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In Search of the Reasonable Woman: Anti-Discrimination Rhetoric in the United States

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In Search of the Reasonable Woman: Anti-Discrimination Rhetoric in the United States[1]

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The rallying cry to "end discrimination" is rhetorically powerful, but ultimately empty. Discrimination is an inevitable and important feature of modern life. We constantly discriminate between courses of action, behaviors and beliefs. It would not just be irrational to end discrimination, it would be impossible. What the proponents mean, of course, is that they wish to end *unfair* discrimination, or perhaps more accurately put, to end *undesirable* discrimination. This clarification reveals that there is an underlying wrong beyond the mere fact of discrimination, and it is precisely the character of unfairness that puzzles many courts and commentators.

This is a familiar lesson in insurance law. Insurance is premised on pooling a variety of risks and then segmenting this pool to provide appropriate pricing. For example, life insurers promise to pay upon the death of a single individual, but they are able to do so only because they have thousands of insureds gathered into a large pool that regularizes the risk into something approaching an actuarial certainty. The insurers then discriminate among members of the pool based on factors such as age, whether the applicant smokes, and the applicant's medical history. This is rather unexceptional. Discrimination makes sense for

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all concerned, because it lessens the risk of adverse selection and promotes fairness in the setting of policy premiums. Discrimination is *fair* to those in the insured pool; a refusal to discriminate between insureds with regard to premiums probably would be deemed to be fundamentally *unfair*.

But there is another side to the notion of "fair actuarial discrimination." We know as a matter of actuarial fact that African-American men have a shorter expected life span than Caucasian men, and that they have more health problems. Does this mean that insurers should charge greater premiums based on race, which can often (although certainly not always) be an easy "risk factor" to confirm? It should come as no surprise that the rule in America is that insurers *cannot* use race or ethnicity to set premiums, even if doing so can be justified as a matter of actuarial fact. The legacy of racial discrimination in the United States simply is too raw and pervasive to ignore in this context.

Discrimination on the basis of gender is more complex. An employer that provides insurance products to employees may not use gender-rated pricing because that would amount to discrimination against women in the employment setting, but the insurance industry is permitted to use gender to price its products to the public at large. Consequently, it is no violation of employment law statutes for an employer to provide an equal amount of money to employees to purchase various insurance benefits, even though the price of the insurance products that they purchase will be based, in part, on the gender of the applicant. We learn from the insurance context that discrimination can be rational and socially beneficial, but that society imposes limits on discrimination for policy reasons, even when the discrimination is motivated by reason rather than animus.

In this paper I will discuss discrimination in the employment setting. Specifically, I will discuss how the United States has attempted to address the problem of sexual harassment. I believe that the rhetorical underpinnings of this area of law focus on the notion of "unfair discrimination," although judges and lawyers find it very difficult to deal with this fundamental question in a satisfactory manner. As a means of making my discussion as concrete as possible, I discuss the adoption by some courts of the "reasonable woman" standard to assess whether the work environment is so abusive that it amounts to gender discrimination. My thesis is that this doctrinal development is an attempt – limited and undertheorized – to develop the contours of how to determine which discriminatory effects in the workplace are unfair.

First, I provide a brief overview of the development of the doctrine that a "hostile work environment" can amount to gender discrimination. Then, I analyze how some courts adopted the "reasonable woman" standard for judging whether the hostility is "severe or pervasive" enough to constitute a violation of civil rights laws, and the issues relating to this

doctrinal development. Finally, I discuss the rhetorical dimensions of the "reasonable woman" standard and assess how the rhetoric reveals the fundamental questions raised by these cases.

A. Hostile Work Environment Sexual Harassment.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees or applicants "with respect to compensation, terms, conditions or privileges of employment because of race, color, religion, sex or national origin."[2] Title VII is the primary civil rights act protecting American workers, although it has been supplemented by important statutes that have been modeled on its provisions.[3] Thus, this simply-worded ban on discrimination serves as the fountainhead for employment discrimination laws in the United States.

When read with today's eyes, the protection of persons from discrimination based on gender seems unexceptional and is to be expected. However, the inclusion of "sex" in the statute was the result of interesting, if not downright bizarre, politics. While the bill was being debated in the United States House of Representatives there were numerous attempts to derail its passage, especially by proposing amendments that would water down its provisions or would make the bill odious to enough Representatives to preclude its adoption. The addition of "sex" to the bill at the last minute on motion of Howard Smith, a conservative Virginia Democrat, is regarded as one of these efforts to derail the bill. The liberal supporters of the bill, led by Representative Manny Celler of Massachusetts, immediately spoke against the amendment for fear that it would weaken support for the bill among conservative men, but the women Representatives in the House joined with conservative southern Democrats to adopt the amendment at the last minute of the legislative process. As Chief Justice Rehnquist later noted in the first case that recognized hostile work environment sexual harassment as a violation of Title VII:

> The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong.Rec. 2577-2584 (1964). The principal argument in opposition to the amendment

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[2] 42 U.S.C. §2000e-2(a). The statute is broadly applicable to American workers, inasmuch as it applies to federal, state and local governmental employers, private employers with 15 or more employees, and labor unions.

[3] Federal statutes relating to discrimination in the workplace include the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34, the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, the Pregnancy Discrimination Act of 1972 (amending Title VII), and the Genetic Information Non-Discrimination Act of 2008, P.L. 110-233, 122 Stat. 881 (May 21, 2008). Additionally, many states and municipalities have enacted a variety of anti-discrimination laws.

> was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.,* at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.,* at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."[4]

Read in historical context, the understated observation by the Chief Justice captures the difficulty at the core of interpreting the statutory provision protecting employees from gender discrimination: whether it is possible to enforce a principle of anti-discrimination through a part of the statute that became law only because its proponents hoped that attitudes *against* full equal rights for women in the workplace could be galvanized to defeat the Civil Rights Act![5]

The prohibition on gender discrimination is easy to understand when applied to employers who refuse to hire women for certain jobs, or who hire them on terms different than those offered to men. There are difficulties, of course, that the statute recognizes by providing an exception when there is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[6] This exception is narrowly construed, as explained by the Supreme Court in a case involving an employer that excluded fertile women from jobs resulting in exposure to lead in the manufacture of automobile batteries. Although motivated by a understandable desire to protect fetuses from harm, the Court held that the employer had no basis to exclude women from these positions on the basis of this paternalistic desire, as opposed to factors relating to the woman's ability to perform the job itself. "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."[7]

In addition to overt discrimination with respect to job opportunities, women face threats of sexual harassment in the workplace that amount to unacceptable "terms" of

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[4] *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986).

[5] This cynical view is not uniformly shared. Some scholars argue that the addition of "sex" to the statute was actually a product of opportunistic hard work by progressive women who turned a defensive maneuver against the conservatives in their effort to provide equal rights to women. *See* Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 163 (1990).

[6] 42 U.S.C. § 2000e-2(e)(1).

[7] *United Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991).

employment. Courts developed the concept of "sexual harassment" to address situations in which male supervisors demanded sexual behavior from women employees in exchange for the benefits of employment. Originally termed "quid pro quo" sexual harassment, and later construed as sexual harassment leading to "tangible economic loss," the Court has made clear that subjecting a woman employee to sexual demands as a requirement for her to receive the ordinary benefits of employment is a form of gender discrimination for which the employer is strictly liable. As explained by one court,

> An employer may not require sexual consideration from an employee as a quid pro quo for job benefits. . . .
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> It necessarily follows from this premise that an employer is strictly liable for sexual discrimination by supervisors that causes tangible job detriment. See Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc). "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R.Rep. No. 238, 92d Cong., 1st Sess. 5 (1971), reprinted in 1972 U.S.Cong. & Ad.News 2137, 2141. Sexual harassment resulting in tangible job detriment is a form of sex discrimination every bit as deleterious to the remedial purposes of Title VII as other unlawful employment practices. We hold that an employer is strictly liable for the actions of its supervisors that amount to sexual discrimination or sexual harassment resulting in tangible job detriment to the subordinate employee.[8]

The demand by an employer, through its agent in a supervisory capacity, that a woman engage in sexual activity in order to obtain or retain the benefits of employment is a clear case of prohibited sex discrimination.

A much more difficult question arises in connection with more indirect forms of gender discrimination. Title VII prohibits discrimination on the basis of gender with respect to compensation, terms and privileges, but the statute also prohibits discrimination with respect to "conditions." This wording opened the possibility that employers must maintain workplace conditions that are not hostile to employees based on their gender, race or ethnicity in order to avoid liability for a civil rights violation. In 1971, the Fifth Circuit Court of Appeals held that a Latina could maintain a claim for a hostile work environment on the

[8] *Henson v. Dundee*, 682 F.2d 897, 908-910 (11th Cir. 1982).

basis of race for which the employer could be found liable under Title VII.[9] The court noted the expansive statutory language to buttress its pathbreaking holding:

> Section 703(a) (1) of Title VII, 42 U.S.C.A. § 2000e-2(a) (1) provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate *in extenso* the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection, nor blind ourselves to their potential misuse.
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> We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination. . . . Furthermore, I regard this broad-gauged innovation legislation as a charter of principles which are to be elucidated and explicated by experience, time, and expertise. Therefore, it is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of

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[9] *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971). The plaintiff alleged that the workplace was hostile because her employer, an optometrist, segregated patients by race and terminated her for causing "friction" with her white co-workers who harassed her. The dispute before the court concerned whether the EEOC could obtain patient records as part of its investigation of the workplace.

