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Treating Sexual Harassment with Respect

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TREATING SEXUAL HARASSMENT WITH RESPECT

Anita Bernstein

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TREATING SEXUAL HARASSMENT WITH RESPECT

Anita Bernstein[*]

What is sexual harassment? Individuals in the workforce need to know. Judicial opinions do not fully inform them, and academic commentary has not linked doctrine to everyday work experience or to an intelligible ethical philosophy that is widely understood and shared. In this Article, Professor Bernstein undertakes to explain sexual harassment using the concept of respect. She argues that a defendant charged with hostile environment sexual harassment ought to be held to the standard of a respectful person. This doctrinal device improves on approaches that now prevail, particularly those emphasizing "reasonableness." After detailing the shortcomings of current law, Professor Bernstein describes the virtues of a legal rule that affirms respect. These virtues — which extend beyond sexual harassment — include the resonance of respect as a value among ordinary people, the history of inclusion based on human dignity that informs respect, the orientation of respect around the conduct of an agent (rather than the reaction of a complainant, the focus of current rules), and congruence with a tradition, found in many other areas of American law, of calling on citizens to render respect.

INTRODUCTION

Years of feminist effort created the term sexual harassment, now a legal wrong and a cultural colossus. But as doctrine the phrase remains elusive, connoting no specific type of harm. Once thought of as a problem that has no name,[1] sexual harassment is now a term that brings no clear image to mind — a name, as it were, that has no problem. Decades of litigation in the federal circuits and the Supreme Court have resulted in the promulgation of workable guidelines[2] but prompted little vivid judicial writing and no courtroom-scene edification; neither the Hill-Thomas pageant of 1991 nor the spectacles that followed shed much light on sexual harassment law.[3]

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* Professor of Law and Norman & Edna Freehling Scholar, Chicago-Kent College of Law. B.A. 1981, Queens College; J.D. 1985, Yale. I acknowledge with deep thanks the inspiration, and challenges, of Carolyn Raffensperger, Chicago-Kent Class of 1994, who first proposed that we write together on this subject. Carolyn's commitments later precluded her from being co-author — or indeed sole author — of this Article. In my role of adoptive parent, I hope I have not betrayed the promise of her early ideas. Another former student from the same class, John Franczyk, Jr., made several helpful remarks as I got started. Thanks also to Patricia O'Brien and Beth Miller for research assistance; Ian Ayres, Jacob Corré, Paul Fanning, Steven Heyman, Richard Gonzalez, Herma Hill Kay, Peggie Renée Smith, and Alison Steele for sharing their ideas about respect and sexual harassment; and the Marshall Ewell fund for financial support.

[1] *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 106 (1987).

[2] *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1996).

[3] Numerous writings on sexual harassment spectacles include DAVID BROCK, THE REAL ANITA HILL (1992); JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS (1994); Douglas R. Kay, Note, *Running a Gauntlet of Sexual Abuse: Sexual Harassment of Female Naval Personnel in the United States Navy*, 29 CAL. W. L. REV. 307 (1992);

Attempting to fill this void, legal scholars have struggled to observe the rigors of doctrine and at the same time to understand sexual harassment as it is experienced. Appropriately focusing on hostile environment sexual harassment in the workplace,[4] these commentators explain this phenomenon as expressions of gender hierarchy,[5] economic inefficiency,[6] free speech,[7] and misplaced pluralism.[8] But few of these descriptions have achieved widespread acceptance in the judicial or academic communities.[9] Among those who undertake to describe the nature of sexual harassment,[10] a division has emerged. One group of writers, expressing a sunny view of human relationships, offers a paradigm of workplace hostile environment sexual harassment as miscommunication. These observers envision a man who provokes fear or anger, perhaps unintentionally, when he approaches a colleague or

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and Susan B. Jordan, *A Profession of Packwoods?*, L.A. DAILY J., Sept. 21, 1995, at 6. On the vagueness of the term "harassment," see Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1012–18 (1996).

[4] Sexual harassment occurs in a variety of settings; within case law the workplace is the most important of these settings. Workplace sexual harassment, according to an early manifesto by Catharine MacKinnon, divides into two categories: quid pro quo harassment and hostile or abusive environment harassment. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32 (1979). This division, accepted by American courts, has become less informative since its formulation. Quid pro quo harassment, or explicit sexual blackmail, occupies a minuscule fraction of sexual harassment case law; only extraordinarily reckless and blatant behavior by a harasser permits a plaintiff to pursue this cause of action. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 834 (1991). Accordingly, much harassment has been diverted into the hostile environment category, such that references to a hostile environment no longer add meaning to sexual harassment in the workplace.

[5] *See* Morrison Torrey, *We Get the Message — Pornography in the Workplace*, 22 SW. U. L. REV. 53, 60–67 (1992).

[6] *See* Marie T. Reilly, *A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss*, 47 VAND. L. REV. 427, 436–76 (1994); *cf.* Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1157 (1995) (defining sexual harassment as conduct "that would lead a rational woman to alter her workplace behavior [to avoid the conduct] if she could do so at little or no cost").

[7] *See* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Michael P. McDonald, *Unfree Speech*, 18 HARV. J.L. & PUB. POL'Y 479, 484–85 (1995); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

[8] *See* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

[9] *Cf.* Katherine M. Franke, *What's Wrong with Sexual Harassment?* 49 STAN. L. REV. 691, 694 (1997) (noting that the problem of same-sex harassment reveals "malaise" and "laziness" in sexual harassment jurisprudence).

[10] Some writings on sexual harassment omit this description. The omission appears to be deliberate in economics-focused writings, *see* Reilly, *supra* note 6, at 434, and consistent with the general reluctance of economic analysis to judge the normative value of individual choices, *see* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 14–15 (2d ed. 1971), even the choice to harass. Whether intentional or accidental, the absence of a working notion of what sexual harassment means is harmful to scholarship on the subject. On the persistence of this omission, see pp. 448–49 below.

ventures a joke.[11] For other writers, the paradigm of workplace harassment is coercion, an obscene gauntlet forced on a woman who needs her job.[12] At the root of this difference lies contention over whether claims of harassment ought to be judged from the vantage point of the object of harassment or from the perspective of the putative harasser.

A separate division reveals itself in the crafting of causes of action and legal remedies. Should fault be pivotal? On one hand, "harassment" connotes wrongful conduct inflicted by one individual and suffered by another; tort remedies for sexual harassment comport with this perspective. On the other hand, Title VII of the Civil Rights Act (and, as I have argued elsewhere, the approach to sexual harassment that prevails in Europe[13]) takes a different approach by focusing on atmosphere or working conditions rather than fault.

The gap between competing perspectives on sexual harassment, so indicative of confusion and disagreement, has never been satisfactorily bridged. Meanwhile, the topic expands in notoriety. While judges and scholars try to define and explain hostile environment sexual harassment, its meaning — a nimble Houdini of legal doctrine — continues to escape their chains.

Even the redoubtable Justice Scalia could not get a lock on the phrase, and hostile environment sexual harassment may go down in Supreme Court history as the subject that left him at a virtual loss for words. In *Harris v. Forklift Systems, Inc.*,[14] the Court was called on to provide an explanation of this concept. Quickly and unanimously, the Justices acknowledged the injury of hostile environment harassment but could add little descriptive detail. Justice O'Connor resorted to synonyms: a hostile environment is an "abusive" one, filled with "severe [and] pervasive" conduct.[15] Refusing to provide "a mathematically precise test," Justice O'Connor insisted that a hostile environment "can be determined only by looking at all the circumstances."[16] Justice

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[11] *See* Sara P. Feldman-Schorrig & James J. McDonald, Jr., *The Role of Forensic Psychiatry in the Defense of Sexual Harassment Cases*, 19 J. PSYCHIATRY & L. 5, 6–8 (1992); David Thomas, *Fatal Attractions*, TIMES (London), May 15, 1994, *available in* LEXIS, News Library, Archives File (referring to innocent overtures that are misunderstood); *What 222,653 Teens Said*, USA TODAY, Sept. 8, 1996, at 10, 12 (noting that jokes may be misperceived as harassment and vice versa).

[12] *See* MACKINNON, *supra* note 4, *passim*; Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 402–08 (1996).

[13] *See* Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1228 *passim* (1994).

[14] 510 U.S. 17 (1993).

[15] *Id.* at 21, 22.

[16] *Id.* at 22. Though reluctant to give readers the guidance that Justice Scalia would have preferred, *Harris* adds emphasis to a prior Supreme Court holding that hostile environment sexual harassment constitutes a Title VII violation when it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d

Scalia wrote a separate concurrence, confessing that he could not define hostile environment. "I know of no alternative"[17] to this definitional void, admitted the Justice — a man confident about the true meanings of separation of powers,[18] just compensation,[19] the dormant commerce clause,[20] substantive due process,[21] national security,[22] freedom of speech,[23] and race neutrality.[24]

The word "abusive" or "hostile," Justice Scalia continued, "does not seem to me a very clear standard — and I do not think clarity is at all increased by adding the adverb 'objectively' or by appealing to a 'reasonable person['s]' notion of what the vague word means."[25] Because courts have been unable to enunciate a clear standard, juries remain unguided, as do men and women in the workplace. Justice Scalia added a telling comparison to negligence.[26] Although "negligent," like "hostile," means what a jury says it means, at least in negligence cases physical harm limits the number of potential plaintiffs.[27] In hostile environment cases abusiveness *is* the harm, unless plaintiffs are required to prove psychological injury or other severe detriment, a burden the Court rejected in *Harris*.[28] Thus the doctrinal enigma is to be reiterated in an infinity of future hostile environment claims.[29]

Strange to relate, the beginning of a resolution may be found in a short opinion by Justice Scalia himself. In one of his early concurrences, Justice Scalia attacked the *Miller v. California*[30] standard of obscenity law,[31] especially its search for "value" by reference to community standards: "Since ratiocination has little to do with esthetics, the fabled 'reasonable man' is of little help in the inquiry, and would

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897, 904 (11th Cir. 1982)). *Meritor* reached the Court in part because of what Justice O'Connor later called the "appalling conduct" alleged there, including rape. *Harris*, 510 U.S. at 22. But in *Harris*, Justice O'Connor observed that "egregious examples" of hostile environments "do not mark the boundary of what is actionable." *Id.*

17 *Harris*, 510 U.S. at 22 (Scalia, J., concurring).

18 *See* Mistretta v. United States, 488 U.S. 361, 426–27 (1989) (Scalia, J., dissenting); United States v. Providence Journal Co., 485 U.S. 693, 708 (1988) (Scalia, J., concurring).

19 *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 831–37 (1987).

20 *See* American Trucking Ass'ns v. Smith, 496 U.S. 167, 202–05 (1990) (Scalia, J., concurring in the judgment).

21 *See* Michael H. v. Gerald D., 491 U.S. 110, 121–30 (1989).

22 *See* Webster v. Doe, 486 U.S. 592, 615–21 (1988) (Scalia, J., dissenting).

23 *See* R.A.V. v. St. Paul, 505 U.S. 377, 391–96 (1992).

24 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 524–28 (1989) (Scalia, J., concurring).

25 Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (Scalia, J., concurring).

26 *See id.*

27 *See id.*

28 *See Harris*, 510 U.S. at 20–22.

29 *See id.* at 24–25 (Scalia, J., concurring).

30 413 U.S. 15 (1973).

31 *See id.* at 24 (holding that a court should look to whether the work as a whole appeals to the prurient interest, whether it "depicts or describes, in a patently offensive way," specific sexual conduct, and whether the work lacks "serious literary, artistic, political, or scientific value").

have to be replaced with, perhaps, the 'man of tolerably good taste' — a description that betrays the lack of an ascertainable standard."[32]

Imagine "the man of tolerably good taste." Though he eludes legal definition, this man is more central than the reasonable person to an understanding of offensive conduct; in questioning the importance of reason in evaluating obscenity, Justice Scalia was certainly right. The reasonable man, woman, or person advances the analysis of conduct when that conduct is challenged as wasteful, imprudent, negligent, reckless, excessive, or inadequate. But reason and reasonableness have little to do with offensiveness[33] as it exists in our laws of obscenity and sexual harassment, and reason is especially useless in evaluating both the conduct of an alleged harasser and the reaction of a complainant.[34]

How, then, to understand sexual harassment? This Article ventures an explanation. Hostile environment sexual harassment, I argue, is a type of incivility or — in the locution that I prefer — disrespect.[35] For purposes of doctrine, accordingly, hostile environment complaints should refer to respect; the plaintiff should be required to prove that the defendant — a man, or a woman, or a business entity[36] — did not conform to the standard of a respectful person. This respectful person standard would rightly supplant references to reason and reasonableness; respect is integral to the understanding and remedying of sexual harassment, whereas reason is not.[37]

In giving content to the ideal of equality behind Title VII as well as the ideal of individual autonomy behind dignitary-tort law, this respectful person standard would fit within the two most important legal bases for redressing sexual harassment in the workplace.[38] Focus on

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32 Pope v. Illinois, 481 U.S. 497, 504–05 (1987) (Scalia, J., concurring); *see also* Jeff Rosen, *'Miller' Time*, NEW REPUBLIC, Oct. 1, 1990, at 17 ("Reasonable people attacked Manet's *Déjeuner Sur L'Herbe* and Beethoven's 'Ode to Joy' as indecent.").

33 *See* 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 35–36 (1985).

34 *See* Ehrenreich, *supra* note 8, at 1214–32; *infra* pp. 467–68.

35 For one judge's expression of this idea, see Stephen Reinhardt, *Foreword* to BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW at xiii (1992). Reinhardt argues: "[W]e [must] learn to treat all individuals with respect and afford them the personal dignity they deserve. If we do, sexual harassment will largely be a thing of the past." *Id.*

36 Research indicates that about "90% of workplace sexual harassment cases arise from men harassing women." HERMA HILL KAY & MARTHA S. WEST, SEX-BASED DISCRIMINATION 833 (4th ed. 1996). Accordingly, this Article, like most writings on sexual harassment, uses nouns and pronouns consistent with this gender division, although other gender permutations are discussed.

37 A role remains for reasonableness. *See infra* pp. 498–504.

38 Of these various legal remedies, Title VII receives primary attention in this Article. I devote little time to other devices such as workers' compensation and the criminal law of extortion, because they are relatively unimportant in sexual harassment case law. Several courts have allowed dignitary-tort remedies for sexual harassment. *See, e.g.*, Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1439 (10th Cir. 1997) (allowing a pendent claim for battery in a Title VII action); Rudas v. Nationwide Mut. Ins. Co., No. 96-5987, 1997 U.S. Dist. LEXIS 169, at *12 (E.D. Pa. Jan. 7, 1997) (allowing a claim for assault and battery); Ford v. Revlon, Inc., 734 P.2d 580, 585 (Ariz. 1987) (approving a judgment against a defendant corporation for intentional infliction of emotional dis-

respect addresses the concerns of both those who identify with the imperfect humanity of the accused harasser and those who seek foremost to purge sexual coercion from the workplace. Respect also reconciles competing perspectives on fault, simultaneously recognizing the tort-like wrong of sexual harassment and the Title VII emphasis on workplace discrimination.[39] It gives shape to a problem whose outlines have been blurred and contested. Despite its apparent novelty, the respectful person standard is intelligible, easy to execute, and not especially vulnerable to abuse or confusion. In short, it is likely to help reduce the incidence of hostile environment sexual harassment and to provide a remedy for injured plaintiffs.

This proposed standard may eventually achieve acceptance in other areas of law: it is imaginable that hostile environment sexual harassment can serve as a circumscribed testing ground for a respectful person standard that will develop more general utility. Just as the nineteenth-century reasonable man went on to find a place in doctrines other than negligence, where he first flourished, the respectful person is a device that may work well outside of sexual harassment. For now, however, I confine my argument to the bounded, though expanding, territory of hostile environment sexual harassment.

This limited approach may not satisfy some readers, inasmuch as respect resembles other affirmative ideals such as altruism and charity. Indeed it is nearly a tenet that in the liberal state legal rules cannot be deployed solely to dictate virtue — or, in the more commonly evoked phrase, to legislate morality.[40] In this view, the virtues that law is com-

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tress). On equality and autonomy — the ideals honored by the respectful person standard — see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985), in which Ginsburg finds the concepts important to an understanding of sex discrimination in the abortion context.

[39] Some commentators on Title VII exaggerate the dichotomy between tort-like discrimination-as-wrong and discrimination-as-social-inequality. To them, fault inquiries appear counterproductive. *See* MACKINNON, *supra* note 4, at 158 (claiming that tort remedies are flawed because they hold women to "traditional male and female norms" and do not facilitate equality); Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994). Legislative history does not support a rejection of the fault-based approach. *See* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 201–02 (1988) (noting the absence of traditional sources of legislative history). One major revision of Title VII, the Civil Rights Act of 1991, brings fault to center stage. Enumerating four purposes, the Act lists first its goal "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(1), 105 Stat. 1071, 1071 (1991). On the burgeoning role of fault in the federal civil rights statutes, see Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation — How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 4 (1993), and compare George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 119 (1995), which refers to "the whole regime of fault on which employment discrimination law has been based." *Id.*

[40] This principle is implicit in such influential works as JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION (Hafner Press 1948) (1789), and H.L.A. HART, THE CONCEPT OF

petent to enforce do not extend much beyond nonaggression and tolerance.[41] Although a strong alternative tradition, which maintains that the liberal state ought to overcome its agnosticism about virtue and promote an edifying vision of the good life,[42] opposes this view, I believe that my proposal is consistent with a traditional liberal outlook. For current purposes, consider the Latin etymology of respect — "respicere," to look back, or to take a second look.[43] The reader is invited to regard again this familiar word, apart from its connotation of moral virtue.

"Respect" more than other words expresses what is wrong about the creation or maintenance of a hostile working environment. As philosophers have elaborated, a fundamental meaning of respect, apart from a separate meaning of *esteem*, is *recognition* of a person's inherent worth. Respect in the sense of recognition is owed to all persons, and thus workplace sexual harassment betrays the ideal of recognition respect, regardless of whether the harassed worker deserves high esteem. Respect also illuminates what is appropriate about the search for a legal remedy of this wrong and, more generally, which goals are attainable in the law's continued endeavor to shape conduct. The word is at the center of a rich philosophical literature, yet is equally integral to ordinary lives, suggesting that it can unite ideals with day-to-day practice. Legal recognition of respect, then, does not merely exhort a citizenry to improve its morals; it enhances the function and the intelligibility of doctrine.

The functioning of respect as an element of sexual harassment law emerges in a study undertaken in the five parts of this Article. I begin with Title VII doctrine.[44] A plaintiff alleging hostile environment sexual harassment in violation of this statute must prove two elements about the challenged conduct, one subjective and one objective. She must contend that she *perceived* her environment to be hostile or abu-

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LAW (1961). Also, OLIVER WENDELL HOLMES, THE COMMON LAW 115 (Mark De Wolfe Howe ed., 1963), disdains "the purpose of improving men's hearts." *Id.*

41 *See* J.S. MILL, ON LIBERTY 68–69 (Penguin Books 1982) (1859). Building upon the works of Mill and Rawls, this posture is a variation on a claim that the right is prior to the good. *See* JOHN RAWLS, POLITICAL LIBERALISM 218 (1993); John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 260–64 (1988). Because no vision of the good may be demonstrated as superior to another, the state in this view may not promote any ideals except those that protect or expand the autonomy of individuals. *See* Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1351 (1991).

42 *See* WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 252–55 (1991); AMY GUTMANN, DEMOCRATIC EDUCATION 46 (1987); KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION *passim* (1989); William A. Galston, *Two Conceptions of Liberalism*, 105 ETHICS 516, 518 (1995); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 132 (1995).

43 *See* Robin S. Dillon, *Respect and Care: Toward Moral Integration*, 22 CANADIAN J. PHIL. 105, 108 (1992).

44 Title VII doctrine is in important respects congruent with the plaintiff's burden of proof in dignitary-tort actions alleging injury caused by sexual harassment.

sive; put another way, she must have regarded the challenged conduct as unwelcome at the time it occurred. The environment must also have been objectively hostile or abusive.[45] When considering the objective element of the prima facie case, virtually all courts resort to the words "reason" or "reasonable." Throughout this Article, I maintain that the concept of respect lies below, undetected, while references to reason purport to govern case outcomes.

Part I details the futility of reasonableness standards for sexual harassment law. Hostile environment sexual harassment is an indignity, not a violation of norms about prudence or cost avoidance; thus inquiries about reason or reasonableness have little to say about hostile environment sexual harassment. This point has been made by writers at opposite ends of the political spectrum.[46] Elaborating on these foundational objections to a reasonableness standard, I contend in Part I that the standard cannot be salvaged, no matter which meaning is used for the word "reasonable." If this word means "characterized by reason," as some argue,[47] then it can tell us nothing whatsoever about whether any given defendant harassed a plaintiff. Reference to reason in hostile environment sexual harassment may be worse than beside the point: it subtly denigrates some claimants and minimizes or denies the nature of their injury. If the word instead means something like sensible, moderate, centrist, or willing to accept shared norms, the standard is equally opaque; like the definition of "reasonable" as "rational," this alternative meaning is also capable of doing harm by tending to marginalize and oppress subordinated groups.

Working with similar themes, writers have built a vast critical literature about reasonableness standards. These judicial and academic efforts to revise the objective criteria of hostile environment sexual harassment are examined in Part II, where I discuss the consequences of a misplaced commitment to reasonableness in American sexual harassment law. With "reasonable" locked firmly into doctrinal place, courts and scholars use it to modify various nouns: reasonable woman, reasonable victim, and more. This unending process of modification is a quandary because, as advocates of each standard argue cumulatively, all reasonableness standards are defective. "Reasonable person" has been challenged by "reasonable woman," which has been attacked in turn by what I call the tinkerers, whose revisions (reasonable target, reasonable victim, reasonable person of the same gender as the victim,

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[45] The prima facie case includes other elements less pertinent to this Article. *See* Henson v. City of Dundee, 682 F.2d 897, 903–05 (11th Cir. 1982) (applying a five-part burden of proof).

[46] *Compare* pp. 448–49 (summarizing the views of Justice Scalia), *with* Ehrenreich, *supra* note 8, at 1230–32.

[47] *See supra* pp. 448–49 (noting the views of Justice Scalia); *see also* Osborne M. Reynolds, Jr., *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature"*, 23 OKLA. L. REV. 410, 420–24 (1970) (distinguishing the reasonable man from the average man, the attentive man, the ideal man, the composite man, and the subjective standard).

ad infinitum) are in turn condemned by those who decide to return to the reasonable person. This circular contest of flawed standards recalls the children's game of rock-paper-scissors. A small but eloquent cohort of lawyers and scholars express their discontent with the reasonableness standard by arguing in favor of a purely subjective approach, where the plaintiff would need to allege little more than that she found sex-based workplace conduct unwelcome. This bold proposal, though cogent, throws away too much. Retaining an objective standard is necessary to affirm the reality — the genuine, non-idiosyncratic injuriousness — of sexual harassment. Yet reasonableness cannot anchor sexual harassment law.

Part III describes my alternative standard, the respectful person. This Part of the Article, aided by philosophy and moral theory, deems respect the pivotal concept of a legal standard for hostile environment sexual harassment cases. Fundamentally a wide-ranging description of relations between human beings, respect in this Part stays within Title VII boundaries. Thus the second half of Part III unites respect with other elements of the statute and its judicial gloss, including "hostile environment," "pervasiveness," and "discrimination on the basis of sex." These additional concepts bring respect into a group-focused referent that would build coherent and stable doctrine.

