹⁵ See Carol Hymowitz & Ellen Joan Pollock, *Corporate Affairs: The One Clear Line in Interoffice Romance Has Become Blurred*, WALL ST. J., Feb. 4, 1998, at A1 ("Offices have replaced bars, churches, parties or gyms as the dominant meeting ground.").

¹⁶ As an aside, we predict that cash gifts are therefore more common in societies in which money is a less important determinant of status than it is in our society. In addition, cash gifts are presumably more common within families, since status within a family is not determined primarily by money.

fended by the solicitation, because the solicitation implies that the solicitor *thinks* she is of low status.

Further, the woman may take offense to the solicitation regardless of whether or not others become aware of it. If they do become aware, she may be offended because this may lower the woman's status in their eyes; they will know there is some possibility, though maybe a slight one, that the soliciting male had reason to believe that the woman was interested in casual sex. Even if the solicitation is private and others are not aware, the woman's self-esteem will still be damaged because she will realize that at least one man doubts whether she is really a high-status woman.

If the soliciting male has great power over the woman, the solicitation may not imply that he thinks she is in the market for casual sex. He may simply think that although she does not want to have sex with him, she will do so to protect her job. Even so, there is an implication about her attitude toward casual sex: not that she likes it, but that she does not disvalue it as much as some other women would—that she values her job more than her chastity. A related point is that because sexual solicitation in the workplace (as outside) often implies a violation of moral norms—the man or woman (or both) may be married, and the man may be promising the woman a competitive advantage over equally or better qualified coworkers—the solicitation signals the man's belief that the woman is not a highly moral person.

The man's rank may make a difference, though. Although sexual solicitation by a high-ranking man may be repulsed and resented (the solicitations by former Senator Robert Packwood being a well-known example), the higher the man's rank, the less likely (other things being equal) the woman is to be offended.¹⁷ There is always a possibility that the solicitation might lead to marriage with a high-status male or confer other advantages. Even if the possibility is small, the benefits, if they materialize, may be great enough to make the expected benefits to the woman of the solicitation exceed the costs.

The qualification "other things being equal" is important. The higher the man's rank, the greater his coercive power over a female subordinate; and so harassment by a high-ranking man is likely to be more severe and

¹⁷ For evidence, see BUSS, *supra* note 13, at 160–61, noting a study that showed women would be most upset by advances from low-status men, such as garbage men, and least upset by those from high-status men, such as premed students. See also Patricia A. Frazier et al., *Social Science Research on Lay Definitions of Sexual Harassment*, 51 J. SOC. ISSUES 21, 28 (1995) ("[O]ne study found that harassees were perceived to have more negative reactions when the harasser had lower status . . . than when the harasser had high status . . .").

protracted than harassment by a low-ranking one.¹⁸ Female students, for example, rate harassment by a professor as more serious than harassment by a student.¹⁹

Not all sex is either casual or marital/reproductive. The male supervisor or coworker might be sincerely "smitten" by the object of his solicitations and desire a passionately romantic, rather than merely a casually sexual, relationship. We expect that in these circumstances the women would be less resentful of the solicitation than if it were apparent that the man was seeking only casual sex; often it would not be unwelcome at all, and therefore would not constitute harassment. Moreover, the range of meanings that a sexual solicitation can take on complicates the interpretation of the woman's initial rejection of the solicitation. Refusal may be a tactic for screening solicitations,²⁰ akin to the ordeals that suitors in chivalrous tales must undergo to win the hand of a beautiful princess.²¹ The man who accepts a rebuff demonstrates by his acceptance either that his interest in the woman was not very serious or that he is a timid sort. If he refuses to take "no" for an answer, exposing himself to the humiliation of a repeated rebuff, his interest is less likely to be merely casual. After a while, however, his very insistence may make him more frightening and bothersome than if his interest were casual. This insistence may, indeed, show that he is unperceptive, obsessive, even crazy, rather than merely deeply pierced by Cupid's arrow. Another possibility is that he enjoys long-shot gambles—but that might also be a sign of poor judgment or of an excessive love of risk.

Women are injured in another way, besides loss of status, by sexual solicitation in the workplace. A woman who is subjected to such solicitation will have difficulty assessing her job performance. She will not know whether she has been hired, promoted, retained, etc. because she is a good

¹⁸ See Frazier et al., *supra* note 17, at 27-29 (noting that propositions by high-status persons are generally seen more as harassment by the persons harassed than advances made by low-status persons).

¹⁹ See *id.* at 27 ("[B]ehaviors engaged in by professors were generally seen as more harassing than the same behaviors engaged in by students.").

²⁰ For evidence, see Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872 (1988), which found that "39.3% of the women [surveyed] had engaged in 'token resistance' at least once." *Id.* at 872.

²¹ An alternative explanation, however, is that the woman wants to signal to the man her acceptance of the "double standard," lest she be thought promiscuous and therefore unsuitable for a marriage partner. See Charlene L. Muehlenhard & Marcia L. McCoy, *Double Standard/Double Bind: The Sexual Double Standard and Women's Communication About Sex*, 15 PSYCHOL. WOMEN Q. 447, 448 (1991) ("Two studies of college women found that 39.3% . . . and 37.8% . . . reported indicating to their partner that they did not want to engage in sexual intercourse when in fact they did want to.").

worker or because a supervisor wants to have sex with her.²² The resulting lack of information about her performance and ability will make it more difficult for her to plan her career intelligently. This is especially true given the different time profiles of a woman's sexual and vocational "careers." Her sexual attractiveness is likely to diminish earlier than her vocational ability. Consequently, if she infers the latter from the former, she may find herself sidelined in the workplace long before she planned to retire. Even if she knows her abilities perfectly, she may not be able to convince other employers and supervisors that she owes her current position to those abilities rather than to sex.

A woman's status in the sexual system may actually be inversely related to her status in the vocational system (for example, youth may be a plus in the sexual system but a minus in the vocational system). If so, a sexual solicitation may degrade her status in both systems. At work, people may think she is interested in casual sex rather than in working; in the marriage market, potential mates may think of her as "cheap."

Kantians might argue that the obvious source of injury from sexual harassment is the affront to the human dignity of women that such harassment implies, and thus is unrelated to their rank in any status hierarchy. But the argument begs the questions of why being pestered for sex, as distinct from being pestered for one's autograph or product endorsement or hand in marriage, should be thought offensive rather than flattering or why being threatened for sex should be more or differently offensive from other threats. The answer is inseparable from the biology of sex. The Kantian approach is too vague to be helpful in dealing with anything as concrete as the psychology of sexual harassment or the proper scope of legal protection against it.

Sometimes males do not seek sex with a female coworker but rather want to expel her from their workplace. Why might they want to do this? Fear of competition and resentment of affirmative action are two reasons. The latter may be conjoined with fear by men for their own safety; male firefighters, for example, may be afraid that female firefighters hired over more qualified males pursuant to a policy of affirmative action will endanger them by not effectively performing essential tasks requiring substantial upper-body strength. But the most important reason for male hostility to female coworkers probably is a function, once again, of status. The hostility is a phenomenon primarily of working-class or lower-middle-class men in

²² See Arthur I. Satterfield & Charlene L. Muehlenhard, *Shaken Confidence: The Effects of an Authority Figure's Flirtatiousness on Women's and Men's Self-Rated Creativity*, 21 PSYCHOL. WOMEN Q. 395, 395 (1997) ("Anecdotal evidence suggests that sexual harassment may cause women to doubt their abilities, attributing their success to their professor's or supervisor's attraction to them rather than to their qualifications.").

“macho” jobs, such as policeman, fireman, soldier, miner, or metallurgical worker. The occupants of these jobs derive status from public recognition that these are tough and dangerous jobs—jobs that only men can do. In other words, these workers are on a status ladder where traditionally *all* women were below them, and so their status is challenged if *any* women are allowed to hold the same jobs.