> creating a working environment heavily charged with ethnic or racial discrimination. I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of Section 703. But by the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.[10]

It pays to pause at this point in my fast-paced historical overview to attend to the rhetorical framing in this first, and therefore paradigmatically influential, opinion on the road to defining hostile work environment sexual harassment. The Court's careful analysis and attention to the realities of the workplace opened a new conception of discrimination, one in which the employer should be held liable for a workplace "polluted" with discriminatory attitudes and actions that do not amount to the direct action of the employer to deprive an employee of the tangible benefits of employment. The court concluded that the broadly phrased statute invites a dynamic interpretation to deal with changes in society, noting that reasonable behavior today might be deemed unjust in the future. In the early days of the statute it might have been enough to provide members of racial minorities with access to paying jobs, but the court recognized the growing importance of the emotional and psychological aspects of a job once the hiring barrier has been overcome. Finally, the court acknowledged the difficulty of line-drawing. It would make no sense to hold employers strictly liable for a single epithet uttered in the workplace, but at the same time it would make no sense to tolerate a noxious work environment that undermined the emotional and psychological stability of employees who are members of racial minorities.

It is precisely these issues that have dominated the development of sexual harassment law.[11] Working on the basis of the developing case law on racial harassment, in 1980 the Equal Employment Opportunity Commission (EEOC) published guidelines that defined sexual harassment. The EEOC guidelines provide:

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[10] *Id.* at 238.

[11] For general discussions of sexual harassment as a form of gender discrimination, *see* THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW (New York: New York University Press, 2004); MARGARET A. CROUCH, THINKING ABOUT SEXUAL HARASSMENT: A GUIDE FOR THE PERPLEXED (Oxford: Oxford University Press, 2001); SEXUAL HARASSMENT: ISSUES AND ANSWERS (Linda LeMoncheck and James P. Sterba, Eds.) (Oxford: Oxford University Press, 2001); CAROLINE A. FORELL AND DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN (New York: New York University Press, 1999).

> (a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[12]

Although the guidelines were intended to broaden the definition of sexual harassment to include circumstances in which the workplace was "intimidating, hostile or offensive," the predicate language of the guideline begins by describing the behavior that generally forms the basis for quid pro quo sexual harassment, namely "sexual advances, and requests for sexual favors." The list of predicate actions extends to "other verbal or physical conduct," but this extension is qualified by the phrase "of a sexual nature." The clear implication is that women are discriminated against because men see them as sexual objects (whether desirable or undesirable) and that it is the introduction of sexual relations into the workplace, even if not in a stark "quid pro quo" manner, that can poison the work environment. By 1980 there were many sophisticated analyses of sexism as a structural barrier to equality in the workplace, and yet the EEOC guidelines reinforced the idea that "sex discrimination" is "discrimination related in some way to sexual relations between men and women."

Following these administrative guidelines, lower courts began to recognize that employers could be held liable for sex discrimination on account of a hostile work environment under Title VII, culminating in the recognition of this interpretation of Title VII by the Supreme Court in 1986.[13] The *Vinson* case involved extreme facts to which the Supreme Court only alluded in its opinion. The employee alleged that during her first year of employment she was taken to a restaurant by her supervisor and propositioned, and that she complied because she feared retaliation. She alleged that she faced repeated demands for sex at the bank where she worked, submitted numerous times, was brutally raped on one occasion, and was harassed and humiliated by constant fondling and ridicule in front of other employees. The lower court determined that the sexual contact was not tied to Vinson's employment, inasmuch as she admitted that all of her promotions were merited by her performance, and so there could be no case of quid pro quo sex discrimination.

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[12] "Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964," 45 Fed. Reg. 74,676 (Nov. 10, 1980) (codified at 29 C.F.R. §1604.11 (2004).

[13] *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

The Supreme Court reversed, finding that the trial court should also have considered the evidence under a "hostile work environment" theory of sexual harassment. The Court concluded that for "sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'."[14] In short, even if the plaintiff had not suffered tangible financial harm as a result of the harassment with respect to the "terms" of her employment, the harassment nevertheless constituted a violation of Title VII because it resulted in discrimination on the basis of sex with respect to her working "conditions." Seven years later, the Supreme Court held that a plaintiff alleging hostile work environment sexual harassment need not show severe psychological injury in the absence of tangible economic harm, reinforcing that the civil rights statute was designed to eliminate hostile work environments rather than just to compensate workers who suffer bodily or economic injury as a result of the environment.[15]

With the Supreme Court having clearly established that Title VII outlaws workplaces that are hostile, intimidating or threatening on account of gender, the lower courts faced the challenge of articulating the contours of this form of sexual harassment. The development of legal doctrine is path-dependent, and so early rhetorical characterizations tend to have a lasting effect. Sexual harassment originally was framed in expressly sexual terms: unlike quid pro quo harassment, the sexual advances did not affect the material terms of the employment relationship, but sexual desire and/or aggression was the prototypical form of behavior that was regarded as discriminatory. This is one legacy of the particular facts of the *Vinson* case, in which the predatory sexual behavior of the supervisor obviously produced an intolerable workplace even if it could not be connected with tangible losses by the plaintiff with respect to promotion or compensation.

However, the dynamics of the workplace can be sexist and offensive to women even in the absence of overt sexual predation. The cases involving harassment based on race or ethnicity involved situations in which majority employees demonstrated their position of

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[14] *Id.* at 67 (quoting *Henson*, 682 F.2d at 904).

[15] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). The court reasoned:

> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.
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> So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, *Meritor, supra,* 477 U.S., at 67 . . . , there is no need for it also to be psychologically injurious.

Id. at 22.

power and ability to subordinate members of racial minorities through the use of inflammatory epithets, differential treatment, and other non-sexual activities. In contrast, it soon became clear that in the area of hostile work sexual harassment courts assumed that the predicate act would involve conduct or speech of a sexual nature. Even the name, "sex discrimination," promotes this understanding of the prototypical case, whereas an alternate characterization of the cause of action as "gender discrimination" suggests a much broader focus. In the next part of the article I will discuss the development of the "reasonable woman" standard for judging the severity or pervasiveness of a hostile work environment, and then analyze how the rhetorical battles over this standard have helped to highlight the full scope of gender discrimination to which Title VII should be addressed.

B. The "Reasonable Woman" Test

Just months after the *Vinson* case interpreted Title VII to bar hostile work environment sexual harassment, the Sixth Circuit Court of Appeals issued an important opinion in *Rabidue v. Osceola Refining Co.* that was widely cited in the following years.[16] The plaintiff alleged that a fellow employee was "an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff," that he was constantly confrontational with her, and that several employees had posted pictures of nude or scantily-clad women in visible areas of their offices and/or work areas.[17] The court affirmed the trial court's determination that the plaintiff had failed to prove that she was subjected to hostile work environment sexual harassment, and rejected the suggestion that it ought to judge the case from the plaintiff's perspective. The court held that a plaintiff must first prove that the work environment would have interfered with a "reasonable person" attempting to carry out employment duties and would have seriously affected that person's psychological well-being, and then also must prove that she herself suffered these effects. The court concluded:

> Accordingly, a proper assessment or evaluation of an employment environment that gives rise to a sexual harassment claim would invite consideration of such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon

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[16] *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986).

[17] *Id.* at 615.

voluntarily entering that environment. Thus, the presence of actionable sexual harassment would be different depending upon the personality of the plaintiff and the prevailing work environment and must be considered and evaluated upon an ad hoc basis. As Judge Newblatt aptly stated in his opinion in the district [trial] court:

> Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to – or can – change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers. Clearly, the Court's qualification is necessary to enable [the regulations] to function as a workable judicial standard.
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> In the case at bar, the record effectively disclosed that Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees. The evidence did not demonstrate that this single employee's vulgarity substantially affected the totality of the workplace. The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places. In sum, Henry's vulgar language, coupled with the sexually oriented posters, did not result in a working environment that could be considered intimidating, hostile, or offensive under [the EEOC guidelines] as elaborated upon by this court. The district court's factual findings supporting its conclusion to this effect were not clearly erroneous. It necessarily follows that the plaintiff failed to sustain her burden of proof that she was the victim of a Title VII

sexual harassment violation.[18]

This analysis was positioned to set the rhetorical agenda for hostile work environment claims in other courts, and a number of courts began to follow the lead of *Rabidue*.[19]

The rhetorical structure of the opinion is at once transparent and latent. The court emphasizes that the gateway to asserting a successful claim is to establish that a reasonable person would find the workplace hostile. This seemingly innocuous requirement must be satisfied before the court assesses the effect of the workplace on the plaintiff. On the surface this appears to be a sensible approach to imposing liability on employers, but the proper construction of the "reasonable person" is assumed and therefore unarticulated. The court lists a variety of factors, but provides no explanation of how one can determine the reasonable person's reaction to these factors. The assumptions of reasonableness come to the fore when the court adopts the trial judge's memorandum by quoting it at length. In sum, the "reasonable person" understands that certain workplaces are rough environments with sexual images and rude behavior, but that person is self-possessed enough not to be bothered any more than a person is bothered by walking past sexually explicit photos outside an adult cinema. The "reasonable person" doesn't expect the law to conform society to an ideal state, and instead just regards the law as protecting persons from behavior that greatly exceeds the bounds of social norms. In sum, the "reasonable person" is a man.