The respectful person standard is a conservative reform. Like other rules governing civil litigation, the standard would sometimes undergird summary judgments — and in so doing keep complainants from juries, assist defendants whose conduct was blameworthy, and bar the claims of individuals who have been genuinely hurt.[48] Nevertheless, the ideal of a respectful person is also a source of change. It can reduce the type of disrespect now condemned, but not directly addressed, by sexual harassment law, and allow everyday civility to flourish. Its connection to philosophy does not render the respectful person a utopian dream for intellectuals. Many qualities of this individual are similar to those of the prevailing reasonable person: as Kant taught, reason and respect are related ideals. Moreover, current American law, both statutory and judge-made, already values the quality of respect. The respectful person is someone each of us can become, without undue departure from existing norms. The attainability of respectful personhood is one of several virtues of this standard noted in Part IV, where I argue that in contrast to reason, with its tradition of exclusion, respect transcends the divisions created to classify human beings.[49]

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[48] A recent article defends the value of summary judgment in sexual harassment cases. *See* Robert J. Aalberts & Lorne Seidman, *Seeking a "Safe Harbor": The Viability of Summary Judgment in Post-*Harris *Sexual Harassment Litigation*, 20 S. ILL. U. L.J. 223, 230–32 (1996).

[49] The switch from reason to respect implicitly acknowledges numerous African-American women whose workplace experiences built such a great share of hostile environment law. *See,*

The proposed standard has numerous other virtues. Disrespect rather than unreason fits with the dignitary injury of hostile environment sexual harassment. In contrast to the gendered pedigree of the reasonable person and the gendered slant of both "reasonableness" and "reasonable woman," the respectful person comes close to gender neutrality. And following the approach taken in virtually every other subcategory of law that uses the reasonable person, the respectful person standard focuses on the conduct of an actor rather than the reaction of a complainant.[50] The respectful person is also a device that jurors can employ well.[51]

Perhaps most important, identification of the respectful person makes a guarded contribution to the melding of moral reasoning and law. This project of melding, identified by James Barr Ames in his classic essay on the duty to act in behalf of another,[52] improves the law by making it more congruent with the dictates of morality, while trying to avoid the dangers of authoritarianism, sanctimony, utopian fantasy, procedural infirmity, and overreaching beyond competence. The legal enforcement of respect falls within this tradition of melding morality and law. Furthermore, though it shapes conduct, it would restrain no liberty that statutory civil rights law, as interpreted by the Supreme Court, does not already limit. The respectful person is thus both a reform and a clarification of what civil rights and dignitary-tort law now demand.

I. On Reason and Reasonableness as They Pertain to Sexual Harassment

Consider two ways to interpret references to the reasonable person in hostile environment sexual harassment law. The first is traditional and literal: a reasonable person possesses certain cognitive traits, uses a faculty for analysis to solve problems, and believes in principles of causality, deductive logic, probabilistic calculation, and other exem-

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e.g., Hicks v. Gates Rubber Co., 928 F.2d 966 (10th Cir. 1991); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). Disrespect, not unreason, drove these plaintiffs to the courts. The goal of respect is also an important theme in writings about women in the workplace that focus on class. *See* JOAN SANGSTER, EARNING RESPECT: THE LIVES OF WORKING WOMEN IN SMALL-TOWN ONTARIO 1920–1960, at 110–16 (1995); *cf.* TONI GILPIN, GARY ISAAC, DAN LETWIN & JACK MCKIVIGAN, ON STRIKE FOR RESPECT: THE CLERICAL & TECHNICAL WORKERS' STRIKE AT YALE UNIVERSITY (1984–85), at 18–32 (1988) (discussing the intersection of class and respect in the labor strike context).

50 *See* Franke, *supra* note 9, at 751 (noting the advantage of emphasizing the harasser's behavior rather than the victim's reaction); *cf.* OXFORD COMPANION TO LAW 1038 (1980) (describing the reasonable man as a standard to evaluate the conduct of a *defendant*).

51 I address Justice Scalia's concern about jury guidance by drafting, and commenting on, a partial jury instruction to be used in hostile environment cases. *See infra* pp. 522–24.

52 *See* James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 111–13 (1908). A more recent essay in this direction is Timothy D. Lytton, *Responsibility for Human Suffering: Awareness, Participation, and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 470–72 (1993).

plars of Western thought.[53] In this view, phenomena that philosophers contrast to reason — such as faith or experience — might influence the reasonable person,[54] but ratiocination guides his or her decisionmaking. The second possibility, explored by Judge Marie Garibaldi in a judicial opinion,[55] by Michael Saltman in his book on the reasonable man,[56] and by other writers in law reviews,[57] is to build a meaning of "reasonable" apart from "reason," to mean something like sensible, ordinary, moderate, or average. Veering from etymology, this approach to the reasonable person within the context of hostile environment sexual harassment need not refer to reason. Neither meaning, however, aids in understanding hostile environment sexual harassment.

A. The Trouble with Reason

Reason — in the sense of a faculty or intellectual process — is alien to the remedying of hostile environment sexual harassment for three reasons. First, the word has been used for centuries to slur and exclude women, racial minorities, and the less-educated — all groups that are harmed by sexual harassment out of proportion to their numbers.[58] Second, a tradition defines reason in contrast to emotion, even though the concepts of harassment, hostility, and abusiveness are unimaginable without reference to emotion. A third tradition views reason as opposite to sex,[59] but sex is an inevitable part of sexual harassment. These dichotomies — reason versus the unreasoning mass of humanity; reason versus emotion; reason versus sexual impulse — are mostly false. But they endure and continue to influence American law. Because of these prejudicial effects, sexual harassment doctrine ought to look at reason with skepticism.

1. The Tradition of Exclusion. — For centuries Western philosophers agreed that reason was not a widely and universally shared trait

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53 *See* ALFRED NORTH WHITEHEAD, THE FUNCTION OF REASON 1–28 (1929).

54 *See* G.J. Warnock, *Reason*, *in* 7 ENCYCLOPEDIA OF PHILOSOPHY 83, 84 (Paul Edwards ed., reprint ed. 1972).

55 *See* Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 458 (N.J. 1993).

56 *See* MICHAEL SALTMAN, THE DEMISE OF THE 'REASONABLE MAN': A CROSS-CULTURAL STUDY OF A LEGAL CONCEPT *passim* (1991) (expunging "reason" from "reasonable man").

57 *Cf.* Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 807–08 (1993) (describing a reasonable person standard that incorporates "all of the shortcomings and weaknesses tolerated by the community"); Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man"*, 8 RUT.-CAM. L.J. 311, 314 (1977) (noting possible meanings such as "individual perfection" and "a community ideal").

58 *See* Susan Ehrlich Martin, *Sexual Harassment: The Link Joining Gender Stratification, Sexuality, and Women's Economic Status*, *in* WOMEN: A FEMINIST PERSPECTIVE 22, 25, 32 (Jo Freeman ed., 5th ed. 1995) (correlating traits of women with the experience of being harassed at work).

59 This view is a common one, notwithstanding Judge Posner's effort to conjoin the two. *See* RICHARD A. POSNER, SEX AND REASON (1992).

among human beings.[60] From ancient Greece through nineteenth-century Europe and beyond, intellectual leaders justified social and political inequality with reference to the transcendent gift of reason. Those who could reason best were most fit to govern, to control property and its laws, and to make use of lesser creatures.[61]

On this subject, great minds thought alike.[62] According to Aristotle, "the deliberative faculty in the soul is not present at all in a slave; in a female it is present but ineffective; in a child present but undeveloped."[63] And for Aristotle there could be no good life without reason: thus a woman's life is always slavish, never fully human.[64] Kant wrote that women were not "capable of principles"[65] and that their "philosophy is not to reason, but to sense."[66] For Hegel, women could not "attain to the ideal" of rational thought: "The difference between men and women is like that between animals and plants."[67] Rousseau denounced women as incapable of thought and unsuited to education;[68] his "highest accolade"[69] for a woman was "Oh lovely ignorant fair!"[70] Schopenhauer described women as "in every respect backward," lacking in reason and reflection.[71] The great British Enlightenment philosophers, notably Hobbes, Locke, and Adam Smith, did not craft misogynous aphorisms about reason as they constructed their view of the state. Rather, their writings, which refer continually to the individual, presume the absence of women's thought, consent, and decisionmaking.[72]

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60 *See* ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 36–37 (1983).

61 *See* DIANA H. COOLE, WOMEN IN POLITICAL THEORY: FROM ANCIENT MISOGYNY TO CONTEMPORARY FEMINISM 29–31, 85, 141, 195–96 (2d ed. 1993) (describing the recurrent argument in western political thought that men should have political power over women because of men's superior ability to reason).

62 The celebrated exception is Mill, who championed the equality of women. *See* JOHN STUART MILL, THE SUBJECTION OF WOMEN 1 (Susan Moller Okin ed., Hackett Publ'g Co. 1988) (1869).

63 ARISTOTLE, THE POLITICS (J.A. Sinclair trans., 1962). For a discussion of Aristotle's misogynous view of reason, see Linda R. Hirshman, *The Book of "A"*, 70 TEX. L. REV. 971, 979–80 (1992).

64 *See* Marcia L. Homiak, *Feminism and Aristotle's Rational Ideal*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 1, 7 (Louise M. Antony & Charlotte Witt eds., 1993).

65 IMMANUEL KANT, OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND SUBLIME 81 (John T. Goldthwait trans., 1960).

66 *Id.* at 79.

67 HEGEL, PHILOSOPHY OF RIGHT 263 (T.M. Knox trans., Oxford Univ. Press 1967) (1952).

68 *See* JEAN-JACQUES ROUSSEAU, EMILE (Barbara Foxley trans., J.M. Dent & Sons 1974) (1762).

69 SUSAN BROWNMILLER, FEMININITY 109 (1984).

70 *Id.* (quoting 3 JEAN-JACQUES ROUSSEAU, EMILIUS (Edinburgh, A. Donalson trans., 1768) (1762)).

71 ARTHUR SCHOPENHAUER, *On Women*, *in* SELECTED ESSAYS OF SCHOPENHAUER 338, 346 (Ernest Belfort Bax ed. & trans., 1926).

72 *See* CAROLE PATEMAN, THE SEXUAL CONTRACT 43–50, 52–53 (1988) (discussing Hobbes and Locke); *id.* at 50–52 (alluding to the subordination of women in classical contract theory).

As the history of female education demonstrates, these beliefs about the nature of women have justified the exclusion of girls and women from schooling and have perpetuated the image of women as incompetent to reason. The belief that intellectual training should be available to female persons has been widely held in the United States for less than a century.[73] Speaking in the name of reason, authority figures have long used the language of science to keep women uneducated.[74] Vestiges of these historical beliefs persist,[75] as girls and women continue to learn that reason remains masculine territory.[76]

This territory is also white: a parallel tradition links reason with race.[77] In his classic, *The Mismeasure of Man*, Stephen Jay Gould recounts the perpetual effort to equate cognitive strength with the traits of white European men: again and again commentators have falsely claimed that intellect correlates with skull size, brain weight, facial features, geographic origin, and other constructs of physical anthropology.[78] Going further than the white-supremacist researchers that

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[73] *See* MYRA SADKER & DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS 15–41 (1994) (discussing the development of women's education in the United States).

[74] One prominent physician, Edward Clarke, wrote in 1873 to a heeding audience that girls should not pursue prolonged education because the effort involved would divert blood needed for menstruation from their wombs to their brains. *See id.* at 30–31, 231.

[75] Today American girls and women are more likely than their male classmates to face neglect, condescension, sexual exploitation, and biased measurement of their school performance. *See id.* at 1–14. Attacks on the Sadkers' work, which have not refuted this general conclusion, are summarized in Carl Horowitz, *Does Education Cheat Females?*, INVESTOR'S BUS. DAILY, Oct. 21, 1994, at A1, *available in* LEXIS, News Library, Arcnews File.

[76] A continuing national preoccupation with gender difference may now exacerbate unequal access to the domain of reason. Both feminists and anti-feminists have endeavored to harmonize the idea of reason with the female experience. In one famous effort, Carol Gilligan argues that moral reasoning encompasses care and connection to others, a perspective traditionally associated with women. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 64–66, 105 (1982). Some read Gilligan as construing morality as "an intertwining of emotion, cognition, and action, not readily separable," whereas the contrasting perspective, identified with the psychologist Lawrence Kohlberg, emphasizes "formal rationality." Lawrence A. Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, *in* AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES 49, 52 (Mary Jeanne Larrabee ed., 1993). *But see* John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, *in* AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES 112, 120–24 (Mary Jeanne Larrabee ed., 1993) (arguing that the distinction between the views of Gilligan and Kohlberg is overdrawn). Although it is too early to predict how Gilligan's revision will ultimately affect the way reason is understood, thus far it appears that her ethic of care has expanded the terrain of reason while leaving its traditional understanding intact.

[77] *See* ASHLEY MONTAGU, THE NATURAL SUPERIORITY OF WOMEN 46 (rev. ed. 1992) ("Everything that has been said about almost any alleged 'inferior' race has been said by men about women.").

[78] *See* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 113–22 (1981). Gould critiques a controversial modern continuation of this argument in Stephen Jay Gould, *Mismeasure by Any Measure*, *in* THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS 3, 4–5 (Russell Jacoby & Naomi Glauberman eds., 1995).

Gould surveys, one writer claimed in 1868 that "reformers" and "friends of humanity" were hopelessly naive to struggle against the manifest design of God:[79] A black man, wrote John Van Evrie, is incapable even of walking erect, let alone of learning on par with white men.[80] Physicians of the nineteenth century commonly believed that black women were brutes, entitled to little recognition as human creatures of reason.[81] The naturalist Oliver Goldsmith blamed a hot African climate for relaxing the "mental powers" of the local population, rendering Africans "stupid" and "indolent."[82]

Native Americans received a similar judgment from the white men who colonized them in the New World. Spanish commentary divided between noble-savage condescension ("God created these simple people without evil and without guile," wrote Bartolomé de Las Casas[83]) and hatred ("What could one expect from a people whose skulls are so thick and hard that the Spaniards had to take care in fighting not to strike on the head lest their swords be blunted?"[84]). Americans of British descent had a similar view of the native population; their concept of a vast frontier conveniently presupposed that no rational beings populated the Americas before the settlement of Jamestown and Plymouth Rock.[85]

The last century has eroded these beliefs.[86] And a century or two earlier, to be sure, reason prodded the Enlightenment, helping to effect

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[79] J.H. VAN EVRIE, WHITE SUPREMACY AND NEGRO SUBORDINATION 93–94 (New York, Van Evrie, Horton & Co., 2d. ed. 1870).

[80] *See id.*

[81] *See* BARBARA EHRENREICH & DEIRDRE ENGLISH, FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN 112 (1978) (describing the use of African-American women in surgical experiments); Charles S. Johnson & Horace M. Bond, *The Investigation of Racial Differences Prior to 1910*, 3 J. NEGRO EDUC. 328, 334 (1934) (citing a comparison of black women to monkeys).

[82] 1 OLIVER GOLDSMITH, A HISTORY OF THE EARTH AND ANIMATED NATURE 213 (Glasgow, Blackie & Son 1860).

[83] LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA 11 (1949) (quoting Bartolomé de Las Casas, *Colección de tratados* 7) (internal quotation marks omitted).

[84] *Id.* (quoting Gonzalo Fernández de Oviedo, *Historia general y natural de las Indians*) (internal quotation marks omitted).

[85] *See* WALTER PRESCOTT WEBB, THE GREAT FRONTIER 3 & n.3 (1952).

[86] Yet it remains respectable — even fashionable — for serious writers to argue that women possess a type of intelligence different from that of men, and that African-Americans possess an inferior intelligence. On the peculiar nature of women's intelligence, see Broughton, cited above in note 76, at 113, which describes Lawrence Kohlberg's conclusion that adult men reason at "'legalistic' stage 4" while adult women languish in "'conformist' stage 3," and compare GEORGE GILDER, MEN AND MARRIAGE 5–18 (1986), which identifies gender differences resulting from reproductive roles, and POSNER, *supra* note 59, at 88–98, which identifies those same differences. For allegations of African-American intellectual inferiority, see RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 269–315 (1994), and ARTHUR R. JENSEN, GENETICS AND EDUCATION 160–63 (1972).

The O.J. Simpson criminal-trial verdict of October 1995 revealed a belief held among some white observers that African-Americans applaud Simpson's acquittal because of the antirational-

a repudiation of caste oppression. One might argue accordingly that progressives should embrace, rather than worry about, reason as a legal concept.[87] Yet the concept of reason, developed in centuries of inequality, monarchy, and white-male supremacism, formed an identity before democracy and the ideal of fidelity to the law could properly inform it. Traditions still hold reason to stand for privilege and exclusion. In order to make reason work against sexual harassment, law reformers must affirm an understanding of reason of comparable strength to balance the weight of historical injustice that the concept of reason bears.

2. Emotion. — Despite warnings by David Hume, Friedrich Nietzsche, and others that reason and emotion are not paired opposites,[88] the notion persists that reason fuels order and justice while emotion explodes, at irregular intervals, to disrupt the calm.[89] Emotion destabilizes justice. It can be a part of bias, distraction, or overidentification with another person.[90] Reason can, and must, tame this wayward force. In this view, emotion is the polar opposite of reason.[91]

One feminist scholar argues that contractarian political philosophy equates feminine emotion with the state of nature that civil society must control.[92] Elemental, weak, swayed by immoderate passions, trapped in their physiology, women are deemed incapable of coming together to create a just and principled society.[93] As Susan Brown-

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ist, emotional lens through which they see the world. *See Unreasonable Doubt*, NEW REPUBLIC, Oct. 23, 1995, at 7, 8 (attacking the Simpson jury's "emotional refusal to find guilt in the face of overwhelming evidence"). "Apparently [the jury's] decision was based on emotion that overcame reason," commented prosecutor Gil Garcetti, whose office lost the case. Alexander Cockburn, *White Rage: The Press and the Verdict*, NATION, Oct. 30, 1995, at 491. Cockburn's article also quotes Norman Mailer: "Take a very large generalization: Whites, for example, believe in technology. Blacks, I would say, have more belief in divine forces, dark and light." *Id.*

87 *See generally* Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 453–54 (1996) (defending reason from attacks by left- and right-wing writers).

88 *See* ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 191–96 (1994); DAVID HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS 105 (Charles W. Hendel ed., Liberal Arts Press 1957) (1751); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 368 (1996) ("Emotion and cognition . . . act in concert to shape our perceptions and reactions."). For a summary of various philosophical critiques of the dichotomy between emotion and reason, see Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1030 (1996).

89 *See, e.g.*, STEPHEN L. DARWALL, IMPARTIAL REASON (1983) (equating reason with justice); *see also* WHITEHEAD, *supra* note 53, at 72 (describing reason as a "tendency upwards" that creates universal order).

90 *See* Payne v. Tennessee, 501 U.S. 808, 856–57 (1991) (Stevens, J., dissenting).

91 One founding father of reason as an American legal standard, Oliver Wendell Holmes, viewed his own temperamental detachment as an asset. *See* LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 289 (1991). Baker elaborates that "Holmes's commitment to the external standard, the objective criterion . . . allowed him to indulge a personal tendency to detachment from human affairs . . . . Committed to objectivity, he need never factor either the human mind or heart into a judicial decision." *Id.*

92 *See* PATEMAN, *supra* note 72, at 100.

93 *See id.* at 101–02.

miller elaborates, this stereotype of feminine emotion does not compensate for its alleged deficiencies by encompassing a "deeper emotional range" or a "greater sensitivity" to nature or subtle feeling.[94] When ascribed to women, emotion merely buffets. Only reason, deployable by those who possess the facility, can conquer emotion. And because of the perceived dichotomy between reason and emotion, valorization of the one may be had only at the expense of the other. Accordingly, a legal standard that rests on reason mismeasures the emotional element of sexual harassment and underdescribes its effects.

Sexual harassment is incomprehensible without the language of emotion. A hostile working environment is necessarily a cauldron of intense feelings. As a lawsuit progresses, emotions often escalate, especially the rage of harassers[95] and the harassed.[96] Headaches, facial tics, cardiac ailments, gynecological complaints, and clinical depression are among the many physical effects of emotional distress that harassed workers have reported to the courts.[97] Below the surface of court pleadings, one will often discern contempt, glee, sympathy (for example, the emotional support of friends that encourages a worker to persist in her complaint), cravings for revenge, and stubborn resolve.

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[94] BROWNMILLER, *supra* note 69, at 208. Regina Austin notes that the emotion stereotype generally applies only to the white bourgeoisie. Although working class women and women of color escape the "emotional" adjective, they do not achieve its opposite designation, "rational." The adjective opposite to "emotional," applied to them, is "physical" — carnal, brutelike, a resource to be used. Regina Austin, Remarks at the Association of American Law Schools Workshop on Torts, Washington, D.C. (June 7, 1996); *cf.* Central R.R. v. Whitehead, 74 Ga. 441, 450 (1885) (Hall, J., dissenting) (explaining the custom of assisting white female passengers but not their black counterparts).

[95] *See* Jackson-Colley v. Department of Army Corps of Eng'rs, 655 F. Supp. 122, 127 (E.D. Mich. 1987) (summarizing testimony that the defendant habitually cursed "at the sky" (internal quotation marks omitted)); *see also* Joseph Posner, *Attacking a Stone Wall — Examination of the Alleged Sexual Harasser*, *in* LITIGATING THE SEXUAL HARASSMENT CASE: A GUIDE FOR PLAINTIFF AND DEFENSE ATTORNEYS 237, 241–47 (Juanita B. Luis ed., 1994) [hereinafter LITIGATING THE SEXUAL HARASSMENT CASE] (describing the emotions and psychology of harassers).

[96] *See* Peggy Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women*, *in* SEXUALITY IN ORGANIZATIONS: ROMANTIC AND COERCIVE BEHAVIORS AT WORK 67, 69–70 (Dail Ann Neugarten & Jay M. Shafritz eds., 1980) (reporting that 96% of harassment victims experienced psychological symptoms, including anger); Martin, *supra* note 58, at 62 (citing a survey in which 78% of harassment victims reported anger).

[97] Sexual harassment plaintiffs have claimed to suffer a wide variety of physical effects resulting from emotional distress. *See* Bristow v. Drake St. Inc., 41 F.3d 345, 350 (7th Cir. 1994) (hives, stomach pains, and vomiting); Schweitzer-Reschke v. Avnet, Inc., 874 F. Supp. 1187, 1196–97 (D. Kan. 1995) (vomiting, diarrhea, and rapid heartbeat); Chester v. Northwest Iowa Youth Emergency Servs. Ctr., 869 F. Supp. 700, 708 n.4 (N.D. Iowa 1994) (headaches, nightmares, crying, and weight gain); Troutt v. Charcoal Steak House, Inc., 835 F. Supp. 899, 901 (W.D. Va. 1993) (sleeplessness and depression); Ford v. Revlon, Inc., 734 P.2d 580, 583 (Ariz. 1987) (suicide attempt and new facial tic); Kelly-Zurian v. Wohl Shoe Co., 27 Cal. Rptr. 2d 457, 461 (Cal. Ct. App. 1994) (heart palpitations and serious drinking problem); *see also* LINDEMANN & KADUE, *supra* note 35, at 551 & n.112 (describing varied effects of post-traumatic stress disorder that can result from sexual harassment).