When men want to drive women out of the workplace, they sometimes do so by flaunting symbols of male sexuality, as by using obscene language, exhibiting their genitalia, and posting pornographic photographs. They may engage in such behavior not because it is a particularly effective method of harassment, but because it is the most effective method short of committing criminal acts for which they might be punished severely. Yet such behavior can make the workplace intensely disagreeable for a woman even when she is not in physical danger. Women are “turned off” rather than “turned on” by men who flaunt male sexuality. Because such flaunting is not a reliable signal of status or resources, women who did not respond positively to these misleading signals of male prowess would tend to do better in the competition for high-status males than females who responded positively, and so an aversion to such signaling may be “hard-wired” in the female brain. Moreover, the average person does not like to be disliked, and so when sexual flaunting is read as expressing hostility, the target is likely to become upset.

Yet often men post pornographic pictures, use foul language, and engage in similar activities not to drive women out of the workplace but merely for their own enjoyment. We know this because similar conduct is commonly found in workplaces in which no women are present. One could argue that the utility of the displays to the men should be balanced against the disutility to the women. The employer would automatically perform this balancing under the pressure of competition, possibly resulting in segregated workplaces. The law in this area tilts in favor of the female employee, since it is not a defense to a charge of sexual harassment that the employer was seeking merely to minimize labor costs. As we shall see, however, the tilt may not ultimately benefit women as a group.

The question arises why there should be any disutility to women in cases in which the displays of pornography are not intended to drive women from the workplace. One possible answer is that a woman subjected to such displays may feel that her status is diminished vis-à-vis other women, namely the “pinups” themselves. As we shall note in discussing the demand for pornography,²³ from a man’s standpoint a picture of a woman can act as

²³ See *infra* Part III.B (discussing various views on the effects of pornography).

a substitute for a woman. Consequently, a woman working in a place festooned with nude pinups for the delectation of her male coworkers will be forced to compare herself with women who, having been selected for their sex appeal, will ordinarily dominate the woman worker along that dimension of attractiveness.²⁴ This explanation is inadequate, however, because the same invidious comparison between the pinup and the woman worker is likely from exposure to fully clothed "media beauties."²⁵ More important is the implication that the men are indifferent to the feelings of their female coworkers (an indifference that is itself a challenge to status) or preoccupied with sex and therefore unlikely to treat female coworkers in a straightforward comradely manner. The display of pornography might also imply a belief by the men that their female coworkers are interested in, or at least not averse to, casual sex, and, as explained earlier, such an implication is offensive.²⁶

2. Women Harassing Men

We have emphasized male harassment of women because it is more common than the reverse. It is more common not only because there are more male than female workers, and in particular more male than female supervisors, but also because women are more likely than men to be offended by sexual solicitations.²⁷ That a woman seeks sex with a man²⁸ does not signal a perception that he is a low-status male, unless he is employed in an occupation (such as the clergy, politics, management in "conservative" large corporations, and, at times, the military and teaching professions) in which men lose status by engaging in casual sex. Further, because men on average are more indiscriminate in their desire for sexual partners than are women, a woman's solicitation of a man for sex is more "complimentary" than a man's solicitation of a woman. Indeed, most men are flattered to be

²⁴ Cf. Douglas T. Kenrick et al., *Influence of Popular Erotica on Judgments of Strangers and Mates*, 25 J. EXPERIMENTAL SOC. PSYCHOL. 159, 159 (1989) (noting a study which found that "centerfold exposure" caused men to find their spouses less attractive, but did not cause a corresponding effect on women when they were exposed to a centerfold of a nude man).

²⁵ *Id.* at 166.

²⁶ See *supra* note 16 and accompanying text (explaining that solicitation of female workers for casual sex implies that the solicitors believe the female workers are of low status).

²⁷ See BUSS, *supra* note 13, at 160 ("When men and women were asked how they would feel if a co-worker of the opposite sex asked them to have sex, 63 percent of the women would be insulted [O]nly 15 percent [of the men] would be insulted" (footnote omitted)).

²⁸ Such a scenario is not uncommon. See HELEN E. FISHER, *ANATOMY OF LOVE* 32-33 (1992) ("American women generally initiate the courting sequence . . .").

solicited for sex other than by a prostitute or another very low-status woman.²⁹ (Solicitation by either may imply that the man is thought to be unable to attract a woman of high status, and such an implication is a challenge to his status.) A telling bit of evidence is that many men are willing to have casual sex with women whom they would not date, whereas many women are unwilling to have casual sex with any man whom they would not date, or even with some men whom they would date.³⁰ In addition, since a man's sexual attractiveness to women does not decline as much with age and may be positively correlated with his occupational status, a favorable performance evaluation by a female supervisor motivated by a sexual interest in the man is not as misleading or as damaging to his occupational prospects.

The status of any minority, moreover, including women in traditionally male jobs, is more sensitive to the misconduct of one member than the status of the majority is to the misconduct of one of its members. The minority's status is inherently precarious because there is less information about its average performance. In Bayesian terms, because there is less of a favorable prior belief regarding the minority's ability to perform, a single new observation can be more damaging.³¹ This implies that a woman in a traditionally male job would be more sensitive to accusations or assumptions indicating that she was not performing well because of a romantic involvement with another worker.

²⁹ A good example of the difference in male and female reactions to sexual solicitations is the sexual solicitation of a teacher by a student. The female teacher is much more likely than the male teacher to be offended, believing that the student's solicitation is an impertinent challenge to her status. The male teacher is quite likely to be flattered.

³⁰ See R.D. Clark & E. Hatfield, *Gender Differences in Receptivity to Sexual Offers*, 2 J. PSYCHOL. & HUM. SEXUALITY 39 (1989); Douglas T. Kenrick et al., *Evolution, Traits, and the Stages of Human Courtship: Qualifying the Parental Investment Model*, 58 J. PERSONALITY 97, 104-10 (1990).

³¹ Compare the following two cases, in both of which there is evidence that, if considered by itself, creates odds of 4 to 1 in the mind of the average observer that a particular worker is underperforming. But in Case A, the worker is a man, and in case B, the worker is a woman. Suppose that prior to confronting the evidence, the observer reckons the odds of a man's underperforming at only 1 to 10, but the odds of a woman's underperforming at 1 to 2. After confronting the evidence the observer will think that the odds that the (male) worker in Case A is underperforming are only 4 to 10, but that the odds that the (female) worker in Case B is underperforming is 2 to 1, even though there is strong evidence of underperformance in both cases. Cf. FREDERICK MOSTELLER & DAVID L. WALLACE, *APPLIED BAYESIAN AND CLASSICAL INFERENCE: THE CASE OF THE FEDERALIST PAPERS* 54 (2d ed. 1984).

B. *Is Sexual Harassment Inefficient? The Allocative Effects of Sexual Harassment Laws*

We have shown why male harassment of females is so much more common than the reverse, why the same behaviors by men and women may have different signal content, and therefore a different legal status, if the law is concerned with offensive behavior, and why perceptions of offensiveness may differ systematically between the sexes. But we have yet to show why the law should forbid sexual harassment. In general, a strong economic case for regulation requires the presence of significant externalities. The reason is that in their absence, the market is likely to bring about an optimal allocation of resources. Since the harassment with which we are concerned is incidental to a contractual relationship—namely employment—it might seem that the optimal amount can be achieved without legal intervention. We pointed out earlier that in deciding whether to permit nude pinups in the workplace, the employer would trade off the costs to its female employees (who would insist on being compensated through higher wages) against the benefits to its male employees, who would accept lower wages.³² With costs and benefits thus internalized by the employer, the optimal decision should be reached.