It is important to note that the *Rabidue* case involved a fundamentally different workplace problem than the *Vinson* case. The plaintiff was not besieged by sexual overtures, nor was she physically attacked and violated. The question in *Rabidue* is not sexuality in the workplace, but the general degradation and subordination of women that pervades the workplace and makes clear to women that they are not taken seriously in that environment. The "girlie magazines," as the court so quaintly put the point, are a symptom of the workplace norm that women are regarded as fantasy constructs relegated to the private sphere rather addressed as colleagues. The court simply didn't understand the nature of the complaint, inasmuch as it told the plaintiff that she should be used to living in a coarse and sexist world, and should not expect more in a workplace.

Judge Keith wrote a powerful dissenting opinion that confronted the majority's rhetorical construction of "reasonableness." Keith argued that a conglomerate "reasonable person" failed "to account for the wide divergence between most women's views of

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[18] *Id.* at 620-22.

[19] *See, e.g.*, *Boutros v. Canton Regional Transit Authority*, 997 F.2d 198, 203 (6th Cir. 1993); *Rose v. Figgie Intern.*, 56 Fair Empl. Prac. Cas. (BNA) 41 (W.D. Mich., Feb 01, 1990); *Reynolds v. Atlantic City Convention Center Authority*, 53 Fair Empl. Prac. Cas. (BNA) 1852 (D.N.J. May 26, 1990).

appropriate sexual conduct and those of men."[20] Consequently, the court should adopt the perspective of a reasonable victim, so as to prevent the ossification of "ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."[21] Prevailing workplace norms are the problem to be addressed rather than a defense to liability, leading Judge Keith to argue vigorously against the majority's suggestion that the background of the workforce ought to be taken into account.

> No court analyzes the background and experience of a supervisor who refuses to promote black employees before finding actionable race discrimination under Title VII. An equally disturbing implication of considering defendant's backgrounds is the notion that workplaces with the least sophisticated employees are the most prone to anti-female environments. Assuming *arguendo* this notion is true, by applying the prevailing workplace factor, this court locks the vast majority of women into workplaces which tolerate anti-female behavior. I conclude that for actionable offensive environment claims, the relevant inquiry is whether the conduct complained of is offensive to the reasonable woman. Either the environment affects her ability to perform or it does not. The backgrounds and experience of the defendant's supervisors and employees is irrelevant.[22]

Judge Keith regards Title VII as a mandate to ensure that all workplaces in the United States are open to women, especially if the type of workplace has in the past been a bastion of male prerogative. Additionally, the presence of sexually degrading messages and images in society provides no justification for permitting them to exist in a workplace that is required to be free of discrimination. He emphasizes that "the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery. I conclude that sexual posters and anti-female language can seriously affect the psychological well being of the reasonable woman and interfere with her ability to perform her job."[23] Judge Keith used the notion of a "reasonable woman" to help clarify the barriers to full participation in the workplace caused by the expression of gendered power relations.

Five years later, the Ninth Circuit Court of Appeals expressly endorsed Judge Keith's analysis and adopted the "reasonable woman" test. The facts of the case are particularly

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[20] *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting).

[21] *Id.*

[22] *Id.* at 627.

[23] *Id.*

important, and so require an extended description. In *Ellison v. Brady*, an employee of the Federal Government (Ellison) alleged that she was sexually harassed by a non-supervisory co-worker (Gray). Ellison alleged that Gray hung around her desk, asked her to lunch when nobody else was around, and generally made a nuisance of himself. The day after declining Gray's invitation to lunch on a day that he had uncharacteristically dressed in a three-piece suit, he handed Ellison a note saying that he had cried all night, was in constant turmoil, and couldn't bear to feel her hatred for another day. Shocked and frightened, she left the room and reported the matter to her supervisor. She didn't want official action to be taken, and instead asked another man in the office to speak privately with Gray and make clear that she wasn't interested in a romantic relationship. She left soon thereafter for a four week business trip, during which time she received a three-page letter that she described as "a hundred times weirder" than the first note; it frightened her and caused her to believe that he was unbalanced. Ellison demanded that Gray be transferred to another office, and he was gone by the time she returned from her business trip.

Unfortunately, Gray then filed a union grievance and sought to return to Ellison's office. The grievance was settled by agreeing that he could return after four more months if he promised not to bother Ellison. Upon hearing this news, Ellison became frantic and sought her own transfer. Gray then sought joint counseling to resolve any tensions and wrote a third note to her that assumed they had some form of relationship. In response to Ellison's claim, the EEOC determined that the employer had undertaken appropriate measures and found no discrimination. The trail court ruled that Gray's conduct was isolated and trivial, and that Ellison had failed to establish that it was sufficiently severe or pervasive to alter the conditions of her employment by creating a hostile work environment. On appeal, the Ninth Circuit reversed.

The court began by noting that *Rabidue* had not imposed liability on much more egregious facts.[24] In contrast to testing the work environment from the perspective of a "reasonable person," the court expressly embraced the "reasonable woman" standard by drawing from the scholarship of Professor Kathryn Abrams and others.[25] In response to the findings that Gray's actions were not "severe or pervasive" enough to create a hostile environment, the court elaborated the perspective from which such judgments must be made.

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[24] *Ellison v. Brady*, 924 F.2d 872, 877 (9th Cir. 1991).

[25] Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989). Abrams has refined her analysis in later articles. *See, e.g., The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, 1995 DISSENT 48; *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1993); and *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1033-39 (1992) (detailing the risks and drawbacks to a reasonable woman standard).

> Next, we believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. . . . If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.
>
> We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. . . .
>
> We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman my perceive.[26]

From this basis of understanding, the court emphasized that the standard of whether the hostility was sufficiently severe or pervasive was not one of strict liability, but rather an objective test of reasonableness that is culture-bound and therefore dynamic.

> In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman[27] would consider sufficiently severe or pervasive to alter the conditions of employment

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[26] *Ellison*, 924 F.2d at 878-79.

[27] In footnote 11 which appears at this point, the court indicated: "Of course, where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man."

and create an abusive working environment.[28] . . . [29]

The court emphasized that the "reasonable woman" standard afforded no special privileges to women employees, but instead ensured that employees were treated equally by respecting their differences.

> We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. The reasonable woman standard does not establish a higher level of protection for women than men. . . . Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." *Henson v. Dundee,* 682 F.2d 897, 902 (11th Cir. 1982).
>
> We note that the reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment. Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment. That is because Title VII is not a fault-based tort scheme. . . . to avoid liability under Title VII, employers may have to educate and sensitize their workforce to eliminate conduct which a reasonable victim would consider unlawful sexual harassment.[30]

With this legal backdrop established, the court then described why Gray's conduct amounted to sexual harassment when considered from the perspective of a reasonable woman.

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[28] In footnote 12 which appears at this point, the court indicated: "We realize that the reasonable woman standard will not address conduct which some women find offensive. Conduct considered harmless by many today may be considered discriminatory in the future. . . . Fortunately, the reasonableness inquiry which we adopt today is not static. As the views of reasonable women change, so too does the Title VII standard of acceptable behavior."

[29] *Ellison*, 924 F. 2d at 879.

[30] *Id.* at 879-80.

> The facts of this case illustrate the importance of considering the victim's perspective. Analyzing the facts from the alleged harasser's viewpoint, Gray could be portrayed as a modern-day Cyrano de Bergerac wishing no more than to woo Ellison with his words. There is no evidence that Gray harbored ill will toward Ellison. He even offered in his "love letter" to leave her alone if she wished. Examined in this light, it is not difficult to see why the district court characterized Gray's conduct as isolated and trivial.
>
> Ellison, however, did not consider the acts to be trivial. Gray's first note shocked and frightened her. After receiving the three-page letter, she became really upset and frightened again. She immediately requested that she or Gray be transferred. Her supervisor's prompt response suggests that she too did not consider the conduct trivial. When Ellison learned that Gray arranged to return to San Mateo, she immediately asked to transfer, and she immediately filed an official complaint.
>
> We cannot say as a matter of law that Ellison's reaction was idiosyncratic or hyper-sensitive. We believe that a reasonable woman could have had a similar reaction. . . .[31]

The court concluded by recalling Judge Keith's dissent in *Rabidue* and then characterizing Title VII as a remedial measure designed to change the American workplace and thereby ensure equal opportunity for women.