The neglect or discounting of emotion — an inevitable effect when reason is the legal standard — not only mischaracterizes the experience of sexual harassment but also cheapens the measure of the plaintiff's damages. As American courts have acknowledged following the *Harris* decision, the core of hostile environment sexual harassment damages is a disturbance of inner equilibrium, a notion inherently connected to emotional turmoil.[98] The 1991 amendments to the Civil Rights Act, allowing monetary damages and expanded redress for psychological injury,[99] raised the price of discrimination in the workplace. By occluding the emotional nature of harassment, a legal standard of reason harms the prospect of relief for emotional injury that Title VII now requires.

3. Sex and Reason. — Even more than emotion, sex has been said to embody the irrational. Sexual pleasures, Aristotle wrote, are "an impediment to rational deliberation"[100] and displace reason. Proverbs, slang expressions, literary plots, and other cultural expressions indicate contemporary Western society's agreement with this ancient declaration. Many social practices (such as sex segregation in education) and belief systems (such as Augustinian philosophy) affirm it. The dissociation of sex from reason is so strong that even in *Sex and Reason*, Richard Posner pauses repeatedly to defend his project of viewing sex through the lens of rationality; while writing the book he was apparently haunted by the thought that sex and rationality cannot coexist.[101]

To be sure, sexual harassment is hardly synonymous with sexual impulse; it therefore does not follow that, because reason is deemed unrelated to sexual impulse, it is in fact equally unrelated to sexual harassment. Nonetheless, the sexual dimension of sexual harassment contributes to the problem of defining hostile environment by an objective standard. Courts and jurors must judge the nature of a work environment, but they have little to go on. "Hostile" or "abusive" is a conclusion rather than a piece of information. So is "harassment." The victim's subjective experience, according to doctrine, does not belong in this analysis. What then does the faculty of reason have to work with? Mainly sex — sex-related conduct, or conduct directed at

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98 *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (referring to conditions "[making] it more difficult to do the job" (quoting Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988)) (internal quotation marks omitted)); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994); Mart v. Dr Pepper Co., 923 F. Supp. 1380, 1384 (D. Kan. 1996); Paterson v. State, 915 P.2d 724, 728 (Idaho 1996).

99 *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1071 (1991) (codified at 42 U.S.C. § 1981a).

100 POSNER, *supra* note 59, at 1 (quoting ARISTOTLE, NICOMACHEAN ETHICS, bk. VII, at XI) (internal quotation marks omitted).

101 *See id.* at 4 (noting that his project may seem "quixotic"); *id.* at 9–10 (suggesting that one who writes scholarship about sex "is apt to be thought a little off"); *id.* at 116 (referring to "[t]he tendency to think of sex in terms of biological or psychological compulsion").

the individual because of her sex.[102] Reason must understand and explain an instance of sex.

Here the futility of reason as a standard becomes evident. Unless courts and juries are committed to a feminism that views sexual aggression as coercion and dominance — following the writings of Susan Brownmiller on rape[103] or Catharine MacKinnon on pornography[104] — the presence of sex in the plaintiff's story will tend to suggest ambiguity and mystery, beyond the ken of reason. Courts and juries may see sexual overtures as cool extortion or open hostility but also as demands that originate deterministically, in nature.[105] Unwanted and unreturned sexual attention makes some observers think of romance, beauty, and poignant courtship.[106] Crude working environments have received indulgent treatment by writers who combine a sociobiological outlook with whimsy.[107] Once cast as sex, workplace conduct can demur to the inquiries of reason.

This line of thought suggests that attempts to combine sexual behavior in the workplace with reason are likely to make the workplace more like a state of nature, with hostile or abusive conduct rendered unto Eros, and reason cast aside as irrelevant to the inquiry. At the same time, however, the opposite danger also lurks: reason may be taken too seriously, as opposed to ignored. The employer informed by reason (that is, the "reasonable person," if "reasonable" is deemed to refer to the capacity for ratiocination) may fear sexually impelled behavior because it generates risks and costs. Taking reason seriously might justify strong efforts to keep sexuality out of the workplace; the reason-driven employer might try to purge a workplace of flirtation

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[102] It is true that this phrasing conflates the possible meanings of "sex" — sex as gender and sex as sexuality. But this overlap reflects the current state of doctrine in sex discrimination and sexual harassment case law. *See generally* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 16–18 (1995) (discussing judicial confusion about the meanings of sex, gender, and sexual orientation). The idea of sex, despite the definitional inadequacy, serves the taxonomical function of bringing allegations of sexual harassment together, as a category within legal doctrine.

[103] *See* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE *passim* (1975); BROWNMILLER, *supra* note 69, at 200–01.

[104] *See* CATHARINE A. MACKINNON, *Not a Moral Issue*, *in* FEMINISM UNMODIFIED, *supra* note 1, at 146; CATHARINE A. MACKINNON, ONLY WORDS 9–11 (1993).

[105] *See* Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994) (expressing reluctance to "chill the incidence of legitimate romance" and stating that "increased proximity breeds increased volitional sexual activity"); Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976) (noting that sexual attraction is a "natural" part of work life), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

[106] *See* Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) (suggesting an analogy to Cyrano de Bergerac).

[107] *See, e.g.*, Jones v. Wesco Invs., Inc., 846 F.2d 1154, 1157 n.6 (8th Cir. 1988) (declaring that too much liability for sexual harassment would cause "either the collapse of our commercial system or the end of the human race" (quoting Brief for Appellants at 23, *Jones* (No. 87-1992)) (internal quotation marks omitted)); Lloyd R. Cohen, *Sexual Harassment and the Law*, SOCIETY, May/June 1991, at 9 (recalling nostalgically a female colleague who groped the male author at work).

and erotic energy.[108] This outcome is highly unlikely to occur,[109] but it illustrates the perils of a meaningful definition of reason — reason with teeth — as a device to interpret and regulate sexual conduct.

Despite these infirmities, reason is pertinent to the prevention and redress of sexual harassment in at least three ways. First, an actor inclined to harass ought to use reason to moderate his passions.[110] Second, a target of harassment ought to use reason in reacting: there may be a right way to respond to provocation.[111] Third, a person charged with the task of factfinding or dispute resolution ought to use reason in framing the standard to which an accused individual may be held.[112] Thus the error of current doctrine is not its celebration of reason, but rather its identification of reason as an end in itself. For purposes of sexual harassment law, reason is instead a means necessary to the larger goal of protecting and affirming individual dignity.[113]

B. The Trouble with a Reasonable Person Standard

Consider now the possibility of expunging reason from the meaning of "reasonable." The definition of the word then becomes mysterious, as trial judges have learned to their discomfiture. For generations, appellate courts have found reversible error in trial judges' attempts to explain the reasonableness standard to juries,[114] even though appellate case law itself has proved unequal to this task.[115] Accordingly, the dimensions of the reasonable person have remained vague. As far as one may construct the reasonable person from negligence law, this per-

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108 *See* Hon. Alex Kozinski, *Foreword* to LINDEMANN & KADUE, *supra* note 35, at v, ix–xi.

109 *See* Lisa Jenner, *Office Dating Policies: Is There a Workable Way?*, HR FOCUS, Nov. 1993, at 5 (reporting the reluctance of surveyed human-resource managers to "get involved" in workers' private lives); *see also* Lawrence A. Michaels & Tracy L. Thornburg, *Although Employers' Restrictions on Relationships Between Employees Can Give Rise to Claims, Some Restraints on Office Romances May Withstand Challenge*, NAT'L L.J., Apr. 1, 1996, at B5 (noting that no-dating policies may provoke lawsuits).

110 *See* ARISTOTLE, NICOMACHEAN ETHICS 81 (Martin Oswald trans., Bobbs-Merrill Co. 1962) (describing the duty to moderate one's passions).

111 *Cf.* Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 469–70 (1988) (suggesting that certain responses to provocation are not justified, even if they are excused); Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1167 (1997) (arguing that the provocation defense should be interpreted to encourage individuals "to train their passions").

112 I thank Steve Heyman for his thoughts about this subject, on which this paragraph relies.

113 *See infra* p. 483.

114 *See* Freeman v. Adams, 218 P. 600, 601, 604 (Cal. Dist. Ct. App. 1923) (reversing because "reasonable and prudent man" was described in personal terms); Louisville & N.R. Co. v. Gower, 3 S.W. 824, 827 (Tenn. 1887) (reversing judgment for the plaintiff, in part because the trial judge improperly phrased the standard to the jury as "such care *as one of you*, similarly employed, would have exercised").

115 *Cf.* Reynolds, *supra* note 47, at 418 & n.51 (describing "extreme judicial statements" resulting from attempts to define the reasonable man); Warren A. Seavey, *Negligence — Subjective or Objective?*, 41 HARV. L. REV. 1, 27 (1927) (concluding that the reasonable man cannot be fully defined by objective standards).

son is characterized by common sense and moderation — a prudent, sensible, centrist member of society, who shares its understandings.

Despite this definitional vagueness, the reasonable person is the favored device to establish the objective element[116] of hostile environment sexual harassment complaints.[117] Some virtues of the standard are evident. It is familiar from other areas of law; it purports to transcend gender, race, and other classifications that divide humanity.[118] The flaws of the standard, however, are also manifest.

1. Does the Reasonable Man Lurk Below? The Cipher of Reasonableness. — The reasonable person standard strikes many critics, not all of them feminists, as peculiarly hollow. Neither "reasonable" nor "person" gives the factfinder much content to explore. For hostile environment cases, the reasonable person standard "may be the law," as George Rutherglen put it, "but it makes sense only if it is not taken too seriously."[119]

For the purpose of resolving sexual harassment claims, the standard's most crucial omission pertains to gender. As Professor Rutherglen elaborates, an employee "is sexually harassed because she is a woman, or because he is a man, and certainly not because her or his gender is irrelevant . . . . Yet a standard framed in terms of a 'reasonable person' invites us to imagine a genderless victim of harassment."[120] In search of bland neutrality, courts and commentators who favor a reasonable person standard confound the purpose of employment discrimination law.

In positing a genderless victim of sexual harassment, the reasonable person standard pushes under the rug an embarrassing mass of evidence indicating that gender affects the way men and women perceive sexual behavior in the workplace. A reasonable person standard implicitly denies that women and men are likely to react differently to sexual invitations, innuendo, teasing, or displays in the workplace.[121] Yet empirical findings show that men are relatively likely to feel flat-

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116 *See supra* pp. 452–53.

117 One leading reasonable person case established a duty on the trier of fact to "adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances." Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986). The Supreme Court has also referred to the perspective of the reasonable person in its articulation of a standard to evaluate the hostility or abusiveness of a work environment. *See* Harris v. Forklift Sys., 510 U.S. 17, 22 (1993).

118 *See* Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,267 (1993) (stating that the reasonable person standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability), *withdrawn in* 59 Fed. Reg. 51,396 (1994).

119 George Rutherglen, *Sexual Harassment: Ideology or Law?*, 18 HARV. J.L. & PUB. POL'Y 487, 496 (1995).

120 *Id.*

121 *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202 (1989).

tered or amused, whereas women are relatively likely to feel frightened or insulted, by sex-related behavior or displays at work.[122] In particular, the reasonable woman fears rape, and this fear is so (justifiably) strong that lesser incursions remind her that she could be raped.[123] When these incursions are pervasive, her environment is a hostile one. What does the reasonable person think about rape? The standard keeps silent. It cannot tell judges or juries how much of each gender's discrete perspective is to be included in the amalgam.

Etymology and legal history are of little help in making the reasonable person more than a cipher. Despite the lack of specificity conveyed by this standard, however, it is clear that the reasonable person retains some gender: legal scholars agree that the reasonable person began life as the reasonable man and retains some of his masculine aspect.[124] In standard reference works, the reasonable man *qua* man still exists.[125] Many modern authorities prefer to speak of gender neutrality, however, and regard the reasonable man as an anachronism. "Obviously, this form of description is now outdated," declares a popular

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122 *See* DAVID M. BUSS, THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING 160 (1994); BARBARA GUTEK, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS 88, 96–97 (1985); Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 868 n.45 (1993) (citing Joann S. Lublin, *Thomas Battle Spotlights Harassment*, WALL ST. J., Oct. 9, 1991, at B1, B5). *But see* Barbara A. Gutek & Maureen O'Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. SOC. ISSUES 151, 155–56, 161 (1995) (retreating in part from Gutek's earlier work that supported the reasonable woman standard); Michael Rubenstein, *Harassment Policies Show Growing Sophistication*, EQUAL OPPORTUNITIES REV., Nov.-Dec. 1992, at 32, 33 (quoting a British survey that found agreement between men and women on whether certain behaviors constituted sexual harassment); *cf. infra* pp. 472–74 (questioning the unitary construct of "woman" to support generalizations about sexual harassment).

123 *See* BROWNMILLER, *supra* note 103, at 247–48; Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 535–36 (1993). Professor Carolyn Bratt once asked each student in her criminal law class what he or she did on a daily basis to prevent sexual assault. The male students reported nothing; the women talked about looking into the back seats of their cars before getting in, sleeping with locked windows in hot weather, carrying firearms, avoiding dark public places, and other quotidian details. *See* Lynn Hecht Schafran, *Is the Law Male?: Let Me Count the Ways*, 69 CHI.-KENT L. REV. 397, 406–07 (1993).

124 *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 22–23 (1985); Hilary Allen, *One Law for All Reasonable Persons?*, 16 INT'L J. SOC. L. 419, 422–24 (1988); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 22–23 (1988); Collins, *supra* note 57, at 317–20, 323; Estrich, *supra* note 4, at 846; Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 57–63 (1989); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 773–74; Wendy Parker, *The Reasonable Person: A Gendered Concept?*, 23 VICTORIA U. WELLINGTON L. REV. 105, 105–06, 110 (1993).

125 The *Restatement of Torts* states the negligence standard as that of the reasonable man. *See* RESTATEMENT (SECOND) OF TORTS §§ 283, 291 (1965). The current edition of *Black's Law Dictionary* provides an entry for "reasonable man" but not "reasonable woman" or "reasonable person." BLACK'S LAW DICTIONARY 1266 (6th ed. 1990).

casebook; "[t]he form used here is the reasonable, prudent person."[126] Obviously? If the history of the reasonable person reveals anything, it reveals disagreement about what the term means. Perhaps the reasonable person is inevitably a reasonable man, as Leslie Bender charges,[127] incapable of assimilating that which is not "male, white, and propertied."[128] Or perhaps the reasonable person — a doctrinal device frequently turned over to a cross section of lay citizens — is more likely to promote progress and diversity within authority than are the elites who decry it.[129] Those who despair that the reasonable person can shed its gendered origins believe that the shift from man to person is semantic, too shallow to penetrate the longstanding attitude that the reasonable person is what Susan Estrich once called "a real man."[130] Judges, who in the past read the word "person" specifically to exclude women,[131] may be vulnerable to the same biased tradition. But these conclusions are speculative; the meaning of reasonable person remains a cipher.

2. Ideologies Embedded in Reasonableness. — Although the reasonableness standard lacks clear content, it is also vulnerable to the opposite criticism: below the universalism on its surface, reasonableness contains ideologies that are particularistic and oppressive. Because these meanings of "reasonable" are covert, it is difficult to say how much danger they represent. Nevertheless, attention to these embedded biases suggests the futility of any progressive remedial standard based on what is average, shared, or centrist.

a. Pluralism. — In her important article on hostile environment sexual harassment, Nancy Ehrenreich attacks the assumption behind the reasonableness standard that sexual harassment law functions in "an egalitarian and pluralistic world."[132] According to Ehrenreich, the ideology of pluralism contains certain tenets. First, the ideal democratic society is comprised of competing subgroups, with none dominating. Second, this society denies the existence of absolute truths.

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126 JOHN W. WADE, VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 146 (9th ed. 1994).

127 *See* Bender, *supra* note 124, at 23.

128 Forell, *supra* note 124, at 770; *see also* 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION 6-34.1 (1990) (citations omitted) (stating that "ingrained white male notions of what is acceptable" define the reasonable person).

129 This suggestion extends slightly an argument made in Paul T. Hayden, *Cultural Norms as Law: Tort Law's "Reasonable Person" Standard of Care*, 15 J. AM. CULTURE 45, 50–53 (1992).

130 SUSAN ESTRICH, REAL RAPE 65 (1987).

131 *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 442, 445 (1873) (construing "person" in an Illinois attorney license statute to mean "man"); Parker, *supra* note 124, at 109 n.28 (describing one court's construction of a statute to exclude women from practicing law, even though the statute used the word "persons" rather than "men" and specifically provided that "every word importing the masculine gender only shall extend and be applied to a female as well as a male").

132 Ehrenreich, *supra* note 8, at 1230–31.

Third, the role of the state is to permit all of these groups to flourish and contribute to governance.[133]

Pluralism of this kind thwarts the reformist ambitions of Title VII and other legal remedies for sexual harassment. By emphasizing toleration and consensus, while disclaiming absolutist statements of truth, pluralism decrees in effect that the famous plaintiff Vivienne Rabidue is no more or less entitled to victory in court than Douglas Henry, the man who plagued her with sex-related insults after she took a job previously closed to women.[134] Her right to be free from harassment is mirrored by his freedom to harass. "[T]he concepts of freedom and security are relational (one group's liberty is another's injury),"[135] and reasonableness cannot explain why one set of interests outweighs another.[136]

b. Isolation and Depoliticization. — The reasonable person, until tinkerers began to modify the standard,[137] could be seen as a human being without group-related identification.[138] Although people live in a world influenced by social construction, the reasonableness standard disavows group-based sources of identity; the reasonable person is supposed to be free of distracting memories, political commitments, and group loyalties.[139] Like the Rawlsian creature who peers at the world from behind his veil of ignorance in order to make ex ante choices, the reasonable person possesses an absolutely separate and discrete self.[140]

Affiliative *homo sapiens* cannot survive without personal relationships, but group identities press harder on the consciousness of subordinated people — such that, as a general rule, white Americans give relatively little thought to their race, American Protestants tend to view their religious identity in spiritual terms rather than as an immu-

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133 *See id.* at 1188–90.

134 *See id.* at 1221–22 (citing Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986)).

135 *Id.* at 1223.

136 Although one might distinguish active from passive courses of conduct in order to conclude that Rabidue's right to be let alone is stronger than Henry's right to harass, a distinction of this kind does not indicate which set of wishes is more "reasonable" and leaves open several questions, some of which are taken up in the literature on criminal law. *See, e.g.*, Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1429–31 (1995) (discussing the philosophical conundrum of applying a "balancing-of-interests" test, a reasonableness approach, to self-defense); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 306–23 (1996) (explaining the provocation defense in terms of a reason-based, "evaluative" conception of emotion).

137 *See infra* pp. 477–80.

138 *Cf.* AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 1 (1996) (arguing that American legal traditions neglect group-based sources of identification).

139 *See* Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 436–37, 462–67 (1981).

140 *Cf.* Linda R. Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 COLUM. L. REV. 1860, 1881 (1994) (criticizing Rawls).

table marker of who they are, and heterosexual men are not much preoccupied with gender and sexual orientation. Every human being is endowed with particularistic traits, but some groups experience their particulars more consciously and intensely than others, and these groups will find dissonance in the call to be reasonable. As Guido Calabresi and others argue, this asymmetry means that the reasonableness inquiry reinforces majority dominance.[141] Implicitly it posits a norm in which men and majority groups occupy the center and others the periphery.[142]

In denying group identity and self-concepts that extend beyond the individual, the reasonableness standard is implicitly opposed to conscious political or historical postures. This resolute inattention to group-based memory is contrary to the kind of thinking that ignites sexual harassment claims. It may be surmised, for instance, that minority women are more likely than white women to choose to bring sexual harassment claims because their experience with past discrimination causes them to conclude, more quickly and certainly than would white women, that their work environment is not benign. Different histories yield different judgments of working conditions, despite the claims of universality implicit in the reasonableness standard. Lifted out of context, one incident at work may seem trivial; history and political affiliation may cast the incident in a more malevolent light.[143]

c. Assumption of Risk and Consensus. — As Catharine MacKinnon has pointed out, the reasonable person standard carries the risk that judges and others might infer that the reasonable person would accept ordinary or widespread behavior, so that "the pervasiveness of an abuse" could make that conduct "non-actionable."[144] When Vivienne

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141 *See, e.g.*, CALABRESI, *supra* note 124, at 27–32.

142 *See* Bender, *supra* note 124, at 25; Ehrenreich, *supra* note 8, at 1213.

143 For an illustration of this point, consider the recurring problem of pin-ups and nude photographs of women in the workplace. Commentators disagree about whether such displays cause or indicate a hostile environment. At the center of this disagreement is a dispute over how these images of women — objectified, flattened into two dimensions, physically exposed — relate to the women who work amidst these depictions. Perhaps the reasonable person knows and cares nothing about MacKinnonite talk of objectification and subordination; such a person might think that women at work are individuals unaffected by pictures of others. Equally plausible, the reasonable person might believe that these images function to give women in the immediate environment a message that they are nothing but flesh, to be used and despised. Although neither view is precluded by a reasonableness standard, the latter approach requires a level of overt political engagement that the standard appears to disdain.

144 MACKINNON, *supra* note 1, at 115. MacKinnon was quoted with approval in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1526 (M.D. Fla. 1991). Tort law has long recognized the dangers of inferring reasonableness from the pervasiveness of a particular behavior. In a landmark torts case, Judge Learned Hand wrote that custom alone does not determine reasonableness: an entire industry or sector could be wrong, and the custom unreasonable. *See* New England Coal & Coke Co. v. Northern Barge Corp. (The T.J. Hooper), 60 F.2d 737, 740 (2d Cir.

Rabidue entered a pornography-strewn workplace as one of a minority of female employees doing relatively high-status work, and later objected to the conditions of this workplace, she challenged an environment that probably seemed reasonable to its inhabitants. Her objections, which departed from the norm at Osceola, were correlatively unreasonable, according to the court that heard her claim.[145] Under this kind of assumption-of-risk logic, the reasonable person standard coexists comfortably with a certain amount of harassment.

Catharine MacKinnon envisages sexual harassment as business as usual in a gendered work world, such that any standard grounded in consensus or average expectations would permit harassment to flourish.[146] Her point is supported by research suggesting that both women and men tend to believe that women dress seductively at work[147] and that some women avidly seek out what other people would deem harassment.[148] A woman who wants to prosper on the job must consider the expectation that she behave in a feminine manner.[149] If women must be feminine at work, then men must be masculine, and thus women may feel compelled to project an image of sexual availability, while men expect women to project such an image.[150] In this gendered equilibrium, it is a spoilsport complainant, rather than an aggressor, who will seem unreasonable.

d. Misuse of the Reasonableness Standard. — Some proponents of the principal alternative, a reasonable woman standard, argue that reference to the reasonable person misdirects courts and jurors. Toni Lester sees a connection between the reasonable person standard and misogynous stereotyping.[151] As she points out, judicial opinions that use the reasonable person standard have blamed women for dressing provocatively, wondered why complainants took so long to complain, and disapproved of women who talk about having fantasized.[152]

1932) ("Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.").