The analysis becomes more complicated if we consider the negative effects of sexual harassment on productivity, but the conclusion is the same. The negative effects are likely to be especially great when supervisory employees threaten or even just pester female subordinates for sexual favors. Apart from the time spent in making and fending off undesired sexual advances, there will be selection (both self-selection and selection by male supervisors) for hiring, retention, and promotion of women who are sexually attractive and willing to trade sex for professional advancement. Unless these characteristics are highly positively correlated with characteristics valued by the employer, which is unlikely, the productivity of the employer's female workers will decline if sexual harassment in the workplace is rampant and results in a selection in favor of promiscuous women.

But this may imply only that the cost of harassment will be reflected not only in a wage premium—a kind of “combat pay”—for threatened female employees, but also in a reduction in the productivity of the workforce, which is just another cost for the employer. Women who are not bothered by, or who may even desire, the sexual attentions of male supervisors will not demand a wage premium. If their productivity is less at the normal wage, however, the employer will still be hurt unless he knows who they are

³² See *supra* text accompanying notes 23-26 (discussing how the utility of pornographic displays to the men should be balanced against the disutility to the women).

and either fires them or reduces their wages to reflect their below-average productivity. The employer will also still be hurt unless he is able to identify and fire or otherwise discipline the harassers at acceptable cost. But because everyone affected by the harassment—men, women, and employer—is linked in a contractual relationship and presumably wishes to maximize their utility, it should be possible for an optimal solution to be reached without regulatory intervention.³³

Here we take a brief detour to note that consideration of utility maximization leads us to predict that sexual harassment, like discrimination generally, will be more common in the government and nonprofit sectors than in the private for-profit sector of the economy for the same type of job. The less competition an enterprise is subject to, the less incentive it has to increase its productivity by taking strict measures against an employment practice that reduces productivity, such as sexual harassment. Managers within the less-competitive enterprises still try to maximize their utility, but their utility and the enterprise's efficiency will tend to diverge more than in the case of a more competitive firm.

The qualification "for the same type of job" is important. To the extent that government and nonprofit employment is less likely to involve "macho" jobs, jobs in which the percentage of female workers is traditionally and still low, the type of harassment that involves trying to expel female workers from the workplace will be less likely than in the profit-making sector. Not all government jobs are of this sort, of course; consider fire and police departments. Our analysis predicts that sexual harassment is likely to be much more common in such organizations than in their civilian counterparts. But we shall focus on employers who are fully subject to the usual market incentives to minimize cost.

In the case of harassment committed in secret, as when a male supervisor threatens to fire a subordinate unless she has sex with him, or when a man pulls down his trousers in front of a female coworker when no one else is looking, the costs to the employer of detecting the harassment may be prohibitive. In such cases, there might appear to be an economic rationale

³³ The point that the firm itself is harmed by letting sexual harassment go unchecked is overlooked in the literature. (Examples range from such early works as CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 47-55 (1979) to more recent pieces such as Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1796-805 (1988).) It might seem obvious that since we observe frequent examples of sexual harassment that should not be tolerated, firms are not doing enough. That flawed reasoning would equally imply, however, what no one believes, that stronger measures must be taken against crime because crime has not been completely eliminated, or that the fact that some firms go out of business shows that they are not operating according to profit-maximizing criteria.

for punishing the harasser similar to the economic rationale for punishing an embezzler.

But what is that rationale? Because both embezzlement and harassment occur as incidents to a voluntary employment relationship, it might seem that there could be no externality in either case and so no economic rationale for punishment. Embezzlement, however, does involve an externality, despite its contractual context. If the expected cost of the limited "punishments" that the employer can mete out to the embezzler, such as firing him and refusing to give him a good employment reference, is less than the cost that the embezzlement inflicts on society, then the embezzler will have succeeded in externalizing some of the cost of his misconduct. To state this another way, if there were no criminal punishment for embezzlement, the embezzler would often be able to externalize the cost of the embezzlement to his employer because there would be no combination of private sanctions (such as dismissal resulting in a loss of specific human capital, loss of pension rights, a civil suit for conversion, or a bad employment reference) that would impose an expected cost on the embezzler equal to the private benefit to him of embezzling. This is the economic justification for subjecting the embezzler to criminal punishment, rather than just to the lesser "punishments" available to the employer.

Is there a similar justification for laws punishing the employer when one of his employees harasses another of his employees? The first thing to note is that in embezzlement cases, the law punishes the embezzler rather than the employer because the embezzler is the wrongdoer and the employer is the victim; in harassment cases, however, the law punishes the employer rather than the harasser even though the harasser, like the embezzler, is the wrongdoer and the employer is a victim along with the person harassed. This is a puzzling difference. It is true that harassment (at least when it stops well short of physical violence, which we have excluded from our analysis), unlike embezzlement, may not be a serious enough wrong to warrant the costs of criminal punishment; that it may be too difficult to define with the precision desirable in criminal statutes; and that the private benefit of harassment to the perpetrator often will be small enough for the employer to be able to deter it by means of the informal punishments that employers are allowed to impose. But the fact that harassment is not a crime is a strange reason for punishing one of the victims of it, namely the employer.

The relevant difference between embezzlement and harassment is not that one is a crime (as well as a tort, the tort of conversion) and one merely a tort, but that the employer is the only, or at least the principal, victim of embezzlement, while another employee is the principal victim of harassment. Like the embezzler, the harasser, although in principle subject to tort liabil-

ity, often would be unable to pay substantial damages and would therefore not be worth suing. By making the employer liable for the harm done by the harassing employee, the law in effect enlists the employer as a supplementary law enforcer, thus increasing the probability that harassment will be deterred or otherwise prevented. Employer liability, by leaving matters to the self-interest of the employer (that is, letting the employer do the "punishing"), creates an alternative method to punishing the detected harasser criminally. The prod of liability is unnecessary in the case of embezzlement. The employer is usually the only victim, and we rarely think it necessary or appropriate to punish victims for not taking steps to prevent themselves from being victimized.³⁴

Employer liability for torts committed by employees that do not harm just the employer is commonplace. The doctrine of respondeat superior subjects an employer to liability for the torts committed by his employees within the scope of the tortfeasor's employment. The doctrine has an economic rationale.³⁵ If the tort victim is a stranger to the employer's enterprise (for example, a pedestrian run over by a truck driven by an employee of the truck company), rather than another employee,³⁶ and if the employee who commits the tort is judgment-proof, the cost of the tort will be externalized unless the employer is liable. The victim's status as a stranger to both the tortfeasor and the tortfeasor's employer is significant because it

³⁴ *But cf.* Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1193-97 (1994) (arguing that the incorporation of the principle of comparative fault into criminal law, mitigating the punishment of criminals who acted against careless victims, would promote fairness and efficiency).

³⁵ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.8, at 204-06 (5th ed. 1998) ("The rationale . . . is that most employees lack the resources to pay a judgment . . ."); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 564-65, 581-93 (1988) (stating that economic analysis of the "scope of employment" rule shows that it is consistent with the pursuit of economic welfare and efficiency).

³⁶ Injuries of one employee by another employee of the same employer are nowadays in American law mostly governed by workers' compensation statutes rather than by tort law. The tort law of workplace injuries contains a doctrine, the "fellow-servant rule," that has been carried into the law of sexual harassment to ensure that an employer is not held liable for co-worker harassment unless the employer knew or should have known about the harassment and failed to take cost-justified measures against it. See, e.g., *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431-32 (7th Cir. 1995) (holding that even if a reasonable person could interpret the employee's remarks as sexual harassment, the plaintiff must lose because the company took all reasonable steps to protect her); *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1012 (7th Cir. 1994) (finding that a female tinsmith's employer was negligent in its lack of response to the employee's four years of complaints of sexual harassment). On the economizing properties of the fellow-servant rule, see WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 309-10 (1987). We discuss the structure of the sexual-harassment tort in greater detail later. See *infra* Part II.D (describing the scope of employer liability and the economic ramifications of this scope).

makes the cost of transacting between the potential injurer(s) and the potential victim prohibitive, and therefore prevents the enterprise from internalizing all the costs relevant to the tort. But the employer who is liable for his employee's tort will have an incentive to take all cost-justified measures in selecting and monitoring employees to reduce the likelihood of their committing torts for which he will have to pay.