> Sexual harassment is a major problem in the workplace. Adopting the victim's perspective ensures that courts will not "sustain ingrained notions of reasonable behavior fashioned by the offenders." *Lipsett*, 864 F.2d at 898, *quoting Rabidue*, 805 F.2d at 626 (Keith, J., dissenting). Congress did not enact title VII to codify prevailing sexist prejudices. To the contrary, "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women." *Andrews*, 895 F.2d at 1483. We hope that over time both men and women will learn what conduct we establish today, the current gap in perception between the sexes will be bridged.[32]

This inspiring language in *Ellison v. Brady* was followed by a number of courts and remains

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[31] *Id.* at 880.

[32] *Id.* at 880-81.

the law in the Ninth Circuit.[33] However, the courts have only begun to clarify the reality of gender discrimination that is evoked by the soaring rhetoric.

We can see immediately that *Ellison* involved a case of sexual desire that led to a very frightening situation for Ellison. The court's analysis of how a "reasonable woman" would perceive the situation emphasizes the very different social construction of sexual relationships by men and women, with many women fearing violent or unwanted sexual contact in ways that many men might not understand. But this sensitive acknowledgment of gender differences, due to the facts of the case, is cast in sexual terms. As women entered the workplace in substantial numbers following World War II they faced a situation in which the private world of sexuality became part of the workplace, subjecting them to unwanted additional demands and affronts that did not impede their male colleagues. But this framing of the problem of a "hostile work environment" for women misses the element of power and subordination that defined the cases of racial harassment, leading to the limitation of sexual harassment as an outgrowth of sexual relations between men and women. While the court carefully notes that the realistic fear of sexual assault may shape women's perspectives on behavior of a sexual nature, the court has no reason on the facts before it to explore the fact that sexual assault is a crime of violence and subordination rather than an act of desire. The use of sexual acts by a supervisor, including sexual assault, to demean and subordinate a woman employee was the basis of the Supreme Court's *Meritor Savings Bank* case, but the gendered nature of power in the workplace remained unanalyzed. In contrast, the *Ellison* court endorsed a gendered perspective on sexual harassment, but did so in the context of a pathetic and bizarre romantic overtures by a co-worker, and so did not have to explore the deeper levels of subordination in a sophisticated manner.

Another legacy of the *Ellison* decision is that it highlighted a fundamental issue in feminist jurisprudence in the United States: the debate between "difference," "sameness," and "postmodern" theorists about the nature of the battle for equality in the American workplace. "Difference feminists" argue that women have different (socially-constructed) experiences that require sensitivity in addressing questions of equality, and they generally support efforts to acknowledge these differences to ensure equality in fact, rather than simply abstract equality. "Sameness feminists" argue that women have been impeded in history

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[33] The "reasonable woman" standard has been applied in fact by other Courts of Appeals, even if they have not provided a full theoretical assessment and articulation of the test. *See, e.g., Reeves v. C.H. Robinson Worldwide*, 525 F.3d 1130, 1147 (11th Cir. 2008) (concluding that it was "objectively reasonable that a woman in Reeve's position would have felt humiliated in such circumstances"); *Thomas v. Town of Hammonton*, 351 F.3d 108, 117 (3d Cir. 2003) (holding that "a jury could easily find that a reasonable woman in Thomas's position would be intimidated, in a way not experienced by a man ..."). Notable state court decisions that follow *Ellison* include *Radtke v. Everett, D.V.M.*, 471 N.W.2d 660 (Mich. App. 1991) (rejecting *Rabidue* and endorsing a "reasonable woman" standard as articulated in *Ellison* in interpreting state anti-discrimination law) and *Lehman v. Toys 'R Us, Inc.*, 626 A.2d 445 (N.J. 1993) (construing New Jersey state anti-discrimination law to adopt a "reasonable woman" standard as articulated in *Ellison*).

precisely by the social determination that they are different, and that equality can be achieved when women are not regarded paternalistically as requiring the special protection of the state. "Postmodern feminists" question the bivalent thinking that animates the debate between difference and sameness feminists, and argue that the socially-constructed nature of gender and the ideological construction of any "reasonable" norm – whether gendered or not – compels a less universalistic approach. It is impossible to survey this literature in such a short article, but it bears emphasis that the judicial adoption of the "reasonable woman" standard implicates the debates among these important and complex analyses.

The Supreme Court has never ruled on the Ninth Circuit's adoption of the "reasonable woman" standard, but Justice Scalia's opinion in *Oncale v. Sundowner Offshore Services, Inc.*[34] generally is regarded as providing support for this approach. In *Oncale* the Court dealt with allegations of same-sex harassment by a male employee on an offshore oil rig who was accused by fellow workers of being gay and was also subjected to physical and emotional harassment of a sexual nature. The Court acknowledged that sexual desire is not the gravamen of a Title VII action because the workers in *Oncale* were not (consciously) seeking sexual contact with the plaintiff employee as an expression of their sexual attraction to men. The Court's discussion, though, failed to clarify the nature of the civil rights action other than to leave it to a matter of reasoned judgment. Justice Scalia writes:

> But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "*discrimina[tion]*. . . because of ... sex."[35]
>
> . . . .
>
> We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *Harris, supra,* at 23, 114 S.Ct., at 371. In same-sex (as in all) harassment cases, that inquiry requires careful

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[34] 523 U.S. 75 (1998).

[35] *Id.* at 80-81.

> consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[36]

Commenting shortly after the case was decided, pioneering theorist Kathryn Abrams noted that nearly "a dozen federal and state courts have used or cited the work of feminist commentators on the "reasonable woman" standard" and that *Oncale* suggests "a willingness to take account of feminist thinking on the "reasonableness"standard" that may provide a "trajectory with which we can work."[37] It might be more accurate to suggest that *Oncale* reveals the degree to which the courts have failed to explore fully the implications of feminist theory for sexual harassment law as much as it gives rise to optimism about the possibility of this exploration in the future.[38]

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[36] *Id.* at 81-82.

[37] Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257, 1261 (1998).

[38] After its articulation, the "reasonable woman" standard has been adapted to other forms of discrimination. As explained in the leading treatise in the context of racial harassment:

> The parallel question for racial harassment is whether to use a "reasonable black person" standard. A district court in Maine adopted this standard to assess the severity of racial harassment under Title VII and the Main Human Rights Act (MHRA) in *Harris v. International Paper Co.* [765 F. Supp. 1509 (D.Me. 1991), vacated in part for other reasons, 765 F. Supp. 1529 (D.Me. 1991). See also Kang v. U. Lim America, Inc., 296 F.3d 810 (9th Cir. 2002) ("reasonable Korean" standard used without discussion).]
>
> The incident in question in *Harris* concerned the placement of a post card next to the time clock within a week of the African-American plaintiff's arrival at the paper mill. The post card depicted "Our Gang" and the handwritten caption said: "The new generation of papermakers." It depicted the "Little Rascals" attempting to wash a dog and the black character "Buckwheat" was set apart from the other children, who were white. The term "Buckwheat" was also used routinely in the mill as a racial epithet. The court found that these circumstances could reasonably be perceived by an African-American to be abusive. "Since the concern of Title VII and the MHRA is to redress the effects of conduct and speech on their victims," the court said, "the fact finder must 'walk a mile in the victim's shoes' to understand those effects and how they should be remedied." The court then

C. The Rhetorical Contours of the "Reasonable Woman"

The substitution of a "reasonable woman" standard for the "reasonable person" standard of sexual harassment law is an important rhetorical strategy that raises as many questions as it answers. In the Ninth Circuit *Ellis* case, the dissenting judge argued that liability conditioned on the gender of the victim undermined the principle of equality that girds Title VII. Judge Stephens regarded it to be a "puzzlement" if two employees sued on account of the same conditions in a particular workplace, but one employee prevails because she is a woman and the other employee loses because he is a man.[39] His criticism of the standard is based on the commonsensical claim that identifying workplaces "polluted" by sexual harassment should be the goal of civil rights laws, rather than compensating parties differently depending on their gender.

The argument that it is unfairly discriminatory to distinguish between "reasonable men" and "reasonable women" in the workplace has given rise to a lively debate in the literature. Some feminist legal theorists acknowledge the appeal of the "reasonable woman" standard but are cautious about essentializing the experience of women into an objective and unified construction.[40] Others contend that a failure to recognize the differences between the

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> explicitly adopted the "reasonable black person" standard by which to measure the hostility of the environment. Other courts have continued to use the "reasonable person" test in racial harassment as in sexual harassment cases.

MARK ROTHSTEIN, CHARLES CRAVER, ELINOR SCHROEDER AND ELAINE SHOBEN, EMPLOYMENT LAW (St. Paul, MN: West Group, 4th ed. 2009), §2.12. The test has also been extended to harassment on the grounds of religious affiliation. *Id.* at §2.13.

[39] *Ellison*, 924 F.2d at 884 (Stephens, J., dissenting). It is worth noting that Judge Stephens was a trial judge sitting by designation with the Court of Appeals, and that his perspective on the nature of the trials that would follow from the adoption of the "reasonable woman" standard may be rooted in a different sense of practicalities than his fellow panelists.