145 *See* Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 433 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986). The trial judge wrote that ubiquitous displays of pornography did not create an offensive work environment under Title VII because "modern America features open displays of written and pictorial erotica. . . . Living in this milieu, the average American should not be *legally* offended by sexually explicit posters." *Id.*

146 *See* MACKINNON, *supra* note 1, at 115.

147 *See* GUTEK, *supra* note 122, at 96–99.

148 Almost no women aim this belief at themselves. *See id.* at 99.

149 *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 235–37 (1989) (discussing the assertion that the plaintiff was denied a promotion for not conforming to a feminine stereotype); *cf.* Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1996 (1995) ("Working women perceived to be too masculine . . . may be deemed bad mothers.").

150 *See* MACKINNON, *supra* note 4, at 18, 22–23.

151 *See* Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law — Will It Really Make a Difference?*, 26 IND. L. REV. 227, 232–42 (1993).

152 *See id.* at 237.

Whether Professor Lester is right to lay these sins at the feet of the reasonable person standard may be debated; although female plaintiffs have arguably had more success using the reasonable woman standard,[153] the "reasonable woman" hardly guarantees victory.[154] But one might agree that the vacuity of the term "reasonable person" could cause a judicial mind to wander and become distracted by hemlines or testimony about raunchy office talk. One student commentator makes a similar point by arguing in favor of a reasonable woman standard despite endorsing an objective standard; he maintains that the reasonable person is so amorphous that judges and jurors cannot form any image when the standard is used.[155] Whether one thinks that universalism should be exalted or despised, the reasonableness standard cannot deliver it.

II. DOCTRINAL REVISION: THE REASONABLENESS QUANDARY

This Part of the Article advances two propositions. First, by reviewing cases and academic literature, it underscores the point made by Justice Scalia in his *Harris* concurrence: no satisfactory standard for hostile environment sexual harassment now exists.[156] Judges and scholars have proved that they can neither frame an appropriate objective standard, nor argue convincingly that the objective standard ought to be dropped. These circumstances suggest doctrinal trouble and the need for an alternative. Second, this Part urges the reader to draw a pointed inference. As discussed above, "reasonable person" provides neither gender neutrality nor meaningful content. The further failure of "reasonable woman" to improve on "reasonable person," the futility of continuing to tinker ad absurdum, and the perils of abandoning objectivity add up to a strong condemnation of any standard based on reasonableness. The inference urged is that the adjective, rather than the noun, needs replacement.

A. Innovation: The Reasonable Woman

The idea of a reasonable woman in the law has long provoked titters. Recall Alan Herbert's famous little joke:

> The view that there exists a class of beings, illogical, impulsive, careless, irresponsible, extravagant, prejudiced, and vain, free for the most part from those worthy and repellent excellences which distinguish the Reasonable Man, and devoted to the irrational arts of pleasure and attraction, is one which should be as welcome . . . in our Courts as it is in our drawing-

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153 *See* Childers, *supra* note 122, at 894 n.133.

154 *See id.* at 901 n.153.

155 *See* David L. Pinkston, Comment, *Redefining Objectivity: The Case for a Reasonable Woman Standard in Hostile Environment Claims*, 1993 BYU L. REV. 363, 374–75.

156 *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (1993) (Scalia, J., concurring).

> rooms. I find therefore that at Common Law a reasonable woman does not exist.[157]

Now Sir Alan is gone, and the reasonable woman standard has been approved in a number of federal courts,[158] as well as state courts called on to interpret analogues to Title VII.[159] According to *Ellison v. Brady*,[160] the objective criterion for a claim of hostile environment sexual harassment is satisfied if the plaintiff can show that a reasonable woman would have found the challenged workplace environment to be hostile or abusive.[161] The standard continues to gain influence but has also provoked resistance.[162]

1. Different Strokes, or The Charge of False Essentialism. – Consider this exchange:

> PLAYBOY: Some courts have held that sexual harassment charges should be viewed from the standard of a "reasonable" woman. Do you agree?
>
> [NADINE] STROSSEN: There's no such thing as a reasonable-woman standard. A couple of weeks ago, I did a panel discussion on *Court TV* with a female gender discrimination lawyer. We talked about the case known as *Ellison vs. Brady*, involving unrequited love between IRS employees: A male employee asked a female employee out for drinks and dinner. When she didn't respond, he pursued her with letters. The other female lawyer on the panel described her own reaction as: "This man wrote notes that were so threatening and so intimidating that I know if I had gotten them, I'd have been really frightened." I said, "I can't believe it. I thought those notes were so pathetic. I felt sorry for the man." And Arthur Miller, who was the moderator, said: "Well, which one of you is the reasonable woman?"[163]

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157 A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 20 (1st Am. ed. 1930).

158 *See, e.g.*, Burns v. McGregor Elec. Indus. Inc., 989 F.2d 959, 965 (8th Cir. 1993); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283, 294 (E.D. Pa. 1991).

159 *See* Bougie v. Sibley Manor, Inc., 504 N.W.2d 493, 498 (Minn. Ct. App. 1993); Wood v. Emerson Elec. Co., No. 01-A-01-9310-CH00467, 1994 WL 716270, at *15–16 (Tenn. Ct. App. Aug. 12, 1994).

160 924 F.2d 872 (9th Cir. 1991). *Ellison* is considered the leading case. How *Ellison* achieved this stature is not quite clear. It was not the first federal court opinion to adopt the reasonable woman standard in a reported hostile environment sexual harassment case; that honor probably goes to *Yates*, *see* 819 F.2d at 637. Professor Forell, however, describes *Ellison* as "the first case to explicitly adopt a feminist version" of the standard. Forell, *supra* note 124, at 797.

161 *See Ellison*, 924 F.2d at 878–79. A student commentator elaborates that the reasonable woman has "reasonable expectations concerning what is appropriate and inappropriate, what is fair and unfair. . . . [She assesses] that which is fair, proper, just, and suitable under the circumstances, while taking into consideration a backdrop of female life experiences." Bonnie B. Westman, Note, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795, 819 (1992).

162 *See, e.g.*, Todd B. Adams, *Universalism and Sexual Harassment*, 44 OKLA. L. REV. 683, 685–89 (1991).

163 Dorothy Atcheson, *Defending Pornography: Face to Face with the President of the ACLU*, PLAYBOY, Feb. 1995, at 37, 39.

In a more scholarly medium, Angela Harris argues that postulates about the nature of "woman" are often tainted with the bias of the writer.[164] Her critique of the essentialism and racism implicit in discussions of the nature of "woman" also applies to attempts to delineate the "reasonable woman": those who envision the "reasonable woman" may actually have a white woman in mind. Minority women's experiences are thus ignored. This point inverts George Rutherglen's criticism of the reasonable person standard.[165] Whereas the reasonable person standard seems to convey specific information about objective criteria but is actually, according to Rutherglen, vague to the point of inanity, the reasonable woman standard looks general but is specific. An examination of the hidden normative premises of the reasonable woman standard might reveal this profile: white, heterosexual, upper-income, something of a moderate or liberal feminist, untroubled by intense religious feeling, and a little prissier than the reasonable person in reacting to office shenanigans. In its hidden specificity, the reasonable woman standard elevates one type above others such that she requires no modifiers, whereas departures from this norm might include the "reasonable woman of color," "reasonable lesbian," or "reasonable blue-collar woman." A woman who does not fit in the confines of the profile thus may not find a place in the unmodified reasonable woman standard.

Feminist writers have written extensively about the dangers of what they call essentialism.[166] While commending attention to gender and deeming it long overdue within the law, these scholars have urged courts and scholars not to construct a unitary, polarized "woman" that would hamper the movements and variations found within the female population.[167] A gendered variation on the reasonable person implies a confining standard. As Kathryn Abrams elaborates, one tenet of feminism — that women have been and remain oppressed — has begotten an entire generation of beliefs about female agency that impede progress and misdescribe the life experiences of many women.[168] More, perhaps, than the reasonable man or reasonable person standard, the reasonable woman standard contains the manacles of gender-

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164 *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 *passim* (1990).

165 *See supra* p. 465.

166 *See, e.g.*, Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43 (1994); Harris, *supra* note 164; *see also* Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 226–27 & n.200 (1995) (describing evidence of class and race bias in attempts to generalize about women).

167 *See* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 566 (1992) ("There is no single 'reasonable woman.'").

168 *See* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 337 (1995).

oppression, even though it seeks to reduce the effects of this oppression.

2. Holding Men to a Female Standard. — The reasonable woman standard requires the factfinder to put himself, or herself, in the place of the complainant. He, or she, must try to suppose how a reasonable woman would react to a set of workplace conditions. As these awkward grammatical locutions suggest, the exercise may be difficult.

A male juror, judge, or labor arbitrator cannot easily apply the reasonable woman standard. Although the standard implies that men and women are immutably different and perhaps mutually uncomprehending — and also that this gap is especially wide and deep when hostile environment sexual harassment is alleged — this factfinder is charged with the task of somehow transcending these differences.[169] If he uses women he knows well as reference points ("How would my wife feel?"), he veers into subjectivity and distinctions based on race and class. If he avoids this kind of specific thinking, then he must resort to speculation, or some self-framed variation on the reasonable man or reasonable person standard, or perhaps some unauthorized research on the nature of women — all of which compel him to disobey jury instructions or otherwise fail to apply the law. Of course, this dilemma presumes a sympathetic attitude on the part of this well-intentioned factfinder. He may feel otherwise. As Todd Adams wants to know, why should courts privilege the beliefs of a reasonable woman over those of a reasonable man?[170] One could certainly make a case for this sort of affirmative action, but until its proponents explain it, the reasonable woman standard remains anomalous and perhaps unjust.

Institutional competence is another concern. From the snickers that accompanied the inclusion of "sex" in the Civil Rights Act of 1964 — a few racist congressmen thought the idea of making sex discrimination illegal was so ludicrous that this one word would kill the bill[171] — through the behaviors of various senators during the Clarence Thomas confirmation process, and into the present time, legal institu-

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169 *See* Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 636 (1993).

170 *See* Adams, *supra* note 162, at 687. Nancy Ehrenreich makes a similar point in her discussion of the *Rabidue* case: if Douglas Henry called Vivienne Rabidue filthy names at work, it is not possible to know whose freedom should prevail (Henry's to call names or Rabidue's to be free of name-calling) without resort to some normative premise. *See* Ehrenreich, *supra* note 8, at 1221–22.

171 *See* Norbert A. Schlei, *Foreword* to BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW at xi–xii (2d ed. 1983). *The New Republic* went on record calling the amendment a "mischievous joke," *Sex and Nonsense*, NEW REPUBLIC, Sept. 4, 1965, at 10, and the contemporary *Congressional Record* is consistent with this interpretation, *see* 110 CONG. REC. 2577–84 (1964) (statement of Rep. Smith, a sponsor) ("Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their 'right' to a nice husband and family?").

tions have not proved their ability to respond well to sexual harassment. They "just don't get it," went the feminist cliché circa 1991:[172] whether the harm is rape, incest, inadequate research about treatments for disease, lack of access to abortion, violent or degrading pornography, unequal pay, unequal education, or any other gender-related injustice, the United States legal system is more slothful and complacent in its responses to harms than many feminists would like. Given a record of failures, some find it hard to summon any optimism for a reasonable woman standard that could prevail in a hostile, or at least uncomprehending, environment.

3. Condescension, Stereotyping, and the Pedestal. — Some writers are offended by the reasonable woman standard, finding it patronizing to women.[173] To one critic, the standard divides humanity into persons and women.[174] It also seems to contemplate a fragile, ultrasensitive victim whose male counterpart is incapable of self-control.[175] The standard encourages each plaintiff to tell a familiar story of fear, degradation, and failure at self-help. She needs rescue in the form of a label that credits her with sensitivity and defenselessness.[176] The reasonable woman standard also reminds some writers of prior misplaced efforts to shield women from a harsh world by restricting their freedom.[177] One commentator argues that while the reasonable person

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172 *See* Anthony Lewis, *Abroad at Home: Wages of Cynicism*, N.Y. TIMES, Oct. 11, 1991, at A31 (faulting members of the Senate Judiciary Committee for insensitivity to "women's experience and feelings").

173 Women in particular tend to be skeptical of the reasonable woman standard, to offer alternatives that refer to "context" and "perspective," or to praise the reasonable woman in guarded terms. Some women can scarcely contain their contempt for the idea. *See, e.g.*, Tama Starr, *A Reasonable Woman*, REASON, Feb. 1994, at 48, 49 ("[I]s the menstrual cycle itself the signifier of female reasonableness? Do our courts and legislators intend that businesses be run on a lunar cycle, with preordained times for mass edema, irritability, and ovulation?"); Camille Paglia, Remarks on *Crossfire* (CNN television broadcast, Nov. 26, 1993), *available in* LEXIS, News Library, Script File (stating that "women must learn how to play hardball" rather than expect the protection of a reasonable woman standard). One well-respected conservative judge, Edith Jones, has disapproved of the standard, ruling that harassment must rise to the level of "destroying [women's] equal opportunity in the workplace" to create a hostile environment claim. DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995) ("Now that most American women are working outside the home, in a broad range of occupations and with ever-increasing responsibility, it seems perverse to claim that they need the protection of a preferential standard."). In an opinion written by another distinguished woman judge, the New Jersey Supreme Court ventured a compromise between the reasonable person and reasonable woman standards. *See* Lehmann v. Toys 'R' Us, 626 A.2d 445, 453 (N.J. 1993).

174 *See* Finley, *supra* note 124, at 64.

175 *See* Adams, *supra* note 162, at 686.

176 *See* Naomi Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1416 (1992).

177 *Cf.* Kathleen A. Kenealy, *Sexual Harassment and the Reasonable Woman Standard*, 8 LAB. LAW. 203, 204 (1992) (warning that the reasonable woman standard could become as controversial as another altruistically intended reform, race-based affirmative action). One example of these reform efforts is the protective labor legislation of the early twentieth century that, like the reasonable woman standard, celebrated female vulnerability. By excluding women from hazardous

standard pays serious attention to a complaint, the reasonable woman standard subtly exonerates the harasser.[178] Instead of having done wrong, this man merely failed to see the world through women's eyes. His lapse is trivial, and accordingly sexual harassment is trivial. The reasonable woman standard implies that "while sexual harassment is not a serious issue, a remedy will be provided to women because they find it so upsetting."[179]

The reasonable woman standard implicitly carries a stereotype about men, not only as offenders but also as victims of sexual harassment. If the reasonable woman is more fragile and sensitive than the reasonable person, then as a corollary the reasonable man (which might be the standard when a man complains of sexual harassment[180]) is less so. Faced with workplace harassment, the reasonable man may well be expected to take it and like it. This point must be considered advisedly. I have argued in passing elsewhere that sexual harassment doctrine tends to overvalue men's dignitary interests,[181] and a slight bias against some male complainants that the reasonable woman standard might occasion is not the strongest argument against the standard. But it is important to bear in mind that men too are harassed at work, and these victims are ill served by a standard that reinforces

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jobs, limiting their work hours, excusing them from overtime, or keeping their reproductive organs away from identified toxins, protective labor legislation removed some harshness from women's work lives. But by remaining eloquently silent about other dangers that harm women where they work — poisonous cleaning agents, household drudgery, sexual assaults, domestic violence — such legislation revealed its lack of real interest in protecting women from harm. Unlike other law reforms that are sensitive to gender difference, such as the elimination of the "earnest resistance" requirement from rape, *see* Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 37 (1992), the reasonable woman standard does little to advance women's autonomy.

178 *See* Kenealy, *supra* note 177, at 204.

179 *Id.* at 208.

180 *See* Ellison v. Brady, 924 F.2d 872, 879 n.11 (9th Cir. 1991). *But see* Forell, *supra* note 124, at 799 n.148 (arguing that even for male complainants the better standard could be the reasonable woman).

181 *See* Bernstein, *supra* note 13, at 1279. This misplaced emphasis is not confined to law. Consider the two-millennial literary tradition bracketed by the story of Joseph and Potiphar's wife at one end, *see Genesis* 39:7–18, and the novel *Disclosure* at the other, *see* MICHAEL CRICHTON, DISCLOSURE (1994). Both works describe a predatory woman who importunes a man for sex, is rejected, and then falsely accuses him. The Potiphar's wife story dates back to ancient Egypt and is probably much older than *Genesis*, whose earliest portions are more than 2000 years old, *see* HAROLD BLOOM, THE BOOK OF J 7–8 (1990); the false-accusation plot line continues through David Mamet's *Oleanna* and other works, *see* Colleen O'Connor, *Looking at Gender Bias*, DALLAS MORNING NEWS, Dec. 16, 1994, at 1C (discussing *Disclosure* and *Oleanna* and pointing out that "[f]or the past five years, sexual harassment claims filed by men with the federal Equal Employment Opportunity Commission have made up less than 10 percent of the total charges filed"). *Disclosure* is by far the best-selling fictional treatment of sexual harassment. *See* Maria L. Ontiveros, *Fictionalizing Harassment — Disclosing the Truth*, 93 MICH. L. REV. 1373, 1373 n.3 (1995). False accusations of harassment and rape that hurt men, in short, are more prominent Western cultural tropes than are real harassment and rape.

old, rigid notions of masculinity.[182] Stereotypes chafe those who do not fit easily into their confines.[183] The two stereotypes promoted by the reasonable woman standard — a weakling and a brute — do extra harm: they are socially regressive and exaggerate the differences between the genders.

4. The Subjectivity Slope. — That the reasonable woman standard is a step down the subjectivity slope does not, in itself, make the standard valueless. But the move toward subjectivity should be cause for concern. As one student commentator queries, when does one stop adding identifying details to the reasonable person?[184] It may be arbitrary to stop at gender if race, national origin, sexual orientation, marital status, generational cohort, or religious belief correlates with perceptions of a working environment.[185] The list of personal characteristics could continue. A standard that purports to be objective becomes confusing when it is flavored with subjectivity. This confusion is aggravated by the problem that in sexual harassment claims the factfinder must hold the defendant to the standard of a plaintiff's perspective. Subjectivity, in sum, adds new complications to a standard already controversial and difficult to use. The next section follows the standard further down the slope.

B. Tinkering: The Reasonable [Insert Noun]

Judicial efforts to improve on the reasonable person standard include such constructs as the reasonable person of the same gender as the victim,[186] the reasonable person of the same gender and race or color as the plaintiff,[187] the reasonable person with the defining traits of the accuser,[188] and the reasonable target.[189] Some courts have used, and various academics and commentators have advocated, the reasonable victim standard;[190] a "contextualized reasonable victim stan-

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182 *Cf. Ellison*, 924 F.2d at 884 (Stephens, J., dissenting) (pointing out that women "are not the only targets" of sexual harassment and that a court should use "terminology that will meet the needs of all who seek recourse under . . . Title VII").

183 *Cf.* Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 30 (1995) (noting that the author, a man, will "sometimes claim inclusion in the lesbian category to poke at the sex/gender essentialisms that rigidly and absurdly confine us all").

184 *See* Tracy L. Treger, Comment, *The Reasonable Woman? Unreasonable!!!* Ellison v. Brady, 14 WHITTIER L. REV. 675, 683 (1993).

185 *Cf. id.* (arguing that if the reasonable woman standard is correct for sexual harassment, then the reasonable person standard in torts should logically be replaced by standards such as "reasonable blind person" or "reasonable elderly person"); Orlando Patterson, *Race, Gender and Liberal Fallacies*, N.Y. TIMES, Oct. 20, 1991, at §§ 4, 15 (suggesting that what may look like sexual harassment to white observers may be a "down-home style of courting" to African-Americans).

186 *See* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1993).

187 *See* Stingley v. Arizona, 796 F. Supp. 424, 428 (D. Ariz. 1992).

188 *See* Nichols v. Frank, 42 F.3d 503, 511–12 (9th Cir. 1994).

189 *See* Ellison v. Brady, 924 F.2d 872, 884 (9th Cir. 1991) (Stephens, J., dissenting).

190 *See Ellison*, 924 F.2d at 877–79.

dard";[191] a "flexible reasonable person standard" that would take into account sexual preference, sex, race, and class;[192] and a pluralistic array whereby plaintiffs would "have the ability to claim that a particular perspective fits the circumstances of the case."[193] Although scholars should, of course, argue for any rule they like, judicial tinkering with the reasonable person standard carries costs to litigants as well as to individuals in the workplace who seek guidance from the law.

As noted above, modifying the reasonable person standard to accommodate the plaintiff's context slides down the slope of subjectivity. Hostile environment sexual harassment begins to mean something like an environment in which a single aggrieved employee did not prosper. Even more than the reasonable woman standard, the tinkered-with reasonable person standard scoffs at a plaintiff's wish to have her experience judged by a universalistic measure.[194] Many criticisms of the reasonable woman standard apply generally to standards proposed by the tinkerers; to these arguments one must add the costs of mixing even more subjectivity with objective standards.

Reworking the reasonable person standard also diminishes the benefits of uniformity. These benefits are significant: some evidence suggests that practicing lawyers favor uniformity rather than any one standard.[195] If all tinkerers could get together and agree on a uniform alternative to the reasonable person, they could produce an effective substitute. Instead they refine old paraphrases, now and then taking race or group membership into account, sometimes remembering and sometimes forgetting that male victims exist, and so forth, thereby generating confusion.

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[191] Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 154 (1994).

[192] Forell, *supra* note 124, at 811 n.198 (attributing this view to Professor Jean Love).

[193] Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 140 (1992). Although Professor Chamallas is skeptical of the idea of objectivity, her prescription falls within the objectivity tradition in that she does not favor a purely subjective standard. *See supra* pp. 464–71.

[194] In her critique of standards that replace the reasonable person, Kathleen Kenealy mentions *Vance v. Southern Bell Telephone*, 863 F.2d 1503 (11th Cir. 1989), in which co-workers of the African-American plaintiff hung a noose over her work station. Kenealy suggests that a "reasonable African-American standard," if used in *Vance*, would have been not only unnecessary but insulting. Kenealy, *supra* note 177, at 208 & n.26; *see also* Garcia v. Andrews, 867 S.W.2d 409, 412 (Tex. Ct. App. 1993) (rejecting the reasonable woman standard in favor of "even-handed disposition of all claims without regard to whether the plaintiff is a woman or a man, is young or old, or is a member of any one of numerous and varied sub-groups in our society").

[195] *See* Forell, *supra* note 124, at 815. When Caroline Forell polled eleven practitioners in Oregon — of whom four represented mostly plaintiffs, six represented mostly employers, and one represented both sides — asking them to name the standard they preferred, the reasonable woman commanded a clear majority, even though the lawyers were free to suggest some contextualized alternative to the reasonable person. Professor Forell surmises that living under the Ninth Circuit's *Ellison* rule led these lawyers to adjust to this legal novelty. *See id.*

More confusion emerges on closer study of the tinkerers' work product. Some authors acknowledge the ambiguity of their proposed formulations. For example, one student commentator favoring a reasonable person standard coupled with jury instructions that "reflect the female perspective,"[196] struggles mightily to distinguish this approach from the reasonable woman standard, but by the end of the piece concedes the common practical difficulties of the two standards.[197] Similarly, Martha Chamallas, who proposes that the reasonable woman standard be read to mean the perspective of progressive women who have feminist inclinations, also acknowledges the ambiguity of her formulations.[198] Other revisionists seem less careful about misinterpretation and confusion, as is evident by their use of "reasonable woman" as interchangeable with "reasonable victim."[199]

Tinkering seems to have encouraged a perverse mini-revival of the reasonable person standard. The Supreme Court hinted in *Harris* that it prefers the reasonable person to the reasonable woman standard.[200] Similarly, when its principal hostile environment case was pending, the Michigan Supreme Court received amicus briefs that argued not only for the reasonable woman but also for purely subjective approaches; the court ultimately rejected a gender-specific standard for a reasonable person standard.[201] Other cases decided after *Harris* and *Ellison* have reaffirmed the reasonable person standard.[202] Occasionally, judges have written that under either a reasonable person or reasonable woman standard their decision must be the same, revealing some

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196 Robert Unikel, Comment, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326, 372 (1992).