Making the employer liable for sexual harassment by his employees cannot be defended on the ground just sketched, however, because it does not correct an externality. The *harasser* imposes an externality to the extent that the expected cost of punishment to him is less than the social cost of the harassment, just like the embezzler. But it is an externality to the harasser, not to the employer, because the employer has a contractual relation to the victim of the harasser, another employee. The Coase Theorem clicks in here and implies, at least as a first approximation (the significance of this qualification will become clear shortly), that the imposition of liability on the employer changes only the form in which employers compensate female workers who are harassed. Instead of receiving a wage that compensates them *ex ante* for the risk of being harassed, as they would if employers were not liable for sexual harassment, women receive a lower wage coupled with a tort entitlement to sue for damages after the fact if they are harassed. This implies that if women were free to waive their rights under Title VII³⁷ to sue for sexual harassment, they would sell those rights to employers for a higher wage. If *ex post* compensation were the most efficient method of compensating for an unpleasant work environment, employers would adopt it without the prodding of the law. Therefore, it probably is inefficient, given the high cost of litigation.

An implicit assumption is that the expected cost of harassment to female workers is not so great that there is no feasible wage premium that would compensate them in advance for bearing that cost. This seems a realistic assumption, since otherwise employers would be pressing for criminal sanctions for harassment in just the same way that they favor criminal sanctions for embezzlers. That employers do not advocate such remedies indicates that sexual harassment is not as potentially costly to employers as embezzlement is and that the market can deal with harassment without government intervention. The emphasis that the law places on employer liability for sexual harassment may reflect not the economics of the practice, but simply the fact that Title VII has been the principal statutory vehicle for making sexual harassment a tort litigable in federal courts.

³⁷ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1994). Title VII forbids employers to discriminate on the basis of (among other things) sex. *See id.*

Because advance waivers—waivers signed in advance of the harassment—of Title VII rights are forbidden,³⁸ and because the Equal Pay Act³⁹ forbids employers to pay men and women different wages for the same work, analysis of the bearing of the Coase Theorem is more complicated than we have yet indicated. On the one hand, women are forced to go the ex post route even if they would prefer a higher wage in exchange for forgoing a right to sue. On the other hand, male coworkers bear part of the employer's higher costs. Yet despite these wrinkles, we have shown that employers do have an incentive that is independent of the law to take measures against sexual harassment, since the employer who fails to prevent the harassment of his female employees will have to pay them higher wages.

An unintended effect of making sexual harassment unlawful is that it makes it more difficult for women individually to signal their high status; the law thus impedes information. The more common sexual harassment is, the easier it is for women to establish (or create the credible pretense) that they are high-status women by rejecting the sexual advances of male coworkers. The highest-status women might thus actually be hurt by the legal prohibition of sexual harassment.

The law also makes it more difficult for men to challenge any woman's status pretensions. It treats women's status as a kind of property right. We generally allow people to challenge each other's status pretensions without legal sanction, unlike societies in which a caste system gives certain groups a legally protected (or denied) social status. It is unclear why this right of challenge should be suspended in the workplace, when male workers indicate by their behavior that they do not accept the implied claim of their female coworkers to be high-status women. This rationale would not justify threats, physical abuse, or defamation, but might justify displays of pornography and other less harmful behavior, provided, of course, that the employer allowed it.

Status still would be legally protected indirectly. Because people of high status have more to lose from challenges to status that are legally actionable, such as defamation, than do people of low status, they are entitled to greater damages if they can demonstrate an infringement of their rights. But this is no different from the fact that a person of high income who is disabled in an accident will be able to prove higher lost-earnings damages

³⁸ Once the harassment has already occurred, and the employee thus has a legal claim, she can waive it in exchange for compensation, just as any legal claim can be settled in advance of (or during) a lawsuit. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (“[P]resumably an employee may waive his cause of action . . . as part of a voluntary settlement . . .”).

³⁹ 29 U.S.C. § 206(d) (1994) (prohibiting sex discrimination in pay).

than a low-income person disabled in a similar accident. The law does not recognize a protected status for the rich, but the administration of the law often produces systematic differences in legal outcomes depending on the wealth of the parties.

Defamation illustrates the difference between the protection of status and the prevention of misrepresentations concerning status. The acts of sneaking into a person's home, taping his or her sexual activities there, and then distributing the tape publicly in an effort to portray the person as immoral or as an exhibitionist, would be forbidden by trespass and privacy law. In addition, if the tape cast the person in a "false light," the actions would be forbidden by the branch of privacy law adjacent to defamation law that provides a remedy when a person's character is impugned without outright falsehoods.

The line between defamation involving sex and sexual harassment involving solicitation is not a sharp one, however. If a man states that a woman is promiscuous, this is defamatory, and if the claim is false, it is actionable. But by soliciting a woman for casual sex, a man might be implying that the woman is promiscuous, since otherwise she would not accept his offer and so he presumably would not make it. The implication often will be quite attenuated, however. The man may simply be a boor, willing to meet with continual rebuffs in his quest for casual sex. His behavior still will be offensive, but it is unlikely to do enough damage to the woman's reputation to justify a suit for defamation. If, however, the woman *could* prove that the man's behavior had damaged her reputation by implying falsely that she was in the market for casual sex, nothing would prevent her from bringing a defamation suit. That is different from entitling her to sue the man's employer without having to prove that her reputation was harmed.

A law against sexual harassment may, we conjecture, paradoxically cause the public to believe mistakenly both that there is *more* harassment than ever (because there will be more complaints if there are more remedies, although an offsetting factor is the deterrent effect of the remedies on the incidence of conduct giving rise to complaints) and that it has become grosser since the law was passed. Before there is a law against harassment, the distribution of men who harass will be similar to the distribution of men generally, except that the most refined, religious, or sexually inert men will not be represented. After the law goes into effect, the distribution will shift. Law-abiding individuals—defined as those who are more responsive to legal sanctions, whether because they have superior "character," better sexual alternatives, or a substantial reputation or status capital that will be impaired by the imposition of such sanctions—will abandon the activity. The men who continue to engage in harassing behavior will be a less representative,

and more unsavory, sample of the male distribution.⁴⁰ Sexual perverts, psychopaths, and other disordered types will now constitute a larger fraction of the harassers, along with men who are insensitive, coarse, or stupid.

The general point is that by altering the distribution of actors in an activity, the law can make the activity seem more menacing and degrading than it would be if it were not outlawed.⁴¹ Through this selection effect, prohibiting an activity may strengthen the apparent case for making it unlawful. The effect, however, is likely to be less pronounced in the case of harassment than in the case of drug dealing. One response to threatened punishment for harassment is to engage in milder forms of harassment, since they are less likely to give rise to sanctions.

C. *The Distributive Effects and Political Economy of Sexual Harassment Laws*

As with other antidiscrimination laws, a law forbidding sexual harassment may not on balance benefit the protected group.⁴² To begin with, such a law may make employers more reluctant to hire women in jobs in which sexual harassment is likely. A possible offsetting effect, however, is to make employers more reluctant to hire men.⁴³ Consider a work force that consists of all women, and then a man applies for a vacancy. The employer might refuse to hire him, fearing that it would subject the employer for the first time to potential liability for sexual harassment. But, conversely, the employer whose work force is all-male will be reluctant for the same reason to hire a woman. In mixed work forces, the effect of a sexual-harassment law on the relative propensity to hire men or women would depend on the propensity of women to complain about real and imagined harassment and

⁴⁰ See John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?*, 30 *ECON. INQUIRY* 583, 584-86 (1992) (arguing that reputation effects are much greater for upper-income people).