[40] *See* Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, *in* SEXUAL HARASSMENT: ISSUES AND ANSWERS 207-13 (Linda LeMoncheck and James P. Sterba, Eds.) Oxford: Oxford University Press (2001), pp. 209-11. A recent article surveys the key literature:

> Several landmark articles have discussed the utility of a reasonable woman standard, while not advocating its adoption. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989) (arguing that sexual harassment claims should be cognizable as long as the harasser engaged in sexually oriented behavior and the victim experienced feelings of coercion or devaluation); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398 (1992) (rejecting the reasonable woman standard as not able to address the diversity of women's experiences); Nancy S. Ehrenereich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990) (rejecting the reasonable woman standard, as well as the reasonable person standard, as relying on false ideas about objectivity and social consensus with the effect of supporting the status quo of subordination).

Stephanie M. Wildman, *Ending Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797, 1799 n. 8. Wildman

workplace experiences of men and women will fail to overcome the status quo construction of the workplace according to male norms.[41] Still others argue that the "reasonable woman" standard must extend in scope if it is to accomplish the desired goal of permitting women to be truly equal before the law. For example, employers may assert an affirmative defense to a hostile work environment claim if they had established adequate procedures for reporting such conditions and dealing with them appropriately, but the plaintiff failed to take advantage of such opportunities before filing the claim.[42] In a recent article, a scholar argues that courts should understand that "reasonable women" don't utilize complaint procedures for a variety of socially-constructed reasons that should not disable their claims, and so the "reasonable

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also notes that some feminists argue that the reasonable woman standard is harmful to the feminist cause, citing "Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 454 (1997) (urging that "reasonable cannot anchor sexual harassment law") [and] Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 750 (1997) (contending the reasonable woman standard resolves sex-based bias at the price of enforcing gender stereotypes)." *Id.* at 1780, n.9.

[41] For articles advocating the use of the reasonable woman standard in sexual harassment cases, see Deborah S. Brenneman, *From a Women's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281, 1305-06 (1992) (urging that a reasonable woman standard is necessary in order to adequately address the problem of sexual harassment since men and women have divergent views on acceptable workplace behavior); Lynn Dennison, *An Argument for the Reasonable Woman Standard in Hostile Environment Claims*, 54 OHIO ST. L.J. 473, 495-96 (1993) (arguing that the reasonable woman standard should be used to evaluate sexual harassment claims because it recognizes and gives validity to more diversity of perspective than the reasonable person standard does); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 776 (contending that the reasonable woman standard should be used to evaluate the defendant's conduct in civil cases, including sexual harassment, in which "the perceptions of men and women differ as the existence and seriousness of the harmful conduct"); Elizabeth A. Glidden, *The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment*, 77 IOWA L. REV. 1825, 1829 (1992) (advocating the adoption of a reasonable woman standard in order to combat sexual harassment, particular as [a] means of promoting "greater employer consciousness in discovering and rectifying sexual harassment problems"); David I. Pinkston, *Redefining Objectivity: The Case for the Reasonable Woman Standard in Hostile Environment Claims*, 1993 B.Y.U.L.REV. 363, 364 (advocating the reasonable woman standard because it "more fully achieves the purposes of Title VII by better protecting female employees, reducing sexual harassment, and in ensuring an objective, fair standard upon which employers and employees can rely").
Id. at 1799-80, n.9.

[42] This principle was established in two important cases decided by the Supreme Court in tandem. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). It is important to keep in mind that Title VII imposes liability on the employer as an entity, not on the co-employee who creates the hostile environment, and so there must be some manner of limiting this vicarious liability. The co-employee may be sued in tort for assault, battery, interference with prospective business advantage, and may even be subjected to criminal prosecution.

woman" standard should apply not only to determining liability but also to judging this affirmative defense.[43] Another scholar argues that the standard of a "reasonable woman" can be extended to the ubiquitous concept of the "reasonable person" in tort law as part of a broader feminist critique of law.[44]

This debate is best addressed by returning to the central question of the nature of the harm of sexual harassment in the American workplace. Title VII is a civil rights statute, not a liability statute. Its purpose is to ensure that all persons may participate fully in the labor economy without regard to their gender; it is not a fault-based scheme of liability that focuses on the wrongdoing of the perpetrator. Under these circumstances it is perfectly appropriate for courts to view the challenged conduct from the perspective of the complaining party as the means to ensure that the employer is not maintaining a discriminatory workplace.[45] The qualifier "reasonable" is necessary because the legal standard is not premised on a particular person's reaction to the workplace, but rather on the effects that the workplace has on individuals because of their gender. When "reasonable" is construed as "the average woman" or "the typical woman" it raises the dilemmas of essentialism. But this is not the only conception of reasonableness that can guide decisionmaking.

Kathryn Abrams is one of the prominent scholars who helped to develop the concept of the "reasonable woman" standard and her work provided one of the bases for the *Ellison* opinion. Although recognizing that the standard poses difficulties, Abrams has urged that these difficulties are minimized if the nature of the wrong of sexual harassment is conceptualized "as the institutionalization of women's subordination" in the American workplace.[46] Abrams insists that subordination is not accomplished in only one manner, and

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[43] L. Camille Herbert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711 (2007). Herbert offers a nuanced discussion of this topic, drawing from empirical research.

[44] Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U.L.J. 769 (2001).

[45] It is important to underscore that adopting such a view constitutes an insoluble problem for achieving the goal of a discrimination free workplace only if adjusting employer behavior to make the workplace accommodating for reasonable women would simultaneously render the workplace hostile to reasonable men. It is difficult to imagine such a scenario, and so requiring the employer to be responsive to the perspective of the reasonable woman does not create a double bind.

[46] Abrams, *New Jurisprudence of Sexual Harassment*, *supra* note 24, at 1171. Specifically, Abrams argues that Anita Bernstein's reconceptualization of sexual harassment from the perspective of how "respectful persons" would behave fails to address gendered workplace norms. "Declining to identify the gendered character of sexual harassment both effects a moral and political neutering of the problem and imposes and unnecessary impediment to remedying or preventing it." *Id.* at 1188 (criticizing Bernstein, *supra* note 40). *See also*, Kathryn Abrams, *The Reasonable Woman*, *supra* note 40, at 211-13 (articulating an approach that does not depend on constructing the "reasonable woman" to mean the average female in society, but rather to refer to "the person enlightened concerning the barriers to women's inequality

therefore a theoretical construction of subordination in the workplace must be contextual, pragmatic and plural. Her account

> connects harassment with a set of explicit sex and gender based dynamics. It intensifies, rather than abstracts from, the focus on context that has characterized leading accounts of sexual harassment. . . . [I]t analyzes sexual harassment as arising not only from broad social patterns but also from particular patterns specific to the workplace. . . . Sexual harassment, as depicted here, is a . . . plural phenomenon . . . . There is harassment that secures the workplace as a site of male control versus harassment that secures it as a zone of either male comfort or masculine normative entrenchment.
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> . . . .
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> A persistent assumption that one dynamic should explain everything about women's oppression has made it difficult for feminists to demand pregnancy leaves under equality based theories, fight job segregation under difference based theories, and highlight women's agency under dominance based theories. Instead, feminists should argue that one size cannot fit all, theoretically speaking: it is critical to see women's inequality as the product of many intersecting motives, constructions, and modes of treatment. Because sexual harassment has captured public attention to perhaps a greater degree than any other gender based injury, an understanding of sexual harassment that is explicitly, paradigmatically plural will be a tremendous resource in this effort.[47]

Abrams promotes a contextualized approach that is guided by a theoretical understanding of subordination, but which inevitably requires judgment in light of multiple factors.

To effectuate this subtle approach in the doctrinal law of sexual harassment it is necessary to make a critical shift in the analysis. The *Ellis* court adopted the "reasonable woman" standard for the very limited purpose of determining when behavior is "severe or pervasive" enough to constitute a violation of Title VII, thereby limiting the analysis from the broader scope suggested by Judge Keith in his *Rabidue* dissent. The central underlying assumption is that men and women differ only in the extent to which they can suffer sexual harassment, and not in their very perception of what constitutes harassment. Equating sexual harassment with some kind of variation on sexual relations makes this assumption possible, and this equation is precisely the target at which the "reasonable woman" standard should

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in the workplace.")

[47] Abrams, *New Jurisprudence of Sexual Harassment*, *supra* note 24, at 1214-15, 1217.

be aimed. Construing sexual harassment as the subordination of women in the workplace on account of their gender would lead to a broader, and more profitable, use of the reasonable woman standard.

Following this shift in theory of sexual harassment, we might recast the "reasonable woman" standard by requiring courts to determine if "the woman plaintiff had reason to feel subordinated in the workplace on account of her gender," and, if so, to regard this as a violation of Title VII.[48] By substituting "subordination" for the current standard – whether a reasonable woman would find the workplace to be hostile, intimidating, or threatening on account of her sex – we can reframe the cases in a more productive fashion. One benefit of this approach is that it accommodates masculinities studies, which demonstrate that the social construction of gender roles is not solely a question of constraining women but also constraining men.[49] Moving away from the paradigm case of sexually aggressive men upsetting demure women requires a rethinking of the "reasonable woman" standard in these broader terms.