197 *See id.* at 373 n.295.

198 *See* Chamallas, *supra* note 193, at 135–37.

199 *See* Ellison v. Brady, 924 F.2d 872, 877–80 (9th Cir. 1991); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984); Sally A. Piefer, Comment, *Sexual Harassment from the Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard*, 77 MARQ. L. REV. 85, 99 (1993) (equating "reasonable woman" with "victim's perspective"); *see also* Adams, *supra* note 162, at 683 (stating that the reasonable victim standard "effectively divides the world into reasonable men and reasonable women").

200 In describing the objective referent in sexual harassment, the *Harris* Court referred to the reasonable person. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993). *See generally* Liesa L. Bernardin, Note, *Does the Reasonable Woman Exist and Does She Have Any Place in Hostile Environment Sexual Harassment Claims Under Title VII After* Harris, 46 FLA. L. REV. 291, 299–301 (1994) (explaining that the *Harris* Court chose the reasonable person standard over the district court's reasonable woman standard).

201 *See* Radtke v. Everett, 501 N.W.2d 155, 158 (Mich. 1993).

202 *See, e.g.*, Watkins v. Bowden, 105 F.3d 1344, 1356 (11th Cir. 1997) (holding that a reasonable person jury instruction was proper); Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996) (holding that a reasonable person instruction was not reversible error); *see also* Fowler v. Kootenai County, 918 P.2d 1185, 1189 (Idaho 1996) (favoring the reasonable person over the reasonable woman).

frustration or weariness with the entire endeavor of tinkering.[203] To some commentators, the next step is obvious. Below I examine their claim that the objective criterion of hostile environment sexual harassment must be jettisoned.

C. *Despair: The Subjective Alternative*

Making a statement along the lines of "I didn't like my working environment; I found it hostile" cannot, without an additional objective referent, take a plaintiff to the jury in a Title VII or dignitary-tort action. Although judges have shown their receptiveness to new formulations of the objective criterion in hostile environment sexual harassment claims, to date no court has accepted the argument that the objective criterion should be dropped altogether. Thus, the argument appears only in litigants' briefs and law review articles.[204] The argument reflects a longstanding feminist mistrust of objectivity:[205] academic feminism and postmodernism doubt that anything, including a hostile environment, can exist in some unoccluded, value-free, neutral state.[206] Objectivity is a "myth,"[207] and, accordingly, all criteria relating to reasonableness for sexual harassment actions must be dropped.

Although she ultimately opposes such a standard, Caroline Forell points out that a purely subjective standard has several virtues. It avoids stereotyping, essentialism, and majoritarian universalism;[208] it also eliminates the burdensome and perhaps redundant demand that the plaintiff prove both that she did not (subjectively) welcome the challenged conduct and that the challenged conduct was (objectively)

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[203] *See* King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994); Saxton v. AT&T Co., 10 F.3d 526, 534 n.13 (7th Cir. 1993); Marquart v. McDonnell Douglas Corp., 859 F. Supp. 366, 367 n.2 (E.D. Mo. 1994), *aff'd without opinion*, 56 F.3d 69 (8th Cir. 1995); French v. Jadon, Inc., 911 P.2d 20, 28 n.10 (Alaska 1996). Some social science evidence exists to justify this view. *See* Richard L. Wiener, Barbara A. Watts, Kristen H. Goldkamp & Charles Gasper, *Social Analytic Investigation of Hostile Work Environments: A Test of the Reasonable Woman Standard*, 19 LAW & HUM. BEHAV. 263, 276 (1995) (describing a controlled study that found virtually no difference in result between the reasonable person and reasonable woman approaches).

[204] *See, e.g.*, Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, 16 VT. L. REV. 1005, 1005–06 (1992); Brief of the Women's Legal Defense Fund, The National Women's Law Center as Amici Curiae in Support of Petitioner, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (No. 92-1168), *available in* LEXIS, Genfed Library, Briefs File (urging abandonment of all "reasonableness" standards for hostile environment sexual harassment).

[205] *See* SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES 157–59 (1991) (discussing the feminist belief that norms of objectivity support existing power structures). *See generally* Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994) (summarizing feminist perspectives on objectivity).

[206] *See* Nancy Fraser & Linda J. Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism*, *in* FEMINISM/POSTMODERNISM 19 (Linda J. Nicholson ed., 1990).

[207] *See* Blackwood, *supra* note 204, at 1024.

[208] *See* Forell, *supra* note 124, at 801.

Justice Scalia,[218] who is not known for his devotion to feminism or postmodernism. Even if the idea of objectivity were not problematic, moreover, attempts to express it through an objective standard for hostile environment sexual harassment have failed.

Nevertheless, a purely subjective standard cannot fit within important traditions: the United States legal system has always insisted that in order for conduct to be condemned by the law, it must violate shared principles. A purely subjective standard for hostile environment sexual harassment permits a litigant to claim a violation of the law based primarily, if not entirely, on her assertion that she deems herself injured. To be sure, many observers believe that current sexual harassment doctrine already inclines too far in this direction.[219] But even the most expansive variations on the reasonable person standard do not abandon the objective referent — some norm that goes beyond a plaintiff's special pleading.

At a pragmatic level, the subjective approach would do mischief to the efforts of activists who seek equality and fair treatment in the workplace. It would expose sexual harassment law to a level of ridicule only hinted at by the jeering that followed the formulation of reasonable woman approaches.[220] Journalists would likely permit a caricature — the idiosyncratic, hypersensitive, vindictive straw-woman — to grow to grotesque proportions in the media. Class actions for hostile environment harassment would become much harder to bring.[221] Juries would be cast adrift.[222] Workers of empathy and good faith, unmoored from any reference to objectivity, would worry about being held accountable for peculiar reactions among their colleagues.[223] Although the jettisoning of an objective standard derives from a well-founded skepticism, it throws away too much.

III. THE RESPECTFUL PERSON

The survey of how reasonableness standards function in sexual harassment doctrine, undertaken above in Parts I and II of this Article, has praised as well as criticized "reason" and "reasonableness." Although these terms do not fit all the needs of sexual harassment theory or doctrine, they are valuable. "Reason" stands for much of what makes human beings unique and important. "Reasonable," although

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218 *See supra* pp. 448–49.

219 *See* Starr, *supra* note 173, at 48; Adams, *supra* note 162, at 685–87.

220 *See supra* note 173 and accompanying text.

221 *See* Forell, *supra* note 124, at 801–02.

222 *Cf. Harris*, 510 U.S. at 24 (Scalia, J., concurring) (suggesting that the *Harris* standard leaves juries unable to apply the law).

223 *See* Forell, *supra* note 124, at 803; *see also* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (expressing concern about "the rare hyper-sensitive employee" who could render the entire place of employment vulnerable to idiosyncratic claims of harassment).

hostile or abusive.[209] As another feminist argues in advocating a subjectivist revision of negligence, subjectivity is congruent with any doctrine of compensation (which necessarily takes account of the harm suffered by the victim), whereas objective standards comport more with the criminal law.[210]

Of the commentators wanting to dispense with the objective standard in hostile environment sexual harassment, Eileen Blackwood goes furthest, arguing forthrightly for "subjectivity."[211] According to Blackwood, a plaintiff should reach the jury on the barest prima facie case: sex-related behavior in the workplace, and an aggrieved worker who has indicated to her employer that this behavior is unwelcome.[212] Less starkly, Jane Dolkart advocates what she calls an "individualized test," which she describes as a renamed equivalent to a subjective approach.[213]

One of the most influential writings on the subject offers a variation on the subjective standard that would be achieved through a shift in the burden of proof.[214] Kathryn Abrams proposes that the plaintiff be required to show that sex-related behavior occurred in the workplace, and that this behavior affected her working environment. Upon such a showing, the burden would shift to the employer to show that the plaintiff's reaction was idiosyncratic or unreasonable.[215] Professor Abrams thus preserves the analytic distinction between subjective and objective criteria but establishes a rebuttable presumption that subjective and objective approaches will yield the same conclusion about what happened at a worksite.[216]

These writings deserve serious reception. Doubts about the relevance of objective reasonableness in hostile environment sexual harassment are persuasive. There is even evidence that as hard-headed a feminist as Justice Ginsburg shares these doubts[217] with her colleague

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209 *See id.*; *see also* Estrich, *supra* note 4, at 833 (arguing that requiring both the subjective and objective showing is unfair to plaintiffs).

210 *See* Robyn Martin, *A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury*, 23 ANGLO-AM. L. REV. 334, 354–55 (1994).

211 *See* Blackwood, *supra* note 204, at 1006.

212 *See id.* at 1025 ("If, after receiving notice that sexual behavior is unwelcome, an employer fails to address her concerns, the woman does and should have a claim against her employer. It does not really matter whether her concerns are reasonable or not. The *subjective* effect upon her is the key consideration.").

213 Dolkart, *supra* note 191, at 166 n.47.

214 *See* Abrams, *supra* note 121, at 1209–15.

215 *See id.* at 1210–11.

216 *See id.* at 1209–10, 1214.

217 Justice Ginsburg suggested that conditions in a work environment violate Title VII when "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed" — a test quite distinct from reasonableness — notwithstanding Ginsburg's acceptance elsewhere of reasonable person language. Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

more vague, contains rich and useful connotations. A respectful person standard, therefore, ought to preserve the benefits that both words offer.

To understand the link between reason and respect, one may begin with the work of Immanuel Kant, which contends that entitlement to respect originates in human reason. The capacity to be rational, according to Kant, sets human beings apart from other living creatures.[224] This trait allows human beings to escape brute causality; persons overcome the straits of nature through their thinking and choices.[225] Aided by reason, human beings can favor one course of action and disdain an alternative, and thereby express their moral agency. Reason also gives persons a way of experiencing the past and the future: with the help of reason the past becomes intelligible, a source of perfecting oneself, and the basis of plans for one's life. Because of these characteristics — all of them variations on and outgrowths of reason — human beings, according to Kant, possess intrinsic value and are entitled to respect.[226]

To accept a respectful person standard, one need not endorse all of this valorization of reason, but the association between reason and respect is useful in the construction of such a legal standard. Kantian ethics, widely (although not universally) esteemed for their breadth and compelling clarity,[227] comport with the worldviews of many persons — indeed, many religions and societies[228] — and suggest a consensus upon which lawmaking may build. Moreover, the connection between reason and respect indicates that a respectful person standard for hostile environment sexual harassment does not depart significantly from existing doctrine. The Kantian framework also provides guidance about the particulars of a respectful person standard.

A. Entitlement to Respect: Toward a Conservative Standard

1. Recognition Respect. — Of the many meanings associated with the word "respect," the most pertinent to sexual harassment is what

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[224] *See* IMMANUEL KANT, *Idea for a Universal History with Cosmopolitan Intent*, *in* THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS 116, 118–19 (Carl J. Friedrich ed., 1949).

[225] *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 77 (H.J. Paton trans., 2d ed. 1953).

[226] *See* IMMANUEL KANT, THE DOCTRINE OF VIRTUE 99 (Mary J. Gregor trans., 1964). Locke similarly linked reason and respect by arguing that the obligation not to harm another is owed because of other persons' capacity to reason, and that human beings learn and accept this duty via their own faculty of reason. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 148–51 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[227] *See* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 12–13 (1994) (summarizing the reception of Kant's ethical philosophy).

[228] *Cf.* H.T.D. ROST, THE GOLDEN RULE: A UNIVERSAL ETHIC 8 (1986) (describing worldwide acceptance of analogies to Kant's categorical imperative).

Stephen Darwall calls *recognition* respect.[229] Recognition respect consists of the acknowledgment that another person is a free, separate, unique, and independent human being. Dictionary definitions of respect as a noun in this recognition sense include "an act of noticing with attention; the giving of attention to; consideration."[230] As a verb, respect in its recognition sense means "to consider, deem or heed" something.[231] Recognition respect looks at the object with the intent of determining how to act vis-à-vis that object.[232] No admiration is necessarily rendered.[233]

The competing meaning, *appraisal* respect, is briefly noted for purposes of contrast: appraisal respect is "high or special regard: deferential regard as from a servant to his master: esteem"; or "the quality or state of being esteemed."[234] As a verb, to respect in the appraisal sense is "to treat or regard with deference, esteem, or honour."[235] Appraisal respect, unlike recognition respect, considers the question of excellence. When a professor respects her colleague because he has written the best book in his field, she renders appraisal respect, grounded in a comparison or a scale of merit.

As Darwall argues, Kantian respect for persons *qua* persons falls within the category of recognition respect.[236] Appraisal respect, rendered for excellence, is not owed to all persons,[237] whereas "to have recognition respect for persons is to give proper weight to the fact that they are persons"[238] — a formulation in the tradition of Kant. It is

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229 *See* Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 38 (1977). A parallel philosophical literature on "recognition," derived from the work of Hegel and others, emphasizes the rights and duties that are identified by the acknowledgment that persons are free and equal. *See* ROBERT R. WILLIAMS, RECOGNITION (1992); *cf.* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 16–17 (William Rehg trans., 1995) (establishing mutual recognition as a predicate to discourse).

230 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1934 (3d ed. 1981).

231 *Id.*

232 Stephen Hudson identifies three categories of respect that correspond to Darwall's recognition respect: obstacle respect, directive respect, and institutional respect. *See* Stephen D. Hudson, *The Nature of Respect*, 6 SOC. THEORY & PRAC. 69, 70 (1980). Robin Dillon notes that examples of obstacle respect include the tennis player's respect for an opponent's backhand and the mountain climber's respect for the elements. *See* Dillon, *supra* note 43, at 110–11. Directive respect lies behind the regard for the content of contracts, constitutions, and corporate bylaws. *See id.* Institutional respect is expressed in terms like "your Honor," bowed heads during prayer, and references to the president of the United States as "the President" even by those who know him intimately. *See id.* In all of these situations of recognition respect, the agent acknowledges the categorical importance of the object, even if she thinks the tennis player a fool, the United States Constitution flawed, the judge corrupt, the prayer vacuous, or the president an ordinary man. *See id.* at 111.

233 *See* Darwall, *supra* note 229, at 45–47.

234 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 230, at 1934.

235 OXFORD ENGLISH DICTIONARY 732–35 (2d ed. 1989).

236 *See* Darwall, *supra* note 229, at 45.

237 *See id.*

238 *Id.* at 39.

also recognition respect that Robert Nozick, claiming the mantle of Kant, has in mind when he faults utilitarianism for its failure to "respect and take account of the fact that [the individual] is a separate person, that his is the only life he has."[239] Simultaneously premised on the ideas that all human beings have respect-warranting traits in common and that each person is uniquely free,[240] recognition respect unites the disparate ideals of autonomy and equality.[241]

Although recognition respect implies freedom, it also mandates duties. In this sense, respect is different from other attitudes — particularly affection or liking — that an agent may have toward an object.[242] Because it originates in a trait of the object, respect makes its own demands. The agent is not free to withhold or furnish respect based on a whim.

The demands of recognition respect are well known not only within sexual harassment law, which affirms these ideals of dignity and freedom, but also in a variety of legal and extralegal settings.[243] One extralegal example is self-respect, a variant of recognition respect that implies duties and entitlements.[244] Recognition respect for persons is implicit in the legal and extralegal concept of consent, especially informed consent.[245] In the political arena, the demands of recognition respect are eclectic. They buttress both a claim to minimum income and certain arguments in favor of abolishing welfare,[246] for instance, and support feminism while raising questions about the right to abortion.[247] They also cast doubts on affirmative action as well as on rac-

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239 ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 33 (1974).

240 *See* Margaret A. Farley, *A Feminist Version of Respect for Persons*, 9 J. FEMINIST STUD. RELIGION 183, 194–96 (1993).

241 *See* Richard Norman, *Respect for Persons, Autonomy and Equality*, 43 REVUE INTERNATIONALE DE PHILOSOPHIE 323 (1989); *see also* Christopher W. Gowans, *Intimacy, Freedom, and Unique Value: A "Kantian" Account of the Irreplaceable and Incomparable Value of Persons*, 33 AM. PHIL. Q. 75, 84–85 (1996) (arguing that both uniqueness and equality of persons derive from their exercise of freedom).

242 Affection or admiration originates in the caprice of an agent. One might be fond of a person for any reason or for no reason, but respect implies certain criteria. Put another way, respect is object-generated, whereas affection is agent-generated. *See* Dillon, *supra* note 43, at 109–10.

243 *See infra* pp. 512–21 (describing recognition respect in current American legal doctrine).

244 *See* Robin S. Dillon, *Self-Respect: Moral, Emotional, Political*, 107 ETHICS 226, 230 (1997) (noting the demands and expectations generated by self-respect). The phrase "have you no self-respect?" urges another to recognize the rights and responsibilities of being a person. *See* Darwall, *supra* note 229, at 47.

245 *See* Bernard v. Char, 903 P.2d 667, 671–75 (Haw. 1995); Smith v. Reisig, 686 P.2d 285, 288 (Okla. 1984); Adler *ex rel.* Johnson v. Kokemoor, 545 N.W.2d 495, 500–03 (Wis. 1996); Danuta Mendelson, *Historical Evolution and Modern Implications of Concepts of Consent to, and Refusal of, Medical Treatment in the Law of Trespass*, 17 J. LEGAL MED. 1, 1–6 (1996).

246 On this paradox, see James W. Fox, Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workfare*, 74 WASH. U. L.Q. 103, 123–24 (1996).

247 *See* Farley, *supra* note 240, at 195; Don Marquis, *Justifying the Rights of Pregnancy: The Interest View*, CRIM. JUST. ETHICS, Winter-Spring 1994, at 67 (book review) (discussing the relationship between the personhood concept and abortion ethics).

ism.[248] Familiar from ordinary life experience as well as legal precepts, the dictates of recognition respect have in common their insistence that one must "take certain considerations seriously as reasons for acting or forbearing to act."[249] It is this last idea — the duty to forbear to act — that expresses the power of recognition respect to describe, prevent, and remedy hostile environment sexual harassment.

2. A Duty to Refrain. — The division between positive and negative liberties, famously expounded by Isaiah Berlin,[250] is fundamental in American law.[251] Courts describe the Constitution and the Bill of Rights as charters of negative liberties.[252] According to many scholars, concepts of negative rights were widely shared among those who built the American republic, whereas positive rights rested on less sturdy support.[253] A tradition traceable to Berlin and beyond associates negative rights with freedom and positive rights with the affirmative commands of a dictator.[254] Effective law reform honors the distinction between negative and positive rights, favoring negative liberty because it describes legal change in relatively unthreatening terms.[255] Although positive duties of respect may take shape in the future, negative ones necessarily must come first.

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[248] *See* M. Cathleen Kaveny, *Discrimination and Affirmative Action*, 57 THEOLOGICAL STUD. 286, 295–300 (1996).

[249] Darwall, *supra* note 229, at 48.

[250] *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 122–23 (1969). Berlin finds positive and negative liberty to be the central conceptions of liberty, among more than 200 types. *See id.* at 118.

[251] Criticisms of the dichotomy in the law reviews include Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2318–20 (1990), and Steven J. Heyman, *Positive and Negative Liberty*, 68 CHI.-KENT L. REV. 81, 81–83 (1992). As one writer notes, however, "there is no indication that the Supreme Court or the lower courts" will abandon the dichotomy. Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication under the Professional Judgment Standard*, 102 YALE L.J. 639, 667 n.138 (1992).

[252] *See* Bowers v. De Vito, 686 F.2d 616, 618 (7th Cir. 1982); *see also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (proclaiming "the right to be let alone — the most comprehensive of rights"). In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Supreme Court ruled against the plaintiff after characterizing his lawsuit as a demand for positive rights. *See id.* at 194–97. In dissent, Justice Brennan recast the issue as one of government *action* rather than inaction — a stance that underscores the powerful appeal of negative liberty arguments. *See id.* at 203–05 (Brennan, J., dissenting).

[253] The clash between the Federalists and anti-Federalists over political theory closely mirrors the debate over positive and negative liberty. *See* William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property 1760–1860*, 39 EMORY L.J. 65, 71–75 (1990); John Patrick Diggins, *Class, Classical, and Consensus Views of the Constitution*, 55 U. CHI. L. REV. 555, 556 (1988) (book review) (noting the anti-Federalist opposition to the establishment of a centralized federal government).

[254] *See, e.g.*, BERLIN, *supra* note 250, at 131 (claiming that proponents of the theory of negative liberty regard the notion of positive liberty as "no better than a specious disguise for brutal tyranny"); Heyman, *supra* note 251, at 82 (attributing Berlin's dichotomy to the Cold War backdrop against which he wrote).

[255] *See* Anita Bernstein, *Better Living Through Crime and Tort*, 76 B.U. L. REV. 169, 182–83 (1996) (describing uses of negative and positive liberty in law reform efforts).

The distinction between positive and negative liberty is central to political liberalism, the stance that lies behind the respectful person standard outlined here. The liberal seeks primarily to avoid cruelty.[256] Wider ambitions — such as the desire to promote goodness — to the liberal imply coercion. This minimalist concern with avoiding harm may readily be extended from the physical to the psychological. Accordingly, a duty arises to avoid forms of cruelty such as bringing indignity or humiliation upon another.[257] A liberal and minimalist conception of recognition respect thus emerges. The ethical duty to render respect becomes a negative one: a duty to refrain from unjustified or cruel manifestations of disrespect.[258]

In the context of sexual harassment, this negative duty has at least three distinct applications. Recognition respect requires first that an agent not treat another person only as a means of achieving the ends of the agent.[259] Second, the actor has a duty to refrain from humiliating another.[260] Third, the agent must not engage in conduct that rejects or denies the personhood and self-conception of another.[261] Subject to the constraint of minimalism, these broad and deep precepts provide specific guidance.

a. Ends and Means. — Contrary at its heart to consequentialist or utilitarian ethics, recognition respect resists many of those influences on law and philosophy that are associated with economic analysis. Persons may choose to behave instrumentally, but they cannot with-

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256 *See* Alan Wolfe, *Before Justice*, NEW REPUBLIC, May 27, 1996, at 33, 34 (crediting this view to political philosopher Judith Shklar).

257 *See id.*

258 Of the many variations on the Golden Rule surveyed by the Bahá'í scholar H.T.D. Rost, the Confucian version is noteworthy for stating the maxim in negative terms: "What you do not want done to yourself, do not do to others." ROST, *supra* note 228, at 49 (internal quotation marks omitted). Centering on "the fundamental principle of social propriety," *id.* at 47, Confucian ethics posits a respectful person who knows his place in the social order, rather than one who fulfills a religious or spiritual ideal, *see id.* at 47–48, — a social reformer's approach to the Golden Rule that may be better suited to emulation by reformers than are religious models.