⁴¹ Thus the law against trafficking in drugs has had the effect of associating the sale of drugs with social outcasts. If the drug laws were repealed, drugs would be sold by respectable people, for example, pharmacists. See Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 *J. LEGAL STUD.* 553, 562 (1998) (arguing that subjecting an activity to legal sanction "changes the mixture of people in it by driving away people who have decently remunerative lawful alternatives").

⁴² See RICHARD A. POSNER, *AGING AND OLD AGE* 319-63 (1995) ("[T]he beneficiaries of [age discrimination] laws probably bear the costs of it as well, and therefore do not, on average anyway, obtain a net benefit from it."); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 *U. CHI. L. REV.* 1311, 1334 (1989) (suggesting the possibility that "women have not benefited and have in fact suffered" from "laws and lawsuits aimed at eliminating sex discrimination in employment").

⁴³ We are indebted for this point to William Hubbard.

the cost of screening prospective employees for potential female complain-ers and potential male harassers.

The law gives employers an incentive to segregate their work force by sex (for example, by steering women away from jobs in which they would be traveling with male employees), or more broadly to reduce women's workplace courtship opportunities. The law may also place employers on a razor's edge where they are liable for sexual harassment if they do not maintain a close surveillance of their workers and liable for invasion of privacy if they do. The law increases an employer's labor costs and so reduces wages, and this may harm women employees not only directly but also indirectly, because married women are harmed when their husbands' incomes decline. The indirect effect may be more important, since the wage reduction is partially offset by the new form of compensation ordered by the law: an expected damages judgment for sexual harassment.

If the average woman and the average man are both harmed by sexual harassment laws, the question arises why we have these laws. The answer may be that while women as a whole lose, some women and men gain, and they may be more effective politically than the losers. The clearest gainers are women who are and expect to remain single and childless, since their welfare is not tied up with that of men. If, for practical or legal reasons, the employer cannot discriminate in wages between male and female employees, the former will bear a part of any higher labor costs that are due to women's rights to complain about workplace sexual harassment and the result will be a wealth transfer from male to female workers. Married non-working women will not benefit from the transfer, and in fact will lose because their husbands' net wages will be lower. This may explain why the sexual-harassment tort is of recent origin (the 1980s). When most women worked at home, and those who worked outside generally had low-level jobs, the demand for protection against sexual harassment was slight. The demand grew as more and more women entered the workforce.

A related explanation for sexual harassment laws is suggested by the economic analysis of the prohibition against polygamy. Polygamy benefits high-status men and low-status women at the expense of high-status women and low-status men.⁴⁴ It does this by enabling high-status men to outcompete low-status men for women, by increasing the demand for low-status women, and by forcing high-status women to share high-status men with

⁴⁴ See GARY S. BECKER, A TREATISE ON THE FAMILY 80-107 (enlarged ed. 1991) (analyzing the incidence of polygamy in terms of the gains to men and women); POSNER, *supra* note 1, at 215 (arguing that the prohibition of polygamy is an example of a sex law designed to redistribute wealth "by limiting competition among men for women [thereby] increas[ing] the sexual and marital opportunities of younger, poorer men").

other women. These points explain why in polygamous societies, the age of marriage for most men is high and, for most women, very low. Prohibiting polygamy thus benefits high-status women—as may prohibiting sexual harassment through the effect of the prohibition in limiting workplace courtship. The worst enemies of a professional woman interested in marriage are low-status women in the workplace (secretaries and the like), because high-status men—the sort of men that high-status women wish to marry—often marry low-status women. A law that discourages workplace courtship between employees of different rank makes such marriages less likely. The law also protects low-status men with working wives who might be receptive to sexual solicitations from their high-status superiors, thus completing the analogy to polygamy, since banning polygamy favors low-status men at the expense of high-status men.

D. *The Structure of Sexual Harassment Law*

In the usual case of employment discrimination, the issue of whether there was discrimination and the issue of the employer's liability for the discrimination tend to merge. If the plaintiff can show that the employer discriminated against him on account of say, race, he is entitled to a judgment, even though the actual discriminator will be another employee—the supervisory employee who fired, demoted, refused to hire, or otherwise harmed the plaintiff. The doctrine of respondeat superior makes the employer liable for torts committed by his employees within the scope of their employment, as we have seen. But in the usual case of sexual harassment, the conduct is not within the scope of the harasser's employment. That is, it is not a consequence of the harasser's trying to carry out, however ineptly or even maliciously, the job responsibilities that his employer gave him. He is engaged in a "frolic" of his own for the consequences of which an employer normally would not be liable unless the employer had been negligent in the selection, training, or supervision of the employee.

The scope of employer liability in sexual harassment cases is approximately as follows. If the harasser indeed engaged in a frolic of his own and thus was not acting within the scope of his employment, the employer would be liable only if negligent in the selection, training, or supervision of the employee—provided that the harasser was a coworker of the victimized employee rather than a supervisor.⁴⁵ If he was a supervisor, the employer would be strictly liable, provided that the harassment took the form of a

⁴⁵ See *supra* note 36 (discussing the "fellow-servant rule," which prevents an employer from being held liable for coworker harassment unless he knows or should know about the harassment).

company act, a term we will explain shortly.⁴⁶ If there was no company act,⁴⁷ the employer would be only prima facie strictly liable. He can escape liability by showing, first, that he had a good internal procedure for responding to harassment complaints promptly and with appropriate and effective remedial action, and, second, that the victim failed to utilize the procedure.⁴⁸

This pattern makes a fair amount of economic sense.⁴⁹ Admittedly, it would be simpler to make the employer strictly liable for company acts and liable only if negligent in all other cases. But the difference between this rule and the more complex pattern that the Supreme Court has imposed primarily concerns which party to the suit has the burden of proof on the issue of negligence, and that is important only in close cases.

Begin with coworker harassment. Strict liability is inappropriate here from an economic standpoint because the employer could not stamp out this sort of harassment without going to extreme expense and greatly curtailing the privacy of its employees, as by putting them under continuous video surveillance. If the victim of sexual harassment or a worker who notices such harassment complains to a supervisor, or if the harassment is so pervasive (considering its nature, frequency, and number of victims and perpetrators) that the employer knows or should know about the harassment, the employer ought to take steps to correct the problem. He has or should have the information; he has only to act upon it. And because sexual harassment is a common occurrence in the American workplace, the employer in addition ought to take, in advance of specific cases of harassment, preventive measures against it. Such measures could include adopting and announcing a policy against sexual harassment as well as creating a discreet and convenient machinery by which victims can obtain relief without exposing

⁴⁶ See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292-93 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over an employee."); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998) (same).

⁴⁷ See *Burlington Indus.*, 118 S. Ct. at 2269 (stating that agency requirements imposing employer liability "will always be met when a supervisor takes a tangible employment action against a subordinate").

⁴⁸ See *Faragher*, 118 S. Ct. at 2293 (explaining that "[w]hen no tangible employment action is taken, a[n] employer may raise an affirmative defense," and that this defense consists "of two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff . . . unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer or to avoid harm otherwise"); *Burlington Indus.*, 118 S.Ct. at 2270 (same).