In adopting the "reasonable woman" test under state law, the Supreme Court of New Jersey provided a sophisticated discussion that raised these issues. First, the court emphasized that the wrongful conduct need not be sexual in nature, but instead occurs because of the sex of the victim and results in a hostile work environment.[50] The court then explained the necessity of a gendered standard is in part required because of the gendered character of power relations in the workplace.

> [In] many areas of the workforce, women still represent a minority and are relatively recent entrants into the field. Because of their predominantly junior and minority status, for some women it is more difficult than it is for men to win credibility and respect from employers, coworkers, and clients or customer. That can

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[48] As one critic of the circumscribed "reasonable woman" standard argues, an "analysis beyond the reasonable woman that recognizes systems of privilege, particularly male privilege, is necessary to truly give woman a law of her own." Wildman, *Ending Privilege*, supra note 40, at 1821. This insight is particularly important because women can internalize the system of male privilege as a way to survive male-dominated workplaces, leaving courts to puzzle over the testimony of some women employees that the posting of violent pornographic images in a shipyard workplace was not upsetting. *Id.* at 1803-04 (discussing *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991)).

[49] *See* Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 239 (2004) (arguing that socially constructed gender norms that privilege white male heterosexuals are problematic for many men as well as women, and that Title VII should be more broadly construed to address this social dynamic at the root of harassment); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997) (arguing that sexual harassment law fails to understand that sexism constructs the identities of both men and women and is developed through stereotypes of both genders).

[50] *Lehman*, 626 A.2d at 453.

> make women's position in the workplace marginal or precarious from the start. Sexual harassment operates to further discredit the female employee by treating her as a sexual object rather than as a credible co-worker. That can both undermine the woman's self-confidence and interfere with her ability to be perceived by others as a capable worker with the potential to advance and succeed. Abrams, *supra*, 42 *Vand. L. Rev.* at 1208-09. Because of women's different status in the workplace, conduct that may be "just a joke" for men may have far more serious implications for women.[51]

The factual circumstances in several cases underscore how this new construction of sexual harassment by more broadly employing the reasonable woman standard might dramatically recast the judicial rhetoric of Title VII. The Ninth Circuit Court of Appeals recently reversed the entry of summary judgment, finding that the allegations were sufficient to require the fact-finder to judge the severity and pervasiveness of the alleged hostile work environment discrimination.[52] The court noted that it was a close question, because the allegations fell far short of physical abuse or aggressive sexual advances that form the prototypical case. Apparently having no sense of irony, the court reported that the plaintiff was hired as a "journeyman electrician" but then faced what she alleged to be a hostile work environment.[53] She complained that she was given less desirable overhead work assignments on a repetitive basis that caused her to suffer neck pain, she was excluded from job site meetings, she was given inferior equipment, she faced sexual comments and a co-worker drained her car battery by turning on her lights.[54] The court concludes that a reasonable woman might find the incidents so severe or pervasive as to constitute a hostile work environment, but it appears to miss the problem posed by the (non-sexualized) gendered workplace. The complaint is best understood as claiming that a woman was ostracized and excluded because she was not welcome in this "male" trade, but instead the court claimed that it was a case that fell somewhere between mild "sexual horseplay" that a reasonable woman ought to tolerate and unwelcome sexual advances and taunts.[55]

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[51] *Id.* at 459.

[52] *Davis v. Team Electric Co.*, 520 F.3d 1080, 1096 (9th Cir. 2008).

[53] *Id.* at 1085.

[54] *Id.* at 1087.

[55] *Id.* at 1096. *See also Baskerville v. Culligan Int'l Co.*, 50 F. 3d 428 (7th Cir. 1995), in which Judge Posner writes for the court to reverse a jury finding of sexual harassment based on seven months of statements by the supervisor that the plaintiff is a "pretty girl," that "pretty girls run around naked," etc. Judge Posner concluded that it "is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy – a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity – would find Hall's patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain. Id. at 431. Judge Posner inexplicably fails to understand that Congress has not attempted to regulate the misogynist

Similarly, a court granted summary judgment when the allegations were premised on the events of a single day, concluding that a reasonable woman would not regard the workplace as polluted.[56] The plaintiff was a black belt working as a security guard at a Naval Base who was diagnosed with work-related anxiety after an incident and its aftermath. On a hot day she went to the women's restroom, partially disrobed, and was washing off in the sink when she noticed a uniformed male guard in a stall watching her. She ran from the room, reported the incident, and was met by laughter; then, she began crying, asked if she would lose her job, and sought emergency medical care. The court states the obvious: this was not an extreme event, such a rape or sexual assault, that could immediately render the workplace hostile. However, the court's supposition that a reasonable woman would not find these circumstances severe enough to create a sexually hostile environment reveals the limitations of its rhetorical construction. First, the court determines the reasonableness of the plaintiff's response only after noting that she is accomplished in self-defense and works as a security guard in a military environment, suggesting that the court might be infusing its reasonable woman standard with the conclusion that she was as equipped as a man to deal with such an upset. This points to the deeper issue that goes unquestioned: what was the nature of the plaintiff's work environment that led to this obviously offensive and upsetting event to destroy her ability to return to work? It is plausible that she had struggled to be one of the men in this highly gendered profession, until the perpetrator literally uncovered her gender and she was reduced to tears before unsympathetic co-workers. It was not a single sexualized incident that should have been analyzed by the court, but rather the potential that the workplace was a prototypically macho environment in which a woman must act like a strong man to succeed, a requirement that might have immediately been made clear by the string of emotional assaults suffered by the plaintiff.

To be sure, there are courts that have expanded the "reasonable woman standard" to assess the discriminatory character of the workplace rather than using it just as a measure of the severity or pervasiveness of sexual activity in the workplace, although they remain under-theorized. The Ninth Circuit reversed entry of summary judgment, holding that a reasonable woman would find the workplace objectively hostile as a result of sexists comments by her supervisor, such as "women have no business in construction," "women should only be in subservient positions," "Every woman that comes to our division gets pregnant . . . I hope you don't get pregnant," and "I would never work for a woman."[57] These statements evidenced animus against women in the workplace, creating a hostile work environment on the basis of sex despite the lack of sexual desire or aggressiveness displayed by the

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elements of contemporary culture, but has chosen to regulate these elements in the American workplace.

[56] *Lavarias v. Hui O'Kakoa, LLC*, 2007 WL 3331866 (D. Hawai'i) (Nov. 7, 2007).

[57] *Dominguez-Curry v. Nevada Transportation Dept.*, 424 F.3d 1027, 1031-33 (9th Cir. 2005).

supervisor.[58] Similarly, a federal district court judge held that a female welder suffered hostile work environment discrimination when she entered what amounted to "a boys club" where "women form less than 5 percent of the skilled crafts,"[59] after considering expert testimony of the gender stereotyping that motivated the sexualized behavior and images in the workplace.[60]

Cases like this lean close to adopting what Professor Vicki Schultz terms a "competence centered paradigm" rather than the "sexual paternalism" that assumes that tender women are more easily scandalized by sexuality than their male counterparts.[61] Schultz was a pioneering voice in the effort to decouple "hostile work environment" cases from the sexual desire paradigm and to acknowledge the gendered power relations at work in many of the cases, even if the power was expressed through sexualized images.[62]

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[58] The supervisor did tell sexually explicit jokes in the workplace, *id*. at 1031, but the court mentions this as part of a long list of sexist comments and appears to understand that sexually demeaning jokes often are used to assert power on the basis of gender rather than to sexualize the workplace. As the court concludes, "there is nothing vague about [the supervisor's] comments; rather, they overtly exhibit his hostility to women in the workplace." *Id*. at 1038.

[59] *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493 (M.D. Fla. 1991).

[60] *Id.* at 1502-09.

[61] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1755-74 (1998).

[62] Schultz describes the problem succinctly: "By focusing on sexual advances as the quintessential harassment, the paradigm encourages courts to extend protection to women for the wrong reasons. Rather than emphasizing the use of harassment law to promote women's empowerment and equality as workers, it subtly appeals to judges to protect women's sexual virtue or sensibilities." *Id*. at 1729. Her reconceptualization of sexual harassment follows:

> Courts have not understood, however, that the gender stratification of work – who does what kind of work, under what conditions, and for what reward – is at least as influential as sexual relations in producing women's disadvantage. Although judges understand that women are victimized as sexual objects, they have not been able to see that women are also systematically harassed, discriminated against, and marginalized as workers in ways that render them unequal on the job and, as a result, in many other realms of life. . . . To most judges, sexual advances seem intuitively gender-based because cultural-radical feminists, and the sexual desire-dominance paradigm they inspired, have articulated how women are harmed through sexual relations. Yet, in part because no political tradition has expressed with the same force the ways in which women are rendered unequal through workplace relations, judges have difficulty perceiving the characteristic problems that confront working women as gender-based.
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> In case after case in which nonsexual harassment predominates, in both hostile work environment claims and the disparate treatment claims from which they are disaggregated, the courts have rendered decisions on causation that reveal a fundamental lack of understanding of the gender-based quality of harassing and harmful actions directed at women in the workplace. In the most egregious group of cases, courts seem to be engaged in outright denial. They refuse to characterize conduct as sex-based even when it is accompanied by expressions of resentment or unease directed at women workers who try to make it in traditionally male occupations or jobs.
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> In other cases, courts have found that women workers' mistreatment was prompted by their own