I do not mean to continue the academic folly of overdrawing the distinction between positive and negative liberty. For a pertinent warning on this danger, see Heyman, cited above in note 251, at 82. Statutory and common law protections against sexual harassment imply a modicum of government energy and action that is contrary to a simple-minded endorsement of negative rights paired with a repudiation of positive rights. The basic duty, though embellished with affirmative incidentals in the workplace, *see infra* pp. 495–96, remains one of forbearance and restraint.

259 *See* KANT, *supra* note 225, at 95–96, 102–03. One philosopher elaborates that to be treated simply as a means rather than an end in oneself is to be disparaged as to one's stances, determinations, commitments, and points of view — all aspects of human choice. *See* Bernard Williams, *The Idea of Equality*, *in* MORAL CONCEPTS 155, 159–63 (Joel Feinberg ed., 1969).

260 *Cf.* AVISHAI MARGALIT, THE DECENT SOCIETY 1 (1996) ("A civilized society is one whose members do not humiliate one another . . . .").

261 *Cf.* Elizabeth V. Spelman, *On Treating Persons as Persons*, 88 ETHICS 150, 152 (1977) (arguing that treating another as a person implies that one has authority over one's own definition of oneself).

hold or deliver recognition respect for utilitarian reasons. Certainly they may pretend to render respect, and this hypocrisy — an emphasis on respectful behavior rather than respectful attitudes — can be socially useful; the law might encourage it. For this pragmatic constraint on a respectful person standard, we are again indebted to Holmes.[262] But legal doctrine predicated on recognition respect will pay little heed to quasi-economic apologies for harassment, such as the belief that the market will pay a wage premium to workers willing to endure mistreatment or that the costs of preventing harassment in the workplace are too high. As the "respicere" antecedent of the word implies, respect is rendered because of past or present characteristics. It does not look forward to a future time of greater utility but backward to aspects worth valuing or noting,[263] and so it rejects a central premise of economics-flavored suggestions for law reform.

Just as recognition respect contradicts utilitarian ethics in general and utilitarian defenses of disrespectful workplace conditions in particular, it does not tolerate the aggregation of workers into a class that exists simply as the means to the ends of an agent. A worker might regard women at work simply as terrain from which he can take sexual release. Alternatively, this worker might harbor animus towards women and use mistreatment as a weapon to keep fellow workers down and out. Sexual harassment case law, though necessarily speculative about the motives of harassers,[264] contains numerous accounts of both libidinous exploitation and general hostility towards women in the workplace.[265] These two motives, among many that may lie be-

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262 *See supra* notes 40, 91 (noting the contribution of Holmes to ideologies of reason and reasonableness). In a famous 1925 letter to Harold Laski, the elderly Justice declared that the law ought to look to outward behavior and its consequences rather than seek true desert:

> I am entirely impatient of any but broad distinctions. Otherwise we are lost in a maze of determinism. If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.

BAKER, *supra* note 91, at 289.

263 *See* Carl Cranor, *Toward a Theory of Respect for Persons*, 12 AM. PHIL. Q. 309, 311 (1975).

264 *See* Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 999 (10th Cir. 1996) (differing with the lower court about the motive of harassers); Gerd v. United Parcel Servs., 934 F. Supp. 357, 360–61 (D. Colo. 1996) (discussing the problem of mixed-motive harassment); *see also* Shermer v. Illinois Dep't of Transp., 937 F. Supp. 781, 784 (C.D. Ill. 1996) (noting that motive is often difficult to prove in same-sex harassment litigation).

265 *See* King v. Board of Regents, 898 F.2d 533, 539 (7th Cir. 1990); Snider v. Consolidation Coal Co., No. 86-3462, 1990 WL 484975, at *5 (S.D. Ill. June 27, 1990). In other cases courts have attributed harassment to a general hostility towards women. *See* EEOC v. Farmer Bros. Co., 31 F.3d 891, 897 (9th Cir. 1994); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463–64 (9th Cir. 1994); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991). Feminist commentators generally dismiss these motives, noting that whether harassment originates in concupiscence or in hatred, the result — gender subordination — is the same. *See* Abrams, *supra* note 121, at 1208; Dolkart, *supra* note 191, at 184–85; *cf.* Case, *supra* note 102, at 60 (noting that sexual harassers often allude simultaneously to women's receptive role in fellatio and their pur-

hind sexual harassment, illustrate disrespect that is characterized by treating others as the means to an end. Although a person may be an object of another person's concupiscence or fear, it is wrong to treat the person as *simply* a means to allay the disquiet of the agent.

b. Humiliation. — Defining humiliation as "the rejection of human beings as human, that is, treating people as if they were not human beings but merely things, tools, animals, subhumans, or inferior humans,"[266] the Israeli philosopher Avishai Margalit extends this Kantian injunction into the realm of dignity. To violate the first negative duty mandated by a respectful person — that is, to treat another person simply as the means to an end — is to engender a feeling of indignity and self-rejection in the human object so treated. The person humiliated may know that she is the victim of "an appalling injustice," according to Margalit, but she cannot ignore this treatment because as a human being she is a member of a commonwealth and thus is never entirely self-reliant.[267] Humiliation is both partially avoidable (notwithstanding the claims of anarchist philosophers who deem humiliation ever-present) and real (notwithstanding the credo of Stoic philosophy).[268]

Ever since sexual harassment became actionable in federal courts as a violation of Title VII, courts have implicitly acknowledged that sexual harassment is humiliating to the one harassed.[269] In attempting to list the elements of an abusive work environment, the Supreme Court has contrasted "threatening or humiliating" behavior with behavior that is "merely offensive" and has deemed the former conduct an integral part of the plaintiff's case.[270] The contrast between threatening and humiliating harassment is not stark — humiliation and threatening circumstances are generally present together — but one or the other condition may predominate. Of the two Title VII hostile environment sexual harassment cases decided by the Court, *Meritor Sav-*

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ported incompetence at work). Starting from the somewhat contrary premise that sexual harassment law must not overlook motive and fault, the respectful person standard offered here also relates these two strands of libidinous harassment and animus-based harassment; I argue that the two are alike not only because they subordinate women but because they violate the duty not to treat others simply as the means to an end.

266 MARGALIT, *supra* note 260, at 121.

267 *Id.* at 124–25.

268 *See id.* at 13–15, 22–23.

269 The landmark case is *Williams v. Saxbe*, 413 F. Supp. 654, 655–56 (D.D.C. 1976), *vacated sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). Later decisions also note the humiliation of sexual harassment. *See* Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Ascolese v. Southeastern Penn. Transp. Auth., 925 F. Supp. 351, 360–61 (E.D. Pa. 1996); *cf.* Coney v. Department of Human Resources, 787 F. Supp. 1434, 1443 (M.D. Ga. 1992) (noting the humiliation of racial harassment); Martone v. State, 611 A.2d 384, 385 n.1 (R.I. 1992) (observing that the plaintiff-employee, who had been terminated, deserved "a severe sanction" for having caused humiliation through harassment).

270 Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–23 (1993).

ings Bank, FSB v. Vinson[271] describes a threatening environment, complete with stalking and rape;[272] Charles Hardy of *Harris v. Forklift Systems, Inc.*,[273] however, subjected his employee to various humiliations. He jeered at the plaintiff and called her names that shamed her for being a woman; he told her to pull coins out of his front trouser pockets; he liked to toss objects on the ground and order women to pick them up so that he could view exposed portions of their bodies[274] — all gestures that academic writers, and tacitly Justice O'Connor for the Court, have deemed humiliating.[275] The humiliation manifested itself: Teresa Harris testified that Hardy's behavior made her feel stupid and degraded; she said that she began drinking more and that her relationships with her husband and children became unhappy. Although the judges who heard what went on at Forklift Systems disagreed on whether Harris had a claim under Title VII, they agreed that her reactions were "reasonable," in bounds, and causally linked to mistreatment at work.[276] The elements of humiliation emerge paradigmatically from *Harris*: humiliation is both an action and a reaction,[277] a state that outsiders can perceive,[278] and a concept amenable to categorical norms and thus to law.

The duty not to humiliate another requires the agent to consider the dignity of the other and refrain from injuring that dignity, unless injury is either justified or unavoidable.[279] The actor is obliged to remember the community — in employment law, the workplace — that unites the agent and the object.[280] Sexual harassment at work has a

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271 477 U.S. 57 (1986).

272 *See id.* at 60.

273 510 U.S. 17 (1993).

274 *See id.* at 19.

275 *See* Dolkart, *supra* note 191, at 158; Kerry A. Colson, Comment, Harris v. Forklift Systems, Inc.*: The Supreme Court Moves One Step Closer to Establishing a Workable Definition for Hostile Work Environment Sexual Harassment Claims*, 30 NEW ENG. L. REV. 441, 441–42 (1996); Deanna Weisse Turner, Recent Case, 17 U. ARK. LITTLE ROCK L.J. 839, 841 (1995).

276 *Harris* first reached a magistrate, who deemed Hardy "a vulgar man" and his behavior offensive to a reasonable woman, but nonetheless ruled against Harris because of her failure to show severe psychological injury. The Sixth Circuit adopted the magistrate's findings in full. The Supreme Court unanimously reversed, condemning Hardy's degrading behavior and repudiating the demand that a plaintiff prove severe psychological injury. *See Harris*, 510 U.S. at 22–23.

277 *See* Henry J. Reske, *Scarlet Letter Sentences*, A.B.A. J., Jan. 1996, at 16–17; Jeremy Waldron, *On Humiliation*, 93 MICH. L. REV. 1787, 1792 (1995) (book review).

278 Several cases have discussed harassment witnessed by fellow employees at the workplace and the humiliating effect of such treatment. *See* Humphreys v. Medical Towers, Ltd., 893 F. Supp. 672, 680 (S.D. Tex. 1995), *aff'd*, 100 F.3d 952 (5th Cir. 1996); Fred v. Wackenhut Corp., 860 F. Supp. 1401, 1405–06 (D. Neb. 1994), *aff'd*, 53 F.3d 335 (8th Cir. 1995); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1499 (M.D. Fla. 1991).

279 On justification and unavoidability, see pp. 498–504 below. On the moral ambiguity of even "justified" humiliation, see Waldron, cited above in note 277, at 1795–96.

280 Writing more generally about institutional humiliation, Margalit calls this community "the 'Family of Man.'" MARGALIT, *supra* note 260, at 135–40 (describing further "encompassing

public, communal dimension, even when the offending behavior takes place behind a closed door. Being humiliated at work can diminish settled beliefs about one's competence and relative status vis-à-vis other workers. Humiliation can also make a worker wonder what her job description really is and whether prior feedback must be reinterpreted in light of an erosion of her dignity.[281] This response is natural, almost universal, and so the harassing employer must be presumed to understand that his actions humiliate.

c. Personhood. — The three statements of negative duty express the obligations of a respectful person through separate emphases rather than sharp contrasts. The duty not to treat others simply as the means to an end serves as a warning about aggregation and consequentialism. The duty not to humiliate emphasizes dignity and communal status. The duty not to violate the personhood and self-conception of another, which completes the negative duties of recognition respect, expresses a concern about the boundaries that separate individuals from one another.

Every object is distinct from every agent; and in situations pertinent to sexual harassment rules, both agent and object are persons who are competent, autonomous, and separate. Distinct life plans — designs that create order out of diverse experiences and commitments — distinguish persons. No two life plans, and no two persons, can be exactly the same. These designs warrant recognition respect.[282]

Examples may help to clarify the duty to respect the personhood and self-conception of another. Elizabeth Spelman gathers familiar complaints about failures to respect personhood: "You only pay attention to my body" and its less famous counterpart, "You only pay attention to my mind"; "Think about who I am, rather than how old I am," from an elderly person; and the resentment of a person identified only as the wife or husband of another.[283] These complaints, Professor Spelman argues, make demands more strenuous than rights; the complainant has demanded to be treated as the person he or she is,[284] even though it may not be possible for a heeding agent to comply. But a lesser duty is possible. The agent must acknowledge the separate life plan of the object. The agent must regard the object "as a source —

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groups"); *see also* WILLIAM IAN MILLER, HUMILIATION 144–45 (1993) (describing humiliation as "a social fact" that causes the identity of the humiliated to collapse in public view).

281 One student commentator finds these indignities so intense that she deems sexual harassment a violation of the Thirteenth Amendment, a "badge of slavery." Jennifer L. Conn, Note, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J.L. & SOC. PROBS. 519, 539 (1995).

282 *See* STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 47 (1991) (adding that life plans must claim some origin in rational thought in order to warrant respect).

283 Spelman, *supra* note 261, at 150.

284 *See id.* at 160–61.

albeit not an unimpeachable one" — of information about the object.[285] The agent cannot expect another person to conform to, or be subjugated by, the plans of the agent. Accordingly, the agent must accept communication from the object. Obliged to listen, to pause, to absorb new information, and sometimes to be deterred from action, the agent acknowledges the equality and autonomy of another person. Equality and autonomy cannot, of course, dictate a precise path of action for the agent, as his or her own equality and autonomy are at stake too. The duty to hesitate in recognition respect may be fulfilled in an instant, and the agent need not obey the command of the object in order to fulfill the demands of recognition respect. What is needed is receptiveness to communication, such as taking no for an answer.

The respectful agent also refrains from using stereotypes as a shortcut around the harder work of seeing another as he or she truly is. Spelman gives as examples of such laziness the assumption that another person is defensive because he is short, or vain because he is handsome.[286] These stereotypes offend the tenets of recognition respect because they presume. Incidentally they violate the self-conception of the other, but it is their denigration of individual personhood that implies a betrayal of recognition respect.

B. Respect as a Legal Standard for Sexual Harassment Cases — The Employment Context

In addition to providing a means of understanding sexual harassment, a respectful person standard can illuminate some of the more vexing problems of current employment law doctrine. This section considers three of these problems in turn: first, the question of employer liability for the harassing behavior of employees; second, what I have called (somewhat imprecisely) the problem of justification for apparent disrespect, which includes such concepts as assumption of risk, welcomeness, and the hypersensitive plaintiff; and third, the difficulty of separating questions of law from questions of fact, a problem that has bedeviled courts in sexual harassment cases.

1. Agency and Responsibility. — Although sexual harassment and sex discrimination generally are committed by individuals, employees seeking redress for hostile environment sexual harassment often bring actions against business entity employers. Dignitary-tort actions are more likely to be remunerative to plaintiffs when employers as well as individuals are included as defendants. For Title VII actions, such inclusions were in the past absolutely necessary: until the 1991 amendments, money damages were unavailable under Title VII,[287] and traditional remedies such as back pay and injunctive relief could be had

285 *Id.* at 154.

286 *See id.* at 153, 157 n.6.

287 *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977a(b), 105 Stat. 1071, 1073 (1991).

only from employers.[288] The post-1991 availability of monetary damages has not lessened the tendency of plaintiffs to seek judgments against employers. Legal standards for sexual harassment claims, therefore, must address the question of when employers become responsible for the harassing acts of their employees.

In *Meritor*, the Supreme Court commended "agency principles" to help answer this question of responsibility;[289] and whether a business entity ought to be liable for harassment because of the conduct of its employees seems a straightforward problem of agency. But little is straightforward in sexual harassment law, and in this area the lower courts have simultaneously applauded and repudiated the common law of agency.[290] Courts try to follow the teaching of *Meritor* yet continually advert to fault principles rather than agency law as a basis for employer liability.[291]

The lower court decisions in *Meritor* offered several different approaches to agency in the context of Title VII claims for hostile environment sexual harassment. The *Meritor* trial court ruled against the plaintiff, who alleged harassment as a Title VII sex-discrimination violation, and found that no harassment had occurred; in dicta, the court added that the employer could not be liable because it had no notice of the harassment.[292] The Court of Appeals for the District of Columbia Circuit, reversing, rejected the common law agency rule and held Meritor Savings Bank automatically liable for the harassing acts of its agent, the harasser-supervisor.[293] According to this opinion, a common law approach would treat employers too leniently and was in any event irrelevant to this statutory problem.[294] An opposing perspective on the agency question came from a dissent in the appellate court, in which Judge Bork argued forthrightly for a rejection of agency principles.[295]

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288 *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (1964); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 107 (1972).

289 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

290 *See* Glen Allen Staszewski, Note, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057, 1062 (1995) (explaining that courts have been erratic and inconsistent in their use of agency law in sexual harassment cases); *cf.* Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 589 (arguing that "reliance on agency law has not established a clear standard" for employer liability for sexual harassment).

291 *See* Kenneth L. Pollack, Special Project, *Current Issues in Sexual Harassment Law*, 48 VAND. L. REV. 1009, 1017 (1995).

292 *See* Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd sub nom.* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

293 *See* Vinson v. Taylor, 753 F.2d 141, 149–50 (D.C. Cir. 1985), *aff'd sub nom.* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

294 *See id.* at 150.

295 Judge Bork wrote a separate opinion dissenting from the denial of rehearing en banc in *Vinson*. *See* Vinson v. Taylor, 760 F.2d 1330, 1330 (D.C. Cir. 1985) (Bork, J., dissenting).

When *Meritor* reached the Supreme Court, Justice Marshall wrote separately to defend the use of agency principles in Title VII sexual harassment claims.[296] Justice Marshall agreed with the court of appeals that employers should generally be liable for harassment by a supervisor even without notice, but acknowledged the possibility of rare exceptions to this rule of employer liability.[297] In his opinion for the Court, Justice Rehnquist hedged, maintaining that the record could not support a clear rule about the common law of agency in Title VII harassment cases. Justice Rehnquist deemed agency principles useful for "guidance" and, consistent with these principles, refused to require employer notice for liability in all cases.[298]

These approaches to employer liability — all found within one case — barely skim the surface of options available to the courts. One student commentator, tracing the application of *Meritor*-decreed agency principles in the federal circuits, finds chaos: some circuits favor a fault-based analysis; others prefer strict liability; several circuits have freely written their own variations on these themes.[299] According to another writer, the law of agency as applied to Title VII is a potpourri of consequentialist and deontological rationales, disputes over the meaning of jargon like "respondeat superior," empirical confusion about incentives, and partial overlaps of doctrine.[300] The concept of agency is integral to understanding and remedying workplace sexual harassment, but agency law in its particulars points in varying directions. This judicial uncertainty is the result of uncertainty about the nature of hostile environment sexual harassment. In their present inattention to what makes sexual harassment wrong, courts cannot understand what is responsible for this phenomenon.[301] The concept of respect, however, offers coherent guidance and a unifying theme.

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296 *See Meritor*, 477 U.S. at 74 (Marshall, J., concurring).

297 Justice Marshall suggested that an individual could be a supervisor yet lack supervisory authority over the complainant if "the two work in wholly different parts of the employer's business." *Id.* at 77. The court of appeals opinion would apparently have favored employer liability in such a situation, and Marshall would have used agency reasoning to exonerate the employer. *See id.* at 76–77.

298 *See Meritor*, 477 U.S. at 72.

299 *See* Justin S. Weddle, Note, *Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724, 734–37 (1995).

300 *See* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 VAND. L. REV. 1229, 1239–46 (1991).

301 One example of this incoherence is found in the notice requirement embraced by Judge Bork, *see* Vinson v. Taylor, 760 F.2d 1330, 1332 (D.C. Cir. 1985) (Bork, J., dissenting), as well as several other judges, *see, e.g.*, Lipsett v. University of Puerto Rico, 864 F.2d 881, 899–901 (1st Cir. 1988) (interpreting Title IX); Jones v. Flagship Int'l, 793 F.2d 714, 719–20 (5th Cir. 1986) (holding that the plaintiff must establish actual or constructive knowledge). The notice requirement absolves employers who did not know about the harassment. As the student commentator Glen Staszewski points out, advocates of a notice requirement tend to dispense with notice when the harassment is of the quid pro quo variety, even though hostile environment harassment is much more noticeable by a third party. *See* Staszewski, *supra* note 290, at 1083 n.154.

Consider what a respectful place of employment would look like. In order for respect to flourish in a workplace, the employer must acknowledge the status, opportunities, communicative functions, and vulnerabilities of each worker.[302] Title VII makes parallel demands.[303] For purposes of its duty to prevent and remedy sexual harassment, therefore, the employer must be seen as an agent as well as a principal; its responsibilities — direct and nondelegable — arise from its *own* obligations not to promote or condone a hostile workplace.[304]

In the role of an employer, the respectful person is aware that official authority, peer pressure, and anxiety about change in the workplace — all natural and inevitable at a job site — can contribute to unlawful injury. The respectful employer therefore must structure a workplace to reduce and to prevent these effects: within the narrower perspective of Title VII, this employer must design its workplace to reduce and to prevent those effects that are addressed by Title VII. Under a respectful person standard, an employer has a nondelegable duty to maintain an attitude of responsiveness and attention.[305] As one court put it, "energetic measures"[306] of correction must be available to employees who believe that they are being harassed. Because the respectful person listens and heeds in good faith,[307] it would violate the standard to imply that a complaint, rather than the wrongful conduct itself, is a problem; thus the respectful employer who finds a complaint credible must confront the harasser, rather than merely separate him from the complainant.[308] The tenet of respect also re-

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302 *See supra* pp. 484–92.

303 *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971); *cf.* Note, *supra* note 199, at 1464 (arguing that Title VII's purpose is to prohibit all practices that create inequalities in the workplace among identifiable social groups).

304 *See* Weddle, *supra* note 299, at 742 (urging courts to view the working environment "as a whole"). As Weddle notes, agency principles acknowledge the existence of nondelegable duties, thus establishing a nondelegable duty to avoid a hostile environment is consistent with the "agency principles" directive in *Meritor*. *See id.* at 743; *see also* Phillips, *supra* note 300, at 1252–55 (detailing agency principles pertaining to nondelegability).

305 Responsiveness and attention, crucial constituents of respect, are expressed doctrinally in the requirement that the employer take "prompt action" to remedy a complaint. Cross v. State of Ala., 49 F.3d 1490, 1507 (11th Cir. 1995). The respectful employer has additional duties relating to prevention, but this object-focused, attentive, and responsive respect is the most central element of the standard.

306 Pinkney v. Robinson, 913 F. Supp. 25, 34 (D.D.C. 1996); *cf.* Carmon v. Lubrizol Corp., 17 F.3d 791, 793 (5th Cir. 1994) (noting that "[i]mmediately [the employer] sprang into action" in response to a complaint).

307 *See supra* pp. 486–92.

308 *Compare* Nash v. Electrospace Sys., Inc., 9 F.3d 401, 404 (5th Cir. 1993) (approving of the transfer of the complainant), *with* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (disapproving of the reassignment of the plaintiff to a new shift away from the harasser). The question whether an employer can satisfy Title VII's nondiscrimination mandate by merely separating accuser and accused illustrates again the need to acknowledge the theme of moral fault that pervades the statute. Inattention to the quasi-tort concerns of Title VII, in favor of a sterile, depersonalized emphasis on "environment," leads to remedial error. A harassed worker has a cor-

quires sincerity in remediation: if an employer responds to a complaint by reprimanding the harasser and threatening more severe action should he fail to desist, respect demands that the employer make good on its threat when the harassment continues.[309] Current interpretations of the statute, coupled with the respect-based tenet that individuals should be viewed and judged as unique beings, mandate such affirmative behavior.