⁴⁹ Because courts have imposed this scheme of liability as an interpretation of Title VII, this scheme may not necessarily be applicable to sexual harassment cases brought under other bodies of law, such as the common law of torts.

themselves to retaliation. These are the responsibilities that a negligence standard imposes. A standard of liability that asks the employer to do more than is feasible to control harassment will impose costs without creating deterrent benefits. If the employer is liable even when there is no reasonable measure that he could have taken to prevent the harassment, the only effect will be to impose extra costs on employers and those with whom they are linked contractually (including, as we have emphasized, their employees). Employers will prefer paying the occasional judgment to incurring costs that, by definition, exceed the employer's expected liability costs. Were the costs of prevention less than the expected liability costs, the failure to incur them would be negligence, and so strict liability would make no difference. Strict liability bites only when there would be no liability under a negligence standard because the precautions that would have prevented the plaintiff's injury were not cost-justified.⁵⁰

Now consider cases in which the harasser is a supervisor rather than a line employee. We need to distinguish between two types of supervisor harassment. In the first type ("quid pro quo" harassment), the supervisor uses or attempts to use his supervisory authority to obtain sexual favors from an employee. In the second type ("hostile work environment" harassment), the supervisor does not use or attempt to use his supervisory authority at all. He harasses an employee in exactly the same way that an employee with no supervisory authority would harass another employee. From an economic standpoint, the proper standard of employer liability here is negligence, just as in the case of harassment by nonsupervisory employees. It will often be as costly for the employer to police this kind of harassment by a supervisor as it is to police the identical harassment by a coworker. The employer may have thousands of supervisory employees; because they will try to conceal any harassment in which they engage, the employer may be unable to detect it without excessively intrusive monitoring. If the employer is small and has few supervisory employees, failure to detect harassment is apt to be strong evidence of laxity in the supervision of his supervisors. Consequently, the imposition of strict liability may add little to the negligence standard.

Regarding the other type of supervisor harassment, quid pro quo harassment, we again make a two-fold distinction. First is the case in which the supervisor effects a significant alteration in the terms or conditions of his victim's employment. He fires her, denies her a promotion, blocks a scheduled raise, demotes her, transfers her to a less desirable job location, or

⁵⁰ This is a somewhat oversimplified analysis of the economic difference between negligence and strict liability, but it is adequate for our purposes. For a fuller discussion, see LANDES & POSNER, *supra* note 36, at 54-84.

refuses to give her the training that the company's rules entitle her to receive. In all these examples, the supervisor is using his delegated authority to perform a company act. Strict liability is appropriate because it is likely to deter this kind of sexual harassment much more effectively than negligence liability would, and at a reasonable cost. The employer who is strictly liable will monitor the exercise of this delegated authority carefully, knowing that he will be liable if the authority is abused. This monitoring should be relatively easy to do, since it is usually a mistake for a firm, quite without regard to any potential legal liability, to give a supervisor unilateral authority to significantly alter a subordinate's terms or conditions of employment. In well-managed companies, decisions having such consequences are subject to rules and to review by higher-ups in the company—the industrial equivalent of appellate review. If the employer is strictly liable for the supervisor's use of delegated powers to harass subordinates, the employer will be more careful in formulating the rules, as well as in reviewing the supervisor's compliance with them. Further, courts applying a negligence standard would have great difficulty determining how closely the supervisor should be supervised. Questions such as how many tiers of review should be provided before an employee can be fired or demoted are not easily answered in terms of reasonableness or due care, the criteria of negligence. The regime of strict liability shifts the responsibility for deciding these questions to the employer, who knows more than a court does about how to control his supervisory employees.

This argument might seem, however, to support strict liability for *all* sexual harassment by company employees, including harassment by co-workers, since employers know more than courts about how to extirpate that form of workplace sexual harassment. But courts do know what action is reasonable for an employer to take to combat hostile work environment harassment—institute a tough policy, disseminate it, establish a procedure by which a worker can complain without fear of retaliation, and respond promptly and effectively to any report of possible harassment. Knowing what steps the employer should take, the courts have only to decide whether he took them to determine whether he was negligent and, therefore, should be held liable. When it comes to designing the optimum system for reining in the discretion of supervisory employees, however, the courts are at sea. Accordingly, it makes sense to shift the responsibility entirely to the employer to create and administer an effective system for the review and control of company actions taken by supervisors in the exercise of their delegated authority.

Strict liability is inappropriate when the supervisor merely makes threats, even if the threats are effective. That is why it is important to dis-

tinguish between the type of quid pro quo harassment in which the supervisor actually alters the terms or conditions of his victim's employment (that is, commits a company act) and the type of harassment in which he merely threatens to do so, whether or not the victim yields to the threats. Suppose the supervisor threatens to fire a subordinate unless she will have sex with him and she agrees—or she refuses and he does not carry out his threat. In either case, because he has not used his delegated authority to commit a company act, a system for vetting such acts would not discover any wrongdoing. It will be no more feasible for the company to determine what is going on in this case than it would be if the harasser were a coworker who had threatened to steal the victim's work tools if she didn't submit to him.

We conclude that the current structure of the sexual-harassment tort when litigated under Title VII makes at least broad economic sense by essentially confining strict liability to company acts. That leaves open, however, the fundamental question, on which we have expressed our doubts, as to whether the tort itself makes economic sense.

III. NUDITY AND PORNOGRAPHY

Although sexual harassment can involve assault or other tangibly harmful behavior, it is for the most part offensive rather than concretely injurious. For example, exposure to the sight of a nude body (other than in inoffensive settings, such as that of a hospital bed) and to pornography (whether or not as part of a campaign of sexual harassment) is primarily a source of offensiveness, or even of disgust, rather than of concrete harms. Like the offensiveness of sexual harassment, such exposure is often best understood in terms of challenges to women's status. By engaging in conduct that a woman is expected to dislike because it is inconsistent with the female sexual strategy, the offender shows that he does not respect the woman. It is like a person of low status calling a high-status person by his first name.

A. *Nudity*

Since clothing is usually a more reliable signal of taste, attitude, mood, occupation, and wealth than is the naked body, it is easy to see why people in most societies go about clothed even in warm weather. (And where it is too hot for clothing, people use tattoos, paint, and mutilation as signaling devices.) Men, for whom the possession of resources is a more important signal and physical beauty a less important signal of status than for women,

tend to be more fully, and also less carefully, clad than women.⁵¹ A related reason is that men are less likely to be offended by a degree of female nudity than the reverse.

Because sexual intercourse requires a degree of nudity, once the adults in a society go about clothed, nudity becomes a signal of sexual availability. This is another reason why most women are more averse than men to being seen naked (except when status differences are so great as to cancel the signal, as when great ladies in pre-Revolutionary France bathed in the view of their male servants⁵²), and can also help explain why, in modern societies in which women are not sequestered and women dress more carefully than men, women usually spend more on clothes than men, and why there is generally more variety in women's clothing than in men's. The signal that women emit by how they dress is more complex than the signal that men emit. Women want to be attractive, and attractiveness may be enhanced by scanty or tight-fitting clothing. But women do not want to flaunt their attractiveness lest they be thought to be inviting casual sex.⁵³

None of this explains, however, why there is a nudity taboo—only why public nudity is rare. It is easy to see why societies that want to reduce nonmarital sexual contacts, such as Islamic societies, insist that women be fully clad when in public. And to the extent that superficial physical differences are irrelevant in most settings, clothing reduces communication “noise” by blocking out irrelevant sights, which, in turn, may confer external benefits.

Irrespective of these considerations, we can expect laws against public nudity to be supported by most men and women. High-status men are harmed if low-status men (normally younger) are allowed to compete with them for women by flaunting handsome bodies. High-status women are offended by male nudity because it often signals the man's belief that the woman is available for casual sex. And women of average or below-average beauty may wish to impede competition from women of above-average beauty by limiting the ability of those women to advertise their beauty by going naked. For the most part, only some low-status men, and some low-status women, would gain from a relaxation of the ban against public nudity, these being people whose only assets are likely to be their bodies. Yet it would not follow that membership in a nudist society would

⁵¹ Another reason, however, is that women tend to be more tolerant of cold than men and less tolerant of heat, especially during late pregnancy and lactation.