Stephanie Wildman has advocated moving "beyond the reasonable woman" in just this manner. She argues: "By failing to address the systems of privilege that maintain the sex-based, gendered status quo, the reasonable woman standard cannot go far enough to ensure that the legal system will recognize women's harms."[63] Wildman notes the difficulties in cases involving sexual behavior when some women in the workplace testify that they were not offended, concluding that it is "unclear, where women themselves disagree, why the reasonable woman standard would always (or even often) lead to the vindication of women who complain about sexual harassment."[64] If the "reasonable woman" standard is to have any efficacy, it must be expanded from its current application to recognize "systems of privilege, particularly male privilege" in order to effectuate the purpose of Title VII.[65]

The limitations of the narrow use of the reasonable woman standard to determine if the sexualization of the workplace was severe or pervasive enough to amount to a civil rights violation is to disregard situations in which the sexual overtures may not be problematic in themselves, but courts may be ignoring the underlying hostile work environment based on gender. There are many cases in which a supervisory employee makes sexual advances in a clumsy manner that the courts conclude is not a civil rights violation, but which the courts might see in a different light if the implications of these otherwise uncomfortable exchanges

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> shortcomings rather than by their own sex – even as judges disregard signs that the evaluation of the plaintiffs' competence may not have been free from gender stereotyping. . . .
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> Indeed, in numerous cases in which women work in male-dominated settings, courts have overlooked evidence that the denigration of women's competence, authority, or entitlement to the job is itself a core component of what makes the work environment sexist and hostile. . . .

Id. at 1749-50. She then concludes:

> The sexual desire-dominance paradigm is too narrow. Although its triumph has been viewed as a feminist victory, that success has rung hollow for the many women (and men) who experience forms of harassment that it does not envision. Most centrally, the paradigm has failed large numbers of people who are not subjected to sexual abuse, but whose competence as workers is constantly thrust into conflict with their identities as women or gender-nonconforming men. We need an account of hostile work environment harassment that recognizes that sexuality is only on e tool that male workers can deploy in a struggle to maintain the masculine composition and image of more highly rewarded jobs. Conversely, the account should acknowledge that sexuality is not inherently gender-biased; in some contexts, it can be a neutral or even positive resource for women (and nonconforming men).

Id. at 1796-97. *See also* Vicki Schultz, *Sex Is the Least of It: Let's Focus Harassment Law on Work, Not Sex*, *in* SEXUAL HARASSMENT: ISSUES AND ANSWERS 269-73 (Linda LeMoncheck and James P. Sterba, Eds.) Oxford, Oxford University Press (2001), p. 273 ("Once we realize that the problem isn't sex but sexism, we can re-establish our concept of harassment on firmer ground. Title VII was never meant to police sexuality. It was meant to provide people the chance to pursue their life's work on equal terms–free of pressure to conform to notions of how women and men are supposed to behave in their work roles.").

[63] Wildman, *Ending Privilege*, *supra* note 40, at 1798.

[64] *Id.* at 1804.

[65] *Id.* at 1821.

are understood in light of the details of workplace dynamics.[66] And yet, the proposal to fully embrace the reasonable woman standard to determine what constitutes a hostile work environment leads to the persistent criticism that even the narrow use of the reasonable woman standard courts substantial practical difficulties. The question, then, is whether the rhetorical resources of anti-discrimination law are sufficiently rich to support the full realization of the standard.

D. Practical Issues in Implementing the Reasonable Woman Standard

From the beginning, the use of the "reasonable woman" standard has sparked controversy and dissent in the courts because of the perceived difficulties of articulating and fairly applying this standard.[67] I acknowledge these concerns, but argue that the difficulties arise because the courts have attempted to use the reasonable woman standard to measure whether the sexually offensive behavior in question was offensive enough to interfere with the working conditions of a reasonable woman. This approach puts courts on a fool's errand, because women have a variety of responses to sexuality, whether in the workplace or outside the workplace. Without any theoretical backing to explain how courts may determine the sensibilities of a reasonable woman, the standard will be helpful in some cases involving obvious gendered differences in perceptions. However, it is unlikely that the standard will lead to genuine reform of hostile workplace sexual harassment law when limited to current application.

In the *Ellison* case, a strong dissent was written by Judge Stevens, a trial court judge sitting with the Court of Appeals by designation. It is unsurprising that a judge tasked with hearing cases at the trial level would be concerned about how to render this new "reasonable

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[66] *See Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir. 1993) (no actionable harassment when supervisor asked plaintiff for dates, put his hand on her shoulder several times, place "I love you" signs in her work area, and attempted to kiss her in a bar); *Saxton v. American Telephone & Telegraph Co.*, 10 F. 3d 526, 528, 534-35 (7th Cir. 1993) (no actionable sexual harassment where supervisor placed his hand on the plaintiff's leg above the knee several times, rubbed his hand along her inner thigh, and pulled her into the doorway and kissed her for several seconds).

[67] Kathryn Abrams acknowledges that, despite the seemingly obvious need to take into account women's experiences in judging sexual harassment, the articulation of the "reasonable woman" standard encountered difficulties.

> All of these factors suggested the preferability of a "reasonable woman" standard. This formulation would explicitly challenge notions of a universal perspective. It would characterize the evaluation of harassment, like the experience of harassment itself, as a phenomenon strongly differentiated on the basis of gender. The gender-specific language would place male judges on alert that they could not longer rely on their unexamined intuitions. The "reasonable woman" standard would replace those intuitions with a perspective that promised a radical revision of workplace conditions. Yet beyond the notion that such a perspective would "take harassment seriously" – viewing it neither as a right of the employer, not as a harmless, if vulgar, form of male amusement – there was little explicit discussion of what insights or sensibilities it entailed.

Kathryn Abrams, *The Reasonable Woman*, *supra* note 40, at 209.

woman" standard concrete. Judge Stephens clearly worries that the new standard will simply be a vehicle for unarticulated pop psychology regarding gender differences.

> It takes no stretch of the imagination to envision two complaints emanating from the same workplace regarding the same conditions, one brought by a woman and the other by a man. Application of the "new standard" presents a puzzlement which is born of the assumption that men's eyes do not see what a woman sees through her eyes. I find it surprising that the majority finds no need for evidence on any of these subjects. I am not sure whether the majority also concludes that the woman and the man in question are also reasonable without evidence on this subject. I am irresistibly drawn to the view that the conditions of the workplace itself should be examined as affected, among other things, by the conduct of the people working there as to whether the workplace as existing is conducive to fulfilling the goals of Title VII. In any event, these are unresolved factual issues which preclude summary judgment.[68]

Certainly, such evidence is available and should be offered at trial.[69] But Judge Stephens is correct to note that this line of proof may undermine the equality principle of Title VII by suggesting that the problem is not with the workplace environment, but rather by the different attitudes of women to the same environment that men would find acceptable.[70]

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[68] *Ellison*, 924 F.2d at 884 (Stephens, J., dissenting).

[69] See Jeremy D. Pasternak, *Comment: Sexual Harassment and Expertise: The Admissibility of Expert Witness Testimony in Cases Utilizing the Reasonable Woman Standard*, 35 SANTA CLARA L. REV. 651 (1995). Pasternak argues that it is "not only permissible, but necessary" for judges to admit expert testimony regarding the gendered character of employee reactions to hostile work environment situations, concluding that failure to do so is "antithetical to the very notions embodied in the establishment of the reasonable woman standard." *Id.* at 654. He discusses a variety of cases in which judges considered whether the admit expert testimony, and summarizes: "Expert witness testimony that might address the reasonable woman standard is cultural testimony. That is, it seeks to define a cultural norm, here the views of American women's culture on the subject of sexual harassment." *Id.* at 676.

Barbara Gutek explains the pervasiveness in sexual harassment in the workplace as a result of "sex-role spillover" and its effect on women employees in a manner that provides the framework for offering such expert testimony in support of the reasonable woman standard. Barbara A. Gutek, *Understanding Sexual Harassment at Work*, *in* SEXUAL HARASSMENT: ISSUES AND ANSWERS 50-61 (Linda LeMoncheck and James P. Sterba, Eds.) Oxford, Oxford University Press (2001).