This use of respect, which treats the employer as a person, salvages the best elements of current fault-based and strict liability approaches. Fault-based inquiries of hostile environment sexual harassment claims brought under Title VII address the agency question by focusing on whether the employer knew or should have known of the harassment.[310] The virtues of this inquiry are analogous to the advantages of negligence over strict liability.[311] The knew-or-should-have-known standard is also congruent with the fault-based themes that pervade Title VII. With good reason, courts favor this approach to employer liability in hostile environment cases.[312] The respectful person standard affirms these critical themes of duty and connection. Yet the knew-or-should-have-known standard manifests shortcomings in practice that the respectful person standard would ameliorate. When using the knew-or-should-have-known standard courts have sometimes been too quick to sever links of responsibility between management and errant employees, thereby encouraging aloofness and inattention.[313] Such a fault standard is flawed because it urges employers to remedy,

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rective justice right to have her working environment restored — that is to say, given back to her — with the harassment removed. The statute also entitles workers to the prevention of harassment. Both of these moral claims are slighted by cases like *Steiner* that regard the simple shifting of a complainant, to a new space or time within the workplace, as an adequate response to the harm. In a more egregious display of inattention to moral fault, the Tenth Circuit in *Buchanan v. Sherrill*, 51 F.3d 227 (10th Cir. 1995), dismissed one hostile environment claim on the sole ground that the plaintiff had been offered a transfer. *See id.* at 229. In deeming the employer's conduct acceptable, the court cited *Saxton v. AT&T Co.*, 10 F.3d 526 (7th Cir. 1993), in which the perpetrator, not the complainant, had been transferred.

309 *See* Intlekofer v. Turnage, 973 F.2d 773, 780 (9th Cir. 1992) (faulting the employer for the idleness of its threat).

310 *See* Saxton v. AT&T Co., 10 F.3d 526, 535–36 (7th Cir. 1993); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515–16 (9th Cir. 1989); Hall v. Gus Constr. Co., Inc., 842 F.2d 1011, 1015 (8th Cir. 1988).

311 *See* Phillips, *supra* note 300, at 1263–64.

312 *See* LINDEMANN & KADUE, *supra* note 35, at 191–92 (1992); Weddle, *supra* note 299, at 734.

313 *See, e.g.*, Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59, 64 (2d Cir. 1992) (condoning the employer's unawareness of harassment that took place in Oswego, New York, because central management was located in Rochester); Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101, 1117–21 (N.D. Ill. 1996) (blaming the plaintiff — who did not follow employee-manual procedure for reporting harassment because she feared retaliation — for the employer's ignorance), *aff'd in part and rev'd in part en banc sub nom.* Jansen v. Packaging Corp. of America, 123 F.3d 490 (7th Cir. 1997) (per curiam); Thompson v. Berta Enters., Inc., 864 P.2d 983, 989 (Wash. Ct. App. 1994) (noting that the plaintiff had never reported harassment to the management and that the harassment had taken place behind closed doors).

but not to prevent, sexual harassment.[314] Knew-or-should-have-known analysis also subtly bifurcates employers and employees, leading to a fragmented perception of the wrong.[315]

In contrast, the respectful person standard tempers fault-based approaches to employer liability by looking at the workplace as a unit. Yet its attention to human conduct and individual choices rescues the standard from the major failings of strict employer liability. Courts invoke strict liability in the relatively rare context of Title VII quid pro quo sexual harassment, and some commentators argue for broadening this application to hostile environment claims.[316] Vicarious liability for any harm usually creates incentives to prevent injury.[317] But when divorced from the idea that a workplace consists of relationships among individuals, strict employer liability also suggests evils of its own: threats to privacy due to policing,[318] occupational segregation,[319] and inattention to the conditions that allow workers to flourish within a group.[320] The respectful person approach thus mediates between fault-based and strict liability views of hostile environment sexual harassment, flavoring each with the strengths of the opposite approach. In this process, the respectful person standard comports with agency law and operates under its specific guidance — for example, agency law helps to say whether an action took place inside or outside the worksite — but does not become ensnared in its contradictions.

2. Justifications for Apparent Disrespect. — Can hostile environment sexual harassment be justified? Courts have had scant opportunity to consider this question. Title VII doctrine permits a defendant to introduce evidence of justification after a plaintiff has completed her prima facie case,[321] but in sexual harassment cases few defendants

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314 *See* Weddle, *supra* note 299, at 737–38 & n.98 (pointing out that Title VII encourages prevention as well as redress).

315 *See id.* at 738 & nn.101–103 (citing Baker v. Weyerhauser Co., 903 F.2d 1342 (10th Cir. 1990)).

316 *See* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 71 (1995); Christopher P. Barton, Note, *Between the Boss and a Hard Place: A Consideration of* Meritor Savings Bank, FSB v. Vinson *and the Law of Sexual Harassment*, 67 B.U. L. REV. 445, 460–62 (1987). For a more tentative endorsement of expanding liability, see Note, cited above in note 199, at 1462.

317 *See* Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 607 (1988).

318 *See* Vinson v. Taylor, 760 F.2d 1330, 1331 n.3 (D.C. Cir. 1985) (Bork, J., dissenting).

319 *See* Kozinski, *supra* note 108, at x–xi (warning that women employees could be trapped in a "gilded cage" and separated from opportunities); Epstein, *supra* note 12, at 408 n.57; Barbara Paul Robinson, Letter to the Editor, N.Y. TIMES, Jan. 15, 1996 (referring to a New York bar association study that suggested that many male lawyers respond to expanded liability for sexual harassment "by avoiding working with women").

320 *See* Kozinski, *supra* note 108, at xii.

321 *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714–15 (1983); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

do so formally. One court has professed to find it "hard to see how an employer can justify harassment."[322] The question of justification becomes more pressing, however, when hostile environment sexual harassment is seen in the contours of fault. Antidiscrimination law, focusing on the workplace rather than on individual dereliction, cannot consistently be concerned with the righteous motives of a personalized employer any more than it can demand proof of intent to injure. Even if traditional antidiscrimination doctrine had room for justification, moreover, judges have noted that when they focus on the work environment as a whole, claims of justification begin to appear false or pretextual.[323]

Fault-based doctrine, by contrast, generally permits defendants to escape liability when they acted with justification.[324] Hostile environment sexual harassment, envisioned in this Article mainly in terms of Title VII and thus only partially fault-based, has a role for justification, albeit a circumscribed role. The concept of justification in the context of sexual harassment jurisprudence has eluded the understanding of the judiciary, which has failed to set forth a conceptual framework for the doctrine.

Here the work of Joel Feinberg on offensiveness is pertinent. Professor Feinberg writes that subjective perceptions of offense must be tempered with qualifications: "the standard of reasonable avoidability," the maxim *volenti non fit injuria*, and the discounting of abnormal susceptibilities.[325] Feinberg acknowledges that these qualifications on offensiveness partake of a reasonableness standard, yet he insists that offensiveness exists apart from reasonableness and reason.[326] By analogy to offensiveness, then, choices on the part of the victim of alleged harassment can diminish the full force of what would otherwise be disrespect.

One may derive three criteria from Feinberg. First, could the offender reasonably have avoided behaving in a disrespectful manner? Second, does the complainant fall within the *volenti* maxim: is she "the willing" for whom there is no injury?[327] Third, do the complainant's

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322 Moffett v. Gene B. Glick Co., 621 F. Supp. 244, 266 (N.D. Ind. 1985), *overruled by* Reeder-Baker v. Lincoln Nat. Corp., 644 F. Supp. 983 (N.D. Ind. 1986).

323 *See* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996) (citing Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989)).

324 To move along the fault continuum, criminal law provides the most elaborate scheme of justification, distinguishing it from excuse and grading levels of justification; next comes tort law, which recognizes privileges to commit a prima facie intentional tort. *See* John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 651–52 (1994).

325 FEINBERG, *supra* note 33, at 35–36.

326 *See id.*

327 *See* BLACK'S LAW DICTIONARY 1575 (6th ed. 1990) ("The maxim . . . means that if one, knowing and comprehending the danger, voluntarily exposes [her]self to it, though not negligent in so doing, [s]he is deemed to have assumed the risk and is precluded from a recovery for an injury therefrom.").

abnormal susceptibilities weaken her claim of having been treated with disrespect?

Because these questions fit within justification as it is understood in Title VII doctrine, they ought to burden the defendant rather than the plaintiff. *Meritor Savings Bank v. Vinson*, misguided on this point,[328] has created confusion in the lower courts. This confusion would be remedied by a change to a respectful person standard. Under the new standard, defendants could, in a pretrial motion, raise the possibility that a complaint is diminished by one of the Feinberg-derived justification conditions. Judges would apply summary judgment criteria to decide whether the defendant could pursue discovery, or introduce evidence, as to these defenses. These changes in theory and litigation practice are simple and flow logically from the respectful person standard. As I argue below, moreover, all of the Feinberg-derived criteria have counterparts in current Title VII case law, and these counterparts would ease the transition.

The first criterion, avoidability, parallels something that at first blush may look different: the Title VII requirement of pervasiveness. Avoidability resembles pervasiveness because both emphasize questions of proportion: How bad was the challenged conduct? Fleeting hostility or abusiveness does not affect the work environment enough for courts to find liability.[329] As doctrine, the requirement of pervasiveness has been relatively uncontroversial, although some courts and commentators have considered whether a single act can amount to pervasive hostility.[330] This twinge of analytic doubt suggests that it may not be possible to count the number of relevant acts to determine whether it is large enough to indicate pervasiveness.[331]

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328 *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) ("The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome . . . .").

329 *See id.* at 67 (holding that harassment must "alter the conditions of [the victim's] employment" (alteration in original) (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)) (internal quotation marks omitted)).

330 The EEOC seems to think not but keeps the question open. *See* EEOC Policy Guidance on Current Issues of Sexual Harassment (Mar. 19, 1990) [hereinafter EEOC Policy Guidance], *reprinted in* LINDEMANN & KADUE, *supra* note 35, at 661, 670–71 (suggesting that, among possible isolated instances, an extremely aggressive physical violation would most likely suffice for liability).

331 Consider the peculiar use of the phrase "isolated incident" in case law. The phrase does not mean "one incident" but rather indicates some number too low to impress the court: in other words, the question of pervasiveness is answered *before* the court enumerates the number of harassing incidents. *See* ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE 49 n.166 (1990) (citing "isolated incidents" cases involving "50 incidents over 10 years," "five incidents over three years," and "three isolated incidents of harassment over [a] three-year period" (citations omitted)); *see also* Black v. Zaring Homes, Inc., 104 F.3d 822, 824–25 (6th Cir. 1997) (noting that the magistrate judge deemed the harassment to have been an "isolated incident," even though the plaintiff had complained to her employer's general counsel: "Has it always been like this? . . . [The harassment] takes up so much time" (internal quotation marks omitted)).

Here a respectful person standard, tempered by the defense of reasonable avoidability, conveys what is desirable about doctrinal attention to pervasiveness — that is, the chance to weigh and to measure the wrongness of workplace action — while at the same time rescuing what is desirable about the idea of reasonableness. It may be reasonable, for example, for company management to pay less attention to a few sexual harassment complaints in the middle of its own hostile takeover crisis. As the harassment becomes more encompassing — lasting longer, affecting more people — it becomes less reasonable for management to neglect these conditions of disrespect, even if fundamentals of company ownership happen to be in turmoil. At this point, one may say that pervasiveness has been achieved. The quality to look for is not simply the breadth of harassment, as attention to "pervasiveness" in its current state suggests, but the additional dimension of avoidability.

Volenti non fit injuria — a theme sounded in the student note whose title begins "Did She Ask for It?"[332] — influenced Justice Rehnquist's opinion for the Court in *Meritor Savings Bank, FSB v. Vinson*[333] and the *Meritor*-derived rule that a plaintiff must prove that she did not welcome the challenged conduct.[334] As many commentators argue, the rule about "welcomeness" is akin to the common law belief that rape claims are often lies that are asserted to nullify past consent: according to the prejudice, a woman who is now a plaintiff or a prosecutrix was a willing participant when the conduct occurred.[335] Trial courts have acquiesced to this effort by allowing defendants to argue welcomeness with an array of testimony — for instance, that the plaintiff used coarse language at work, talked to colleagues about her sexual activities, or told risqué jokes.[336] Lawyers who defend Title VII

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[332] *See* Ann C. Juliano, Note, *Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558 (1992).

[333] 477 U.S. 57, 68–69 (1986) (stating that the complainant's "fantasies" and "sexually provocative speech or dress" are "obviously relevant" to the issue of voluntariness (citation omitted) (internal quotation marks omitted)).

[334] *See* Moylan v. Maries County, 792 F.2d 746, 750 (8th Cir. 1986) (holding that the plaintiff must prove that she was subject to "unwelcome" sexual harassment); Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 519 (1994) (noting that almost all federal circuits follow this rule); Childers, *supra* note 122, at 862 n.29 (reading *Meritor* to state a presumption of welcomeness that the plaintiff must rebut).

[335] *See* Janine Benedet, *Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law*, 3 MICH. J. GENDER & L. 125, 132 (1995); Estrich, *supra* note 4, at 816; Juliano, *supra* note 332, at 1573–75.

[336] *See* Reed v. Shepard, 939 F.2d 484, 491–92 (7th Cir. 1991) (ruling against the plaintiff in part because of her history of enjoying sexually suggestive jokes); Weiss v. Amoco Oil Co., 142 F.R.D. 311, 316 (S.D. Iowa 1992) (permitting discovery, on the question of welcomeness, regarding the complainant's practice of sending and pinning up risqué cards); Gan v. Kepro Circuit Sys., 28 Fair Empl. Prac. Cas. (BNA) 639, 639 (E.D. Mo. 1982) (noting sexually explicit remarks of the plaintiff). In *Weinsheimer v. Rockwell International Corp.*, 754 F. Supp. 1559 (M.D. Fla. 1990), *aff'd without opinion*, 949 F.2d 1162 (11th Cir. 1991), the plaintiff made extensive allegations of ha-

sexual harassment claims have said that welcomeness is among their best weapons of defense.[337]

The rule about welcomeness shuttles uneasily between two truths. One is that people are different: one person's meat is another's poison. As Justice Scalia has noted, once the courts are willing to hear complaints of sexual harassment without proof of severe injury, the most straightforward way to judge the magnitude of the harm is to ask what the conduct meant to the complainant, and the subjective theme of the welcomeness requirement reaches toward an answer.[338] Although this reasoning might argue for retaining the welcomeness rule, it would also argue for its banishment — it is equally true that a welcomeness inquiry sometimes slurs the complainant, overlaps at least partially with her burden to prove an objective wrong,[339] and exposes her to pretrial maneuvers likely to prove humiliating.[340]

As with avoidability, the Feinberg-derived *volenti* criterion can work with a respectful person standard to encourage simultaneously the respectful treatment of workers and attention to individual circumstances that could support a defense. This approach would mark an important contrast. The opinion of the Court in *Meritor* asks: Did she ask for it? Did she deserve it because of her clothes and conversation? *Meritor* indulges trial judges who want to evade their duties with a stereotype. The respectful person standard, however, chooses another query: Did the defendant behave as a respectful person? That is, did the defendant regard the complainant as a person, self-propelled and unique, with a range of potential reactions to sex-based conduct in the workplace? This range is intelligible to actors willing to render respectful attention; they may blunder, but their respect will be discernable. Indeed the concept of welcomeness, when used appropriately to evaluate the conduct of an actor rather than the reaction of a complainant, is at its root a question whether respect was rendered.

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rassment, including a claim that one defendant had pressed his penis into her hand while she was looking elsewhere. *See id.* at 1561. The court found that although this "incident" was "graphic," the plaintiff had reported it to management too casually and had generally failed to make a case because of her "proven, active contribution to the sexually explicit environment." *Id.* at 1563–64.

337 *See* Jared H. Jossem, *Investigating Sexual Harassment Complaints: Guidelines for Employers, in* LITIGATING THE SEXUAL HARASSMENT CASE, *supra* note 95, at 103, 113 (suggesting that, as part of trial preparation, lawyers for employers should investigate the clothing and joke-telling proclivities of complainants).

338 *See supra* notes 25–29 and accompanying text (noting the sparseness of the plaintiff's prima facie case under current doctrine).

339 *See* Estrich, *supra* note 4, at 830.

340 *See* Sanchez v. Zabihi, 166 F.R.D. 500, 502 (D. N.M. 1996) (limiting the defendant's effort to seek discovery on a "sexual aggressor" defense); Priest v. Rotary, 98 F.R.D. 755, 757 (N.D. Cal. 1983) (quoting intrusive questions posed by defense counsel); Ellen E. Schultz & Junda Woo, *Plaintiffs' Sex Lives Are Being Laid Bare in Harassment Cases*, WALL ST. J., Sept. 19, 1994, at A1.

Courts obscure this essence when they impose the burden of proof on this question on the plaintiff. Like the defenses associated with *volenti non fit injuria* — consent and assumption of risk — welcomeness ought to be proved by the defendant. *Volenti*, if successful, enables a defendant to describe a situation in which the plaintiff received just what she wanted, in a fair exchange. Good defense lawyers can sketch a plausible motive to explain the bargain.[341] The complainant's autonomy and clearheadedness are demonstrated.[342] As numerous cases indicate, courts can work capably with this understanding of willingness.[343]

The third Feinberg-derived criterion, relating to hypersensitivity, requires careful construction. The Equal Employment Opportunity Commission has declared that Title VII cannot vindicate "the petty slights suffered by the hypersensitive";[344] this declaration seems logical and sensible.[345] As feminist commentators point out, however, hypersensitivity is a problematic term, tending to marginalize the experiences and perceptions of women.[346] In practice, a concern with hypersensitivity lessens focus on the actor and focuses scrutiny on the complainant instead.[347] Yet it is difficult to dispense with the category of the hypersensitive plaintiff if one wishes to retain an objective ref-

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341 *See* Swentek v. USAir, 830 F.2d 552, 555–56 (4th Cir. 1987) (describing the partial success of the "bargain" tactic).

342 For a parallel argument, compare the reasoning with Abrams, cited above in note 121, at 1214–15, which raises the possibility that defendants may attempt to demonstrate that the plaintiff's response to the defendant's behavior is idiosyncratic. A classic instance of *volenti* appears in *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y. 1929), in which Chief Judge Cardozo regarded the hapless plaintiff with respect: a man, he reasoned, might want to take a rough ride in an amusement park. *See id.* at 174. So too might a woman want to hear rough jokes at the job, or to have another employee touch her breast. The respectful person standard admits these possibilities.

343 *See, e.g.*, Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1011 (7th Cir. 1994) ("The asymmetry of positions must be considered. She was one woman; they were many men."); Burns v. McGregor Elec. Indus., 989 F.2d 959, 963–64 (8th Cir. 1993) (acknowledging that the workplace behavior could have offended the complainant despite her having posed nude for a magazine, and noting that the trial court's contrary rationale "would allow a complete stranger to pursue sexual behavior at work that a female worker would accept from her husband or boyfriend"); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 883 (D. Minn. 1993) ("[The fact] [t]hat women say 'fuck' at work does not imply that they are inviting any and every form of sexual harassment."); *cf.* Kelly-Zurian v. Wohl Shoe Co., 27 Cal. Rptr. 2d 457, 463 (Cal. Ct. App. 1994) (refusing to admit evidence of plaintiff's abortions, taste for pornography, and prior sexual history).

344 EEOC Policy Guidance, *supra* note 330, at 669 (quoting Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984)) (internal quotation marks omitted).

345 One reformer admits that there is some validity to this point of view. *See* Frank S. Ravitch, *Hostile Work Environment and the Objective Reasonableness Conundrum: Deriving a Workable Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive Employees*, 36 B.C. L. REV. 257, 265–66 (1995).

346 *See* Abrams, *supra* note 121, at 1211; Dolkart, *supra* note 191, at 210; *cf.* Estrich, *supra* note 4, at 845–47 (arguing that the mere fact of a complaint may brand a woman as hypersensitive).

347 *See* Sara Needleman Kline, Comment, *Sexual Harassment, Wrongful Discharge, and Employer Liability: The Employer's Dilemma*, 43 AM. U. L. REV. 191, 199–200 (1993).

erent for hostile environment sexual harassment claims.[348] The respectful person standard suggests a cautious interpretation of hypersensitivity that preserves the gains of the objective standard but still accommodates the need for a standard that guides behavior in the workforce.

On this question, the respectful person standard would, following a framework used in dignitary-tort law, function as follows. Once the plaintiff produces evidence that the defendant did not conform to the standard of a respectful person, the court would permit the defendant to argue that he did indeed conform to the standard, and that the plaintiff's feeling or experience of disrespect resulted from her hypersensitivity. Liability would depend on whether the plaintiff's unusual sensitivity was known by or knowable to the defendant.[349] If the defendant could not have known or predicted the reaction, then the defendant would not be liable. If, however, the defendant knew about the hypersensitivity and acted deliberately to provoke a pained reaction, then the defendant would be liable.[350] A corporate employer would be liable if it knew of and condoned its employee's deliberate exploitation of the plaintiff's hypersensitivity.[351]

Parallels to current doctrine are evident. The question of hypersensitivity is embedded in the dialectic between objective and subjective assessments of conduct.[352] The respectful person standard, which partakes of both objective and subjective measures of behavior, validates both the (objective) principle of reasonable knowledge and the (subjective) principle of individual difference. At the same time, however, the

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348 *See supra* p. 477. Consistent with this view, tort law generally discourages plaintiffs from labeling themselves as extremely sensitive. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. j, § 313 cmt. c, § 652D, cmt. c (1965).

349 Frank Ravitch offers as an illustration a female worker whose boss thinks that women do not belong in the workforce. In an effort to drive her out, the boss exploits what he knows to be her sensitivity to loud noise and sets up a noisy machine near her office. The noisy machine would not bother the "reasonable person." Under current analysis, a hostile environment sexual harassment claim would fail, even though the supervisor deliberately imposed detrimental working conditions based on the gender of his subordinate. *See* Ravitch, *supra* note 345, at 257.

350 Longstanding tort rules are in accord. *See* Clark v. Associated Retail Credit Men, 105 F.2d 62, 65–67 (D.C. Cir. 1939) (allowing a remedy for the deliberate exploitation of the plaintiff's vulnerability to stress); Bundren v. Superior Court *ex rel.* Los Robles Reg'l Med. Ctr., 193 Cal. Rptr. 671, 676 (Cal. Ct. App. 1983) (reversing a grant of summary judgment for the defendant in a case in which the plaintiff sought recovery for the defendant's rude questioning of plaintiff while plaintiff was recovering from surgery); Great Atl. & Pac. Tea Co. v. Roch, 153 A. 22, 23 (Md. 1931) (allowing similar recovery for defendant grocer's packing a dead rat in a loaf of bread); RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1965) (noting that, in the case of an actor who knows of the plaintiff's peculiar susceptibility "conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge").

351 This summary is largely congruent with the recommendation of Ravitch, cited above in note 345, except that Ravitch is committed to the concept of the "objectively reasonable person." *Id.* at 271. It is also congruent with the burden-shifting argument proposed in Abrams, cited above in note 121, at 1214–15, and Childers, cited above in note 122, at 862 n.29.

352 *See supra* pp. 480–82.

respectful person standard departs from, and improves on, current doctrine by providing redress for deliberate, hostile conduct aimed at an employee because of her gender. Although the ultrasensitive employee appears to be more a creature of worried imaginations than real cases,[353] sexual harassment doctrine ought to have a place for this individual. In dealing with the possibility of a claim by such a litigant, the respectful person builds on traditions of both objectivity and individual attention.