⁵² See NORBERT ELIAS, *THE CIVILIZING PROCESS* 113 (1994).

⁵³ We are speaking here of the average woman; some women, especially while working, want to avoid at any cost being thought open to sexual solicitation.

be negatively related to income, since low-status people would not gain much from associating with other low-status people.

An unraveling problem will arise if there is no taboo against public nudity. Initially, only people with the most beautiful bodies will go about nude, with the result that society will assume that those who are clothed have the mean beauty of the unbeautiful. This will induce those at the top of that distribution to uncloth, and this process will continue until only the ugliest person remains clothed. This may be one reason why there appear to be no halfway nudist colonies, that is, colonies in which some of the people go about nude and others are clothed; it is not an equilibrium. It is true that clothed people often frequent beaches on which nude bathing is permitted, but since the clothed are strangers, inferences about the quality of their bodies drawn by the nude bathers would not affect the status of the clothed persons in their own communities.

A related reason for why there are no halfway nudist colonies is that they would attract voyeurs. Similarly, exhibitionists would take advantage of a relaxation of the nudity taboo disproportionately. This problem of undesirable self-selection may be another reason for the persistence of the taboo, or, stated in the language of game theory, the impossibility of a separating equilibrium. Still another point, which is as old as the story of the Garden of Eden, is that nudity can be a signal of *absence* of sexual interest, since signs of sexual excitation cannot be concealed in the nude state. This is still another reason why nudists would be made uncomfortable by the presence of clothed persons.

Against all this, it might be argued that as a result of changing mores, people can be so scantily dressed in public without risking arrest that they can flaunt their bodies without the total nudity that would violate the laws against public nudity. Even in the sexually liberated Western countries of today, however, the public display of male or female genitals or female nipples would, depending on the context, send a strong sexual signal that would offend many people. This is suggested by the lack of public agitation for removing the remaining legal restrictions.

Like other taboos, the nudity taboo is stronger than one would infer just from the laws and law-enforcement practices. Restaurants, shops, employers, clubs, parents, schools, media outlets, and other private individuals and organizations frequently impose dress codes that are far more restrictive than what the law requires.

In comparison to the controversies swirling around pornography and sexual harassment, issues of public nudity have been pretty quiescent. Efforts are made from time to time to ban "topless" dancing, but they are

powered largely by a concern that such entertainment is a cover for prostitution.

The spread of "right to breast feed" laws is a recent development overriding the normal prohibition of the public display of a woman's nipple.⁵⁴ The primary reason for these laws is, no doubt, the increase in breastfeeding as a result of increased awareness of its value for children.⁵⁵ But a facilitating factor is that public breastfeeding causes little offense because the function of exposing the nipple for breastfeeding deprives the exposure of the element of deliberate sexual signaling or advertising.

The breastfeeding laws bring out the important point that the sexual-signal content of nudity depends on expectations.⁵⁶ The less fully clad that society expects a woman to be, the less exposure of her body will convey a potential sexual signal, just as the nonsexual context of the exposure of the nipple in breastfeeding reduces or eliminates the sexual signal that such exposure would otherwise convey. This analysis may explain not only why different degrees of undress can have the same sexual charge in different cultures, but also the apparently low level of sexual arousal in nudist colonies. When people are expected to be nude, nudity ceases to be a sexual signal.

B. Pornography

As radical feminists wish to define it, pornography includes nude pinups in salacious poses or in a state of sexual excitement even in the absence of any depiction of intercourse. The objections to pornography go beyond its display in places where women work. Yet fantasizing is a universal and normally approved dimension of human thought; why should it matter if the experience fantasized involves sex rather than, say, the waging of war or the commission of a crime? The answer may lie in the difference between male and female sexual fantasies, which in turn is rooted in the difference between male and female sexual strategies that we have been stressing throughout this paper. "In women's fantasies, lust is the servant of limerence [falling in love] and is intimately bound up with mate choice; in men's fantasies the goal is the satiation of lust."⁵⁷ Women's pornography tends to

⁵⁴ See MARILYN YALOM, *A HISTORY OF THE BREAST* 141-42, 292 n.60 (1997) (accounting for changes in American breastfeeding regulation in this century).

⁵⁵ See *id.* at 142.

⁵⁶ See POSNER, *supra* note 1, at 379-81 (defining the degree of offensiveness of public nudity in terms of the willingness of third parties to observe).

⁵⁷ Bruce J. Ellis & Donald Symons, *Sex Differences in Sexual Fantasy: An Evolutionary Psychological Approach*, 27 J. SEX RES. 527, 550 (1990); see also BUSS, *supra* note 13, at 82-

be more verbal than visual; the male preference is the opposite.⁵⁸ The difference may reflect the fact that, from the standpoint of reproductive fitness, the female qualities that are most important to the male are visible and therefore best conveyed through photographs, while the male qualities that are most important to the female include wealth, power, and reliability, and are described more precisely and credibly in words. And yet the law treats pictorial pornography more harshly than the purely verbal type. Why societies dominated by men should prohibit only the type of sexual fantasy materials that appeal to men is a puzzle. Although it is true that verbal pornography is more easily avoidable than pictorial (because reading a story takes longer than glancing at a picture) and is therefore less likely to create a negative externality, this hardly seems a complete explanation.

The feminist movement is divided on the issue of pornography. Some feminists point out that the production of pornography involving live models or actresses is sometimes accompanied by physical abuse and economic exploitation of these women. But this could well be an artifact of pornography's lack of a recognized legal status, in just the same way that the liquor industry was permeated by gang violence during Prohibition but not before or after. These feminists also believe that pornography incites men to commit rape (that is, they see pornography as a complement to, rather than a substitute for, intercourse). At the very least, this view holds that pornography causes men to have less respect for women because it depicts them as merely the objects of male sexual desire and thus as mere means to other people's ends rather than as ends in themselves. But pornography generally does not depict women as merely *passive* objects of male sexual desire; it depicts them as liking sex—just like men—and it may seem odd that feminists would object to a genre of expression that depicts women as having a male type of interest in sex. One might even think pornography valuable to women in combating the stereotype of the coy, passive female.⁵⁹ The anti-pornography feminists may believe, however, that men's "natural" interest in sex is augmented by pornography and that under conditions of equality neither men nor women would have as much interest in sex as men do now.

83 (reporting that women tend to focus on the emotional characteristics of their partners in fantasies, while men tend to focus on the physical characteristics).

⁵⁸ See Ellis & Symons, *supra* note 57, at 543–46 (finding “[w]omen’s fantasies . . . less dominated by visual images than men’s fantasies” in a study of gender difference with regard to sexual fantasy).

⁵⁹ See, e.g., JANE JUFFER, *AT HOME WITH PORNOGRAPHY: WOMEN, SEX, AND EVERYDAY LIFE* (1998); NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS* (1995); Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General’s Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681, 690-97 (explaining that some women value pornography as sexually liberating).

According to this view, pornography contributes to an exaggerated male interest in sex, an interest that "keeps women down." From a socio-biological perspective as well, women lose more status than men do by being depicted as promiscuous, as we explained in Part I.