[70] A very recent case provides just the sort of conundrum that Judge Stephens feared. The Ninth Circuit Court of Appeals reversed summary judgment in a case involving a male employee (Lamas) who alleged that a female colleague (Munoz) created a hostile work environment that lead to his poor performance and termination, finding that the district court was wrong to assume that a "reasonable man" would not consider being constantly propositioned for sex by a female colleague to be discriminatory. *EEOC v. Prospect Airport Services, Inc.*, 2010 WL 3448119, *4 (9th Cir. 2010). Lamas, recently a widower and an adherent to traditional Christian precepts about sex, was subjected to numerous propositions by a married co-worker (including some communicated through co-employees) that the company refused to address. The court rejected the significance of Lamas admitting that most men in his circumstance would have welcomed the sexual advances by Munoz, finding that it was based on a stereotype of men and that "welcomeness" must

In this posture, the focus of investigation quickly becomes the atypical response of women to workplace situations. In short, the "reasonable woman" may be respected, but she is portrayed as unreasonable! This leads to retrograde analyses that confound the very purpose of Title VII. For example, Marie Reilly engages in a sophistic effort to import econometrics to render decisionmaking more certain, arguing that feminist scholars seeking to change social norms to prevent discrimination luxuriously "ignore entirely the social cost of such a social restructuring."[71] This amounts to a thinly veiled conclusion that the unpredictable (which is to say, unreasonable from the perspective of the established social consensus) responses of reasonable women are too costly for the business world to take account of in structuring the workplace.[72] Reilly's underlying focus is the responsiveness to

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be determined by a mostly subjective standard. The court reasons:

> Title VII is not a beauty contest, and even if Munoz looks like Marilyn Monroe, Lamas might not want to have sex with her, for all sorts of possible reasons. He might feel that fornication is wrong, and that adultery is wrong as is supported by his remark about being a Christian. He might fear her husband. He might fear a sexual harassment complaint or other accusation if her feelings about him changed. He might fear complication in his workday. He might fear that his preoccupation with his deceased wife would take any pleasure out of it. He might just not be attracted to her. He may fear eighteen years of child support payments. He might feel that something was mentally off about a woman that sexually aggressive toward him. Some men might feel that chivalry obligates a man to say yes, but the law does not.

Id. at *5. This analysis is bizarre, because the unwelcome character of the advances was manifestly clear in this case. As the court notes, if Munoz had propositioned Lamas and taken "no" for an answer, there would be no basis for permitting the lawsuit to continue. *Id*. at *6. The real issue in the case under the analytical structure of the "reasonable woman" standard is whether the unwelcome and persistent propositioning for sexual relations is such that a "reasonable man," and not necessarily a recent widower with traditional religious sentiments, would justifiably regard the workplace as hostile on account of sex.

Unlike a reasonable woman who may be fearful of the possibility of sexual assault, feel insecure about her place in a male-dominated work environment, and then must endure sexual provocations designed to subordinate her status in the workplace, the court might reasonably conclude that a reasonable man might simply continue to say "no" to persistent propositions and get back to work. The court avoids this conclusion by considering the plaintiff's subjective (and presumably atypical) characteristics as part of its analysis of the unwelcomeness of the conduct. But the mistake in the court's approach is to focus on the gendered "reasonable" response to a sexual overture in the first place. The real gravamen of Lamas's complaint is that many of his co-workers subjected him "to constant ridicule and taunting," mocked "him for his failure to respond to Munoz's sexual advances," and even began speculating that he was gay. *Id*. at *7, *3. In other words, the court's focus on the gendered nature of reactions to sexual overtures reveals questionable assumptions and generalizations about men and women; even worse, the court's approach totally occludes the gender discrimination at work in the harassing treatment of Lamas for not being "man enough." This case requires the kind of analysis of subordination on the basis of gender stereotypes provided in McGinley, *Masculinities at Work*, *supra* note 49, in order to understand the nature of the hostile work environment faced by Lamas.

[71] Marie T. Reilly, *A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss*, 47 VAND. L. REV. 427, 429 (1994).

[72] Beginning with the principle that from "an efficiency perspective, it is only worthwhile to allocate loss through the judicial system to the extent that the costs of doing so do not outweigh the benefits," *id*. at 460, Reilly contends that the reactions of a supposed "reasonable woman" to workplace conditions cannot be accepted without weighing the costs of deviating from a social consensus that includes the views of both reasonable men and reasonable women.

sexual situations in the workplace, which fairly tracks the use of the "reasonable woman" standard by courts. Although lacking an appreciation that civil rights statutes are not, and should not, be judged according to rules of economic efficiency, Reilly does highlight that reactions to sexual situations in the workplace are probably more ambiguous and multivalent than is assumed by the proponents of the "reasonable woman" standard.[73]

The solution to these potential difficulties is to unhinge the rhetoric of the "reasonable woman" from an analysis of the severity or pervasiveness of (sexual) behavior in the workplace, and to employ a gender-sensitive standard to determine the very nature of sexual harassment discrimination. Working from theoretical critiques of the system of privilege that is, in part,[74] gendered, drawing from socio-legal research that explains how the system is replicated in the American workplace, and moving beyond the law's seeming fascination with protecting "reasonable women" with refined sensibilities from a sexualized workplace, will greatly broaden the scope of inquiry but may also prove to lend itself to more effective and consistent judicial resolution. The "reasonable woman" would no longer be a construct of the fragile female thrust from the safe confines of the home into a hurly-burly and coarse

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> Practical application of the paradigm to workplace sexual conduct reveals more the absence of a social consensus than the existence of one. Individual tastes regarding sexual conduct vary widely and conclusions about what a "reasonable person" or even a "reasonable woman" would find offensive or harmless in a given situation are precarious. Even so, for some sexual conduct, like that which constitutes "quid pro quo harassment," consensus is relatively strong. In contrast, for some, but not all, so-called "hostile work environment harassment," there currently may be no consensus. In the absence of a social consensus regarding the costs and benefits of challenged conduct, there is no assurance that reallocating loss will yield an efficiency gain sufficient to offset the considerable administrative costs of adjudicating the dispute. In such cases, the optimal loss allocation rule is not to intervene at all.
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> The current scholarship ignores the fact that loss from sexual conduct is a product of the interaction between men and women. Writers refer to the complaining woman as the "victim" and the defendant as the "injurer." But a woman is no more a victim of a man's crude remarks than a man is the victim of the woman's sensitivity to them. Scholarship that characterizes defendants in sexual harassment cases as "injurers" and plaintiffs as "victims" presupposes an ethic under which plaintiff's values morally trump those of defendants.

Id. at 431-32, 435.

[73] Reilly betrays her ideological leaning by offering a hypothetical case of a co-worker asking a woman on a date! Id. at 461. Given the highly offensive work conditions challenged by women under the reasonable woman standard, this example is clearly off the mark. However, given the nature of the complaint in the ground-breaking *Ellison* case, raising the differential experience of a reasonable woman to the bizarre and irrational actions of a co-worker persistently seeking a relationship, it is understandable that this example is misunderstood to be the legitimate paradigm of sexual harassment.

[74] It is important to recognize that the system of power in the American workplace is also structured along lines of race, ethnicity, social class, and other deep fault lines in modern society. Courts should not be overly reductive in analyzing everything in terms of gender discrimination.

blue-collar workplace. Instead, the rhetoric of the "reasonable woman" standard would seek to uncover the systemic problems facing women in the workplace, which are regularly, although certainly not exclusively, manifested in the sexualization of the workplace to a degree that hinders the full and effective participation of many women in that workplace.

E. Conclusion: The Rhetorical Evolution of the Reasonable Woman Standard

I have described how the effort to eradicate gender discrimination in the American workplace led to the adoption of a "hostile work environment" theory of discrimination, which then posed a central problem for courts: How can a court assess when a workplace is offensive on the basis of gender? The easiest situations were addressed in the EEOC guidelines dealing with problems of sexual desire harming the opportunities for women in the workplace, but even this insight was not without problems or questions. If a workplace manager is an inept Cyrano who asks a subordinate out on a date, should that lead to liability for the employer? Recognizing that a male perspective might undervalue the harms caused by certain behavior, courts have adopted a "reasonable woman standard" to provide context for assessing the severity and pervasiveness of the behavior in question.

I have urged that we push the rhetoric of anti-discrimination further in this context, such that the very nature of discrimination would be assessed with a "reasonable woman" standard that seeks to identify hostile work environments that subordinate women in a manner that may not be apparent to a "reasonable man" who takes status quo inequities for granted. This means that some woman might be untroubled by a workplace that is deemed discriminatory against women, but the focus on the "reasonable" character of the test would require plaintiffs to demonstrate through sound empirical and theoretical methods that the workplace instantiates gendered stereotypes that interfere with the ability of many women to succeed in that workplace.

One might plausibly respond that every workplace – indeed, every element of civil society – is tainted by discriminatory prejudice. This response is true, but misses the mark. The goal of Title VII, despite the flowery aspirational claims, is not to eliminate any and all manner of discrimination on the basis of gender; this is quite simply an impossible task. The goal is to eliminate discrimination on the basis of sex "with respect to compensation, terms, conditions or privileges of employment." In the context of "hostile work environment" sex discrimination, the question should be whether the workplace environment is such that a reasonable woman would not be able to secure the same compensation, terms, conditions or privileges of employment" as a reasonable man. This inquiry undertakes a much more far-reaching and sophisticated task than merely determining if sexual advances or sexualized behavior is so severe or pervasive that a reasonable woman would suffer discrimination. Expanding the "reasonable woman" standard to assess the initial question of whether the

behavior or policies in question are hostile on the basis of gender raises a host of practical questions, but these questions are inevitable if we fully embrace the evolving rhetorical construction of our commitment to a workplace free of gender discrimination.