Other feminists think that the harmful effects of pornography on women are slight or are outweighed by the danger that the suppression of pornography might encourage hostility to female sexual pleasure.⁶⁰ Their position is supported by the fact that a substantial number of women do enjoy pictorial pornography. The fact that women place greater emphasis than men on resources and commitment in a sexual partner does not preclude an interest in the male body, since bodily characteristics reflect what genes might be passed on. The figures are especially high for pornographic videos, with as much as eleven percent of women purchasing an X-rated movie during a twelve-month period (compared to twenty-three percent of men).⁶¹ Women, however, are much less likely to buy pornographic magazines.⁶² The difference between video and magazine consumption of pornography by women may be related to status signaling. Women have a greater incentive than men to signal faithfulness in order to alleviate a potential marriage partner's paternity anxiety. Thus, a woman seen purchasing pornography from a newsstand would feel more compromised than a man engaging in similar activity. For the same reason, women are less likely than men to attend a pornographic movie by themselves; if they attend such a movie, it is likely to be as the guest of a man, so that the woman might be thought just to be keeping him company rather than indulging her own taste for pornography.⁶³ The VCR enables a person to obtain hard-core pornographic movies discreetly by mail from general video catalogs for viewing in the privacy of the home.⁶⁴ The fact that, in responding to sex surveys, women under-

⁶⁰ See, e.g., BRENDA COSSMAN ET AL., BAD ATTITUDE/S ON TRIAL: PORNOGRAPHY, FEMINISM, AND THE BUTLER DECISION 90 (1997) (advocating the position that "part of the feminist project must involve 'exploring women's sexualities' and that some forms of pornography may play a role in this endeavor"); West, *supra* note 59, at 690-97.

⁶¹ See EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 135 tbl.3.9 (1994) (surveying sexual fantasy and the use of autoerotic materials).

⁶² See *id.* (reporting that only 4% of women viewed sexually explicit books or magazines during a 12 month period compared with 16% of men).

⁶³ See COMMISSION ON OBSCENITY AND PORNOGRAPHY, 6 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY: NATIONAL SURVEY 32 tbl.33, 34 tbl.34 (1971) (setting forth survey results of the viewing habits of men and women).

⁶⁴ Cf. JUFFER, *supra* note 59, at 58 ("If indeed more women are watching porn, then this must be the one area where men do the shopping.").

state the number of sex partners that they have had further shows female reluctance to signal promiscuity.⁶⁵

Historically, society has tolerated pornography more when directed to upper-class than to lower-class men; it is more likely in the former case to be classified as "art." This could be because upper-class men are likely to be better educated and therefore are considered to have better taste, so their preferences command greater respect. Or it could be because the upper class controls the political and legal system and uses its control to promulgate a double standard—disallowing the cheaper equivalent to ordinary citizens while allowing themselves the enjoyment of the more expensive product.

In addition, lower-class people may behave less responsibly in sexual matters. If pornography arouses adolescent or lower-class single men who possess fewer options in the voluntary sexual market, the consequence may be more rapes. This result is less likely in the case of higher-status men stimulated by pornography, because their lawful sexual opportunities are better.

The fact that pornography is often used to enhance masturbation complicates the analysis. Masturbation is a substitute for sexual intercourse. Since rape is a form of sexual intercourse, by stimulating masturbation the consumption of pornography could reduce the "demand" for rape. Masturbation, however, is not as common among less educated men as it is among more educated men,⁶⁶ and it is among the less educated that one expects more rape, since education is a proxy for income, and high-income men have better consensual sexual opportunities than do low-income men.⁶⁷ If

⁶⁵ See LAUMANN ET AL., *supra* note 61, at 185 ("Logically, men should have the same number of female sex partners as women have male sex partners, but the men, here, seem to report more partners than the women."). The discrepancy is large. The median woman reports two sexual partners, the median man six; and homosexuality and prostitution are not frequent enough in our society to account for the difference. See *id.* at 180 tbl.5.1D (reporting the median, minimum, and maximum number of sex partners since age eighteen for several specific social groups); see also *id.* at 325 fig. 9.1 (showing that the average age of first intercourse is reported as lower for men than for women of the same race, even though women typically have intercourse with men older than themselves). Of course these discrepancies may reflect male overstatement rather than female understatement, but this would not affect our basic point, that women are much less likely to flaunt their sexual activities than men.

⁶⁶ See *id.* at 82 tbl.3.1 (showing that over 33% of both the college-educated men surveyed and the men with advanced degrees surveyed masturbated at least once a week while only 19.2% of the men without a high school education surveyed masturbated at least once a week).

⁶⁷ For evidence that income is negatively related to the incidence of rape, see Isaac Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 68, 94 (Gary S. Becker & William M. Landes eds., 1974).

no uneducated men masturbated, the only effect of pornography on their sexual activities would be to increase their nonmasturbatory sexual activities, including rape. If no educated men raped, then their substituting (under the influence of pornography) masturbatory for nonmasturbatory sexual activity would not reduce the incidence of rape, and so would not offset the effect of pornography in increasing the amount of rape by uneducated men.

This analysis shows that pornography *could* increase the incidence of rape. But there is no convincing evidence of this.⁶⁸ One reason may be that pornography is consumed relatively more by the well educated.⁶⁹ The fewer the uneducated men who consume pornography, the less effect pornography may have on the incidence of rape. Further complicating the picture, however, is the fact that pornography increasingly takes the form of videotapes rather than books or magazines, and education is a less important variable in the consumption of the former.⁷⁰

Even if pornography does not increase the incidence of rape, society might frown upon its consumption by low-status people, especially adolescents, as leading to more intercourse with casual partners, resulting in more unwanted and out-of-wedlock pregnancies and more incidents of sexually transmitted diseases.

Since men are the main consumers of pornography, it is a puzzle that the liberalization of pornography has coincided with an increase in political and economic power for women, and that traditional societies in which women have little political power (for example, Muslim societies), are more restrictive. If pornography is harmful to women, why is there not more protection against it when and where women hold power? The answer may lie in the changing role of women. When the principal role of the middle-

⁶⁸ See, e.g., LARRY BARON & MURRAY A. STRAUS, *FOUR THEORIES OF RAPE IN AMERICAN SOCIETY: A STATE-LEVEL ANALYSIS* 123 (1989) (noting that the data used indicate that there may be a correlation between pornography and rape, but cautioning against drawing such a conclusion as there are many other possible explanations for the data); POSNER, *supra* note 1, at 366-71 (discussing possible effects of pornography on the incidence of rape and providing comparative evidence, but concluding that "pornography has not yet been proved to affect the incidence of rape").

⁶⁹ See COMMISSION ON OBSCENITY AND PORNOGRAPHY, *supra* note 63, at 41 (finding that 38% of men and 20% of women with some college education had recent exposure to pornography, compared to only 9% of men and 2% of women with less than a ninth grade education). Edward O. Laumann found (in unpublished data that Professor Laumann has kindly furnished us) that highly educated men are twice as likely as poorly educated men to have bought a sexually explicit book or magazine in the past year. With women the ratio is six to one. Both ratios fall, however, though not below one, when videos rather than books or magazines are in question. Other survey data, furnished to us by the advertising research staff of *Penthouse* magazine, reveal that 50% of the readership of *Playboy*, 45% of the readership of *Penthouse*, and 76% of the readership of *Variations* had some college education.

⁷⁰ See *supra* note 69 (summarizing the data).

class woman is to bear her husband many children, a woman who engages in casual sex is stepping out of her prescribed role. Pornography revels in casual sex and therefore contradicts the official image of women and so is offensive. In today's wealthy, Westernized societies, in contrast, the woman's role as a childbearer is of less importance within marriage, and marriage itself is a less important source of a woman's status.

Average income may have an independent effect on the demand for restricting pornography. If freedom of expression is a superior good, we can expect wealthy societies to tolerate *all* forms of expression because it is difficult to restrict one form alone. When society did not tolerate pornography, works of literature that were not sexually arousing, but that offended powerful groups, were often classified as pornography and outlawed as well.

* * * * *