3. The Law/Fact Divide. — Inasmuch as courts have admitted the difficulty of their task of dividing "the law" from "the facts" in sexual harassment cases,[354] one may wonder how the respectful person standard would function to preserve this distinction with its attendant benefits.[355] Supporters of the distinction can endorse the respectful person standard; in supplanting references to reason in hostile environment sexual harassment claims, the respectful person standard would coexist with the current dichotomy between questions of law and questions of fact. Summary judgment and dismissals of complaints would still be available to defendants on most of the same grounds currently deemed dispositive in federal courts. Procedural bases for dismissals and summary judgments, such as the statute of limitations[356] and the failure to exhaust administrative reme-

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[353] *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (referring to "the rare hyper-sensitive employee"); Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) (stating that the objective standard is necessary to protect employers from "hypersensitive" employees). Reported case law contains few decisions in which a court ruled against a plaintiff on the ground that the plaintiff was hypersensitive. One such case may be *Sand v. George P. Johnson Co.*, 33 Fair Empl. Prac. Cas. (BNA) 716, 720 (E.D. Mich. 1982), although the *Sand* rationale included other considerations. Instead the issue of hypersensitivity emerges as a defense lawyer's tactic, a label to pin on a plaintiff. *See* Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 531 (M.D. Fla. 1988) (denying a defense motion for a compelled psychiatric examination that was intended to show that the plaintiff was hypersensitive to pornography); Feldman-Schorrig & McDonald, *supra* note 11, at 28 (recommending this tactic).

[354] *See* Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 935–36 (1st Cir. 1995); *cf.* Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235, 1238 (7th Cir. 1989) ("Under Rule 52(a) we are obliged to correct errors of law including mixed findings of law and fact, and any finding of fact premised upon a rule of law." (citations omitted)).

[355] A distinction between law and fact offers the possibility of consistency among like cases, and appropriate reliance on the relative capabilities of lay persons and legal experts. *See* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1922–25 (1966). Criticism of the distinction comes from varied quarters. *See, e.g.*, JANICE SCHUETZ, THE LOGIC OF WOMEN ON TRIAL: CASE STUDIES OF POPULAR AMERICAN TRIALS 144 (1994) ("[B]oth law and fact are framed by the culture of the interpreters who create narratives to explain them."); Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487, 489 (1986) (offering a deconstructionist critique). This criticism precedes that of the Legal Realists. *See* James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147 (1890). For one Realist view, see LEON GREEN, JUDGE AND JURY 279 (1930), which calls the distinction a tautology.

[356] *See* Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996); Ellert v. University of Tex., 52 F.3d 543, 545 n.8 (5th Cir. 1995).

dies,[357] would continue unchanged. The plaintiff would retain fully her burden of proof; the substitution of a defendant-focused respectful person for a complainant-focused reasonable person (or woman, target, or the like) would not relieve plaintiffs of their current obligation to support their complaints with evidence.[358]

Even when the plaintiff can clear these hurdles, and even when the defendant did not behave as a respectful person, a Title VII claim might fail under the respectful person standard because of its poor fit with the antidiscrimination purposes of the statute. Disrespectful conduct not based on sex would remain outside the remedial boundaries of Title VII, consistent with the view now prevailing in the courts.[359] When disrespectful conduct is too trivial, isolated, or ambiguous to be deemed "pervasive," summary judgment would be proper under the respectful person standard.[360] The respectful person standard is also analytically severable from the question whether same-sex harassment ought to be actionable under Title VII;[361] like current "reasonableness" standards, the respectful person approach does not necessarily mandate acceptance of same-sex claims.

The law/fact divide may appear at odds with a respectful person standard. In everyday language, treating another person summarily, as in "summary judgment," or with "dismissal," challenges respect in some sense. Yet by supporting pretrial disposition, the respectful person standard honors the concept of respect. In preserving the virtues

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357 *See* Park v. Howard Univ., 71 F.3d 904, 905 (D.C. Cir. 1995), *cert. denied*, 117 S. Ct. 57 (1996); Humphrey v. Potlatch Corp., 74 F.3d 1243 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 616 (1996).

358 On this burden in sexual harassment cases, see *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 959 (4th Cir. 1996); and *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

359 *See* Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 538 (10th Cir. 1994); Walk v. Rubbermaid, Inc., 913 F. Supp. 1023, 1027 (N.D. Ohio 1994), *aff'd without opinion*, 76 F.3d 380 (6th Cir. 1996). Some conduct may be based on sex and yet not be central to Title VII's concern with discrimination; thus, it too would fall outside the scope of the respectful person standard. *See* Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (rejecting a claim based on heterosexual man-to-man harassment, in which plaintiff was teased for having no wife or girlfriend and for living with his mother, and stating that this behavior, though rude and childish, did not fall within Title VII's concern with "discrimination against a discrete and vulnerable group").

360 For current treatments of pervasiveness, see *Callanan v. Runyun*, 75 F.3d 1293, 1296 (8th Cir. 1996), and *Gross v. Burggraf Construction Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995). Present doctrine treats severity and pervasiveness as mixed questions of law and fact. *See* Jordan v. Clark, 847 F.2d 1368, 1375 n.7 (9th Cir. 1988); Anthony v. County of Sacramento, 898 F. Supp. 1435, 1447 (E.D. Cal. 1995). The respectful person standard would comport with this approach.

361 The Supreme Court has agreed to decide whether Title VII covers same-sex harassment. *See* Oncale v. Sundowner Offshore Servs., Inc., 117 S. Ct. 2430 (1997). This issue has divided the circuits. *Compare* Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451–52 (5th Cir. 1994) (holding that same-sex sexual harassment claims are not actionable under Title VII), *with* Hopkins v. Baltimore Gas and Elec. Co., 77 F.3d 745, 752 (4th Cir. 1996) (allowing the claim, but imposing extra burden of proof on the plaintiff to show that harassment was based on his gender), *cert. denied*, 117 S. Ct. 70 (1996), *and* Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995) (allowing the claim).

of an objective standard, the respectful person standard validates a subset of all sexual harassment complaints as grievances about behavior that is wrong, contrary to statute, and amenable to universal judgment. The respectful person approach spares defendants from protracted court proceedings when no reasonable factfinder could conclude that the plaintiff was entitled to relief. More generally, the dichotomous law/fact distinction is consonant with the central importance of dichotomies within respect — between individual and group-based identities; between the object as something other than the subject and the object as critically like the subject; between separation as isolating punishment and separation as affirmation — and thus in its basic questions comports with a respectful person standard.[362] In barring some accounts of harassment, the respectful person standard does not implicitly slur them as a reaction contrary to reason, unlike the prevailing objective criterion for hostile environment case analysis. In other aspects, the two standards are similar for purposes of pretrial disposition as a matter of law.

IV. Some Virtues of the Respectful Person

A respectful person standard would improve the law of sexual harassment in several ways. Because it grasps the distinction between agent and object — a distinction that the reasonableness standards obscure — the respectful person standard improves the descriptive function of sexual harassment law, a function that the judicial opinions of Justice Sandra Day O'Connor and the precedent of race discrimination have illuminated. Development of a respectful person standard would also connect sexual harassment law with important strands of American jurisprudence: the concept of respect permeates American law, and the respectful person standard reveals the common ground of this new legal subject and venerable terrain.

A. Descriptive Accuracy: Offensive Behavior and Harm to Dignity

"It is the accused, not the victim who is on trial, and it is therefore the conduct of the accused, not that of the victim, that should be subjected to scrutiny," wrote Judge Albert Lee Stephens, dissenting from the reasonable woman and reasonable victim prescriptions in *Ellison v. Brady*.[363] Stephens, a senior district court judge sitting by designation on the *Ellison* panel, brought to *Ellison* an important trial-focused perspective on the objective standard problem, and his sensible doubts about the reasonable woman standard have won praise in the law re-

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362 *See supra* pp. 484–92.

363 924 F.2d 872, 884–85 (9th Cir. 1991) (Stephens, J., dissenting).

views.[364] But the Stephens criticism,[365] extended logically, would cover the entire set of reasonableness standards in sexual harassment cases. Whether embodied as man, woman, person, victim, or any other noun, this entity diverts attention from the conduct of a putative harasser and forces the complainant to justify her perspective. Instead of laying down a standard of conduct, reasonableness tests purport to judge a reaction.[366]

By contrast, the respectful person is a standard that measures action rather than reaction. The actor is charged with a duty to refrain from offending others by keeping his behavior within the boundaries of respect. Compliance with this duty should lead to conduct similar to that encouraged by conventional reasonable person rules, but it is critically different in that the actor knows it is he, rather than his accuser, who will be held directly to the standard. Emphasis on the actor's offense, rather than on the victim's perception of the offense, would move hostile environment doctrine closer to the analytical center of civil law.

This shift would acknowledge that reasonableness inquiries work well in a range of other situations, as long as such inquiries focus on the person whose conduct has been challenged as unlawful. Negligence law uses reasonableness to examine the actions of a defendant[367] or of a plaintiff accused of contributory negligence.[368] Criminal negligence is also established with reference to reasonableness.[369] Criminal procedure permits searches by police officers based on their reasonable suspicion,[370] which in turn is based on "specific and articulable facts" that "would lead a reasonable person to conclude that criminal activity was afoot."[371] The law holds trustees to a reasonableness standard: "reasonable care, skill, and caution."[372] In their analyses of contested understandings in commercial contract litigation, courts use reasonableness tests in order to determine what the parties wanted.[373] All of

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364 *See* Johnson, *supra* note 169, at 633; Walter Christopher Arbery, Note, *A Step Backward for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims*, 27 GA. L. REV. 503, 545 & n.269 (1993); Turner, *supra* note 275, at 860.

365 *See Ellison*, 924 F.2d at 884 (Stephens, J., dissenting).

366 *See* Juliano, *supra* note 332, at 1570.

367 *See supra* note 125.

368 *See* United States v. Carroll Towing Co., 159 F.2d 169, 172 (2d Cir. 1947).

369 *See, e.g.*, State v. Crowdell, 487 N.W.2d 273, 277 (Neb. 1992) (inferring mens rea from conduct); Hill, *supra* note 324, at 651–52.

370 *See* Terry v. Ohio, 392 U.S. 1, 27 (1968).

371 Robert J. Burnett, Comment, *Random Police-Citizen Encounters: When Is a Seizure a Seizure?*, 33 DUQ. L. REV. 283, 284 (1995) (citing *Terry*, 392 U.S. at 30).

372 RESTATEMENT (THIRD) OF TRUSTS § 227 (1992).

373 *See, e.g.*, 2 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 6:52, at 611 (Michael A. Lord ed., 4th ed. 1990) (applying a reasonable person standard to the interpretation of silence as acceptance of an offer); *see also* Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 779 (Mo. Ct. App. 1907) (placing the plaintiff in the role of "reasonable man").

these reasonableness standards address actors rather than recipients of action.

Broader references to reason pay tribute to an indispensable concept in the law. "Beyond a reasonable doubt" reminds the factfinder to rely on its reason when assessing whether the evidence supports the intellectual proposition of criminal liability. The law of tax,[374] securities,[375] evidence,[376] antitrust,[377] administrative decisionmaking,[378] and constitutional interpretation[379] cannot be explained without the words "reason" and "reasonable."

These areas in which reason is of the essence are so widespread that it makes for a much shorter exercise to study the areas of law in which reason plays a relatively unimportant role. Dignitary harm is part of this latter category. Reason can be found only at its periphery. The infliction of an indignity has almost no relation to the core world of reason, nor to the search for resolution of doubt and disagreement that reason facilitates.[380]

The work of Joel Feinberg on offense[381] again suggests a valuable parallel. According to Feinberg, offensive conduct must be judged with reference to several variables, including its magnitude and the difficulty of avoiding the offense.[382] But reasonableness is not a proper

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374 *See, e.g.*, National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (establishing criteria for reasonableness of tax regulation).

375 *See, e.g.*, Associated Randall Bank v. Griffin, Kubik, Stephens & Thompson, Inc., 3 F.3d 208, 213 (7th Cir. 1993) (discussing "reasonable care" standards as applied to broker-dealers); Therese H. Maynard, *The Affirmative Defense of Reasonable Care Under Section 12(2) of the Securities Act of 1933*, 69 NOTRE DAME L. REV. 57, 113–15 (1993).

376 *See, e.g.*, Bourque v. FDIC, 42 F.3d 704, 711 (1st Cir. 1994) (using a reasonableness standard to decide whether a document was probative); FED. R. EVID. 201(b) (discussing reasonableness as applied to judicial notice); FED. R. EVID. 706(b) (permitting "reasonable compensation" for court-appointed expert witnesses).

377 *See* Standard Oil Co. v. United States, 221 U.S. 1, 63–64 (1911) (setting forth the antitrust "rule of reason").

378 *See* Aylett v. Secretary of Hous. and Urban Dev., 54 F.3d 1560, 1567 (10th Cir. 1995) (discussing the nature of "reason" in reviewing the decision of an administrative judge).

379 *See* Michael L. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84, 119–20 (1993) (describing the role of reasonableness within a minimalist paradigm of constitutional interpretation); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 n.21 (1994) (noting the interpretive difficulty posed by the word "reasonable" in the Fourth Amendment).

380 One of the handful of doctrines that refer to the perspective of those who receive action is the tort of offensive battery — that is, intentional contact that "offends a reasonable sense of personal dignity." RESTATEMENT (SECOND) OF TORTS § 19 (1965). This formulation of an objective standard addresses actors primarily, with only secondary emphasis on the recipients of action. The adjective "reasonable" serves to assert an objective standard and to define out hypersensitivities unknown and unknowable to the actor. *See* JOSEPH W. GLANNON, THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS 7 (1995).

381 *See* FEINBERG, *supra* note 33; JOEL FEINBERG, RIGHTS, JUSTICE AND THE BOUND OF LIBERTY 96–109 (1980).

382 *See supra* pp. 498–501.

element of the inquiry.[383] Offended states, writes Feinberg, are "neither reasonable nor unreasonable but simply 'non reasonable.'"[384] Indignity and humiliation, equally nonreasonable, fall within the understanding of a respectful person standard. The boundary crossing implicit in offense to others relates fundamentally to the delineation around individual persons, which is central to respect.[385] Defamation law provides another analogy to the harm of hostile environment sexual harassment and additional support for a respectful person standard. To be defamatory, a statement need not be unreasonable, nor need it seem defamatory to the reasonable person.[386] Offering a notable precedent for sexual harassment law, defamation law rejects pluralism and consensus as core principles, using these concepts only to set the outer limits of liability: a statement is not defamatory if it will offend only those whose standards are so clearly antisocial as to be offensive.[387] Like the respectful person standard, moreover, defamation law shows that repudiating reasonableness does not entangle doctrine in a bog of subjectivity. This doctrine is relational, sited firmly in a community.[388]

That hostile environment sexual harassment is fundamentally an injury to dignity escapes few who have experienced and studied the phenomenon. The majority of such persons are women, and although one hesitates to join the unending discussion of whether Justice Sandra Day O'Connor speaks in a feminine voice,[389] during her twelve years as the only woman on the Supreme Court, Justice O'Connor produced several distinct assertions concerning discrimination in employment

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383 *See* FEINBERG, *supra* note 33, at 35.

384 *Id.* at 36. Feinberg adds that some offended states are understandable with reference to reason: it is "perfectly reasonable" to take offense at a racial epithet, for example, and "profoundly contrary to reason to be offended by the sight of an interracial couple." *Id.*

385 *See id.* at 24; *cf.* Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195 (1995) (invoking boundary imagery).

386 *See* Peck v. Tribune Co., 214 U.S. 185, 189–90 (1909) (rejecting the defendant's contention that a defamatory statement must tend to offend a "general consensus," and noting that defamatory nature "is not a question of a majority vote"); Grant v. Reader's Digest Ass'n, 151 F.2d 733, 735 (2d Cir. 1945) (rejecting the contention that the communication must offend "right-thinking people").

387 *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 111, at 778 (5th ed. 1984) [hereinafter PROSSER & KEETON].

388 *See id.* at 771.

389 "One author has even concluded that my opinions differ in a peculiarly feminine way from those of my colleagues," wrote Justice O'Connor, sounding skeptical. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1553 (1991). *Compare* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592–613 (1986) (making the above argument noted by Justice O'Connor), *with* Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, 15 HARV. WOMEN'S L.J. 37, 60–64 (1992) (differing with Sherry). The debate, which has engaged political scientists as well as lawyers, is summarized in Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891 (1995).

that were broader than the proposition advanced here. To Justice O'Connor, employment discrimination is a tort in all but name.[390]

Deliberate, restrained in her analytic approach, and inclined to read statutes narrowly,[391] Justice O'Connor cannot properly be accused of distending antidiscrimination doctrine in pursuit of a remedial agenda.[392] She offers her judicial positions on workplace dignity continually in the spirit of careful statutory construction.[393] In their refusal to frame sex discrimination as indignity, her colleagues on the Court have never effectively refuted Justice O'Connor's cogent position that employment discrimination is a tort in all but name.[394]

The respectful person standard falls modestly within the confines of Justice O'Connor's approach to Title VII and related statutes. Whereas Justice O'Connor deems all employment discrimination a kind of indignity, the respectful person standard addresses sexual harassment only, and harassment (unlike other types of sex discrimination, such as the gender-biased pay schedules at issue in *United States*

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390 Writing separately in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Justice O'Connor emphasized the value of tort concepts — causation, deterrence, compensation, and "evil" — in the adjudication of sex-discrimination actions brought under Title VII. *See id.* at 261–65 (O'Connor, J., concurring). In an earlier case, she wrote separately to insist on a fault-like intent standard for employment discrimination claims brought under Title VII. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 612 (1983) (O'Connor, J., concurring). In a third case, *United States v. Burke*, 504 U.S. 229 (1992), in which the majority characterized the plaintiff's sex-discrimination award as quasi-wages rather than personal injury damages for purposes of federal income taxation, *see id.* at 242, Justice O'Connor dissented to insist that Title VII "offers a tort-like cause of action to those who suffer the injury of employment discrimination." *Id.* at 254 (O'Connor, J., dissenting). Justice O'Connor asserted: "Functionally, the law operates in the traditional manner of torts: Courts award compensation for invasions of a right to be free from certain injury in the workplace. Like damages in tort suits, moreover, monetary relief for violations of Title VII serves a public purpose beyond offsetting specific losses." *Id.* at 250.

Some years later, in the context of a discrimination claim based on disability, Justice O'Connor reasserted her view that employment discrimination is equivalent to tortious conduct. *See* Commissioner v. Schleier, 515 U.S. 323, 339–40 (1995) (O'Connor, J., dissenting).

391 *See* sources cited *supra* note 389.

392 *See* Tammy Bruce & Julianne Malveaux, *Can We Talk?*, ON ISSUES, Summer 1996, at 16, 17 (faulting Justice O'Connor for demanding proof of past discrimination in affirmative action cases); Sheila M. Smith, Comment, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893, 1893 (1995) (calling Justice O'Connor's record on sex discrimination cases "somewhat mixed").

393 *See* sources cited *supra* note 389.

394 Some Justices have attempted to refute her position. *See, e.g.*, *Burke*, 504 U.S. at 243 (Scalia, J., concurring in the judgment) (using the Latin maxim *noscitur a sociis* to contend that the phrase "personal injuries or sickness" should be read narrowly); *id.* at 248 (Souter, J., concurring in the judgment) (stating that although "good reasons tug each way," the plaintiff's award must be characterized as taxable because "exclusions from income must be narrowly construed"). The *Burke* majority opinion by Justice Blackmun is narrower and does not constitute a barrier to the respectful person thesis offered here, because the injury in *Burke* pertained to gender-biased salary schedules rather than the indignity of sexual harassment; moreover, in rejecting the tort analogy, the Court relied on portions of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994), that are now superseded by the 1991 amendments, *see Burke*, 504 U.S. at 237 n.8.

v. Burke[395]) closely resembles tort-remedied indignities such as intentional infliction of emotional distress.[396] Whether or not the American judiciary, under the leadership of a prominent woman Justice of the Supreme Court, will treat gender discrimination as a violation of a person's sense of dignity, the respectful person standard offers a prudent doctrinal expression of this understanding.

The respectful person standard also brings to sexual harassment doctrine a strong influence of African-American culture. As in other areas of antidiscrimination law, the precedents of racial history pertain closely to the building of new sexual harassment rules.[397] Respect, for many years a core theme of African-American literature and legal scholarship,[398] needs to be integrated more closely with current judicial understandings of antidiscrimination doctrine. Toward this end, consider Robin Dillon's description of respect:

> Respect is, we might say, object-generated rather than subject-generated; it is something we *render*, something that is called for, commanded, elicited, due, claimed from us. Thus it differs from liking or loving, and from fearing, to take another emotion with which respect is sometimes confused, all of which have their source in the agent's own desires and interests. When we respect something, we heed its call, accord it its due, acknowledge its claim to our attention.[399]

If Dillon is correct to view respect as a vector extended and received, then it is appropriate to think about conditions that impede this movement. Among these conditions is the obtuseness that derives from comfort. Gaps in social power block the flow of respect, especially its rendering by the subject. In a relation of respect, the subject must acknowledge the claims of the object while refusing the temptation and distraction of feeling too socially exalted to render what is

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395 504 U.S. 229 (1992).

396 *Cf.* Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 273–74 (1991) (presenting the argument that racist speech should be treated as a dignitary tort).

397 *See* Vande Zande v. State Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995) (discussing an analogy between race and physical disability); Dittman v. General Motors Corp., 941 F. Supp. 284, 286–87 (D. Conn. 1996) (exploring an analogy between "reverse age discrimination" and "reverse race discrimination"); Barton, *supra* note 316, at 455 n.58 (noting analogies between race discrimination and sex discrimination); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 149 (1988).

398 Among the mid-twentieth-century classics, see CLAUDE BROWN, MANCHILD IN THE PROMISED LAND (1965); RALPH ELLISON, INVISIBLE MAN (1952); LORRAINE HANSBERRY, A RAISIN IN THE SUN (1959); and RICHARD WRIGHT, NATIVE SON (1940). For the argument that respect ought to be an urgent priority for African-Americans, see MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X, at 275 (1965). Legal scholars widen the discussion. *See, e.g.*, Okianer Christian Dark, *Just My 'Magination*, 10 HARV. BLACKLETTER J. 21, 22–25 (1993) (describing race in the law school environment, including the belief that African-American female professors lack credibility); Ali Khan, *Lessons from Malcolm X: Freedom by Any Means Necessary*, 38 HOW. L.J. 79, 124–32 (1994) (linking respect to a human-rights conception of racial struggle).

399 Dillon, *supra* note 43, at 108.

due. Racial inequality makes white Americans more susceptible to this self-perception of superiority and, when unexamined, tends to obstruct the rendering of respect.

Attention to racial equality accompanies a respectful person standard in other particulars. As the English philosopher Richard Norman argues, respect is crucially different from sympathy; unlike sympathy, respect emphasizes separateness, "a reaction of distancing oneself."[400] The African-American struggle to achieve respectful separation — coexistence combined with living apart[401] — has echoes in the struggle of women workers to be left enough "alone" to do their jobs; the argument advanced for respect here recalls African-American and social science judgments of the need to acknowledge separateness as a step toward equality.[402] Finally, African-American experience sheds light on sexual harassment itself. In case law, African-American women have collectively described workplace behavior whose contemptuous and oppressive nature becomes clear through the lens of race and cannot readily be dismissed as badinage or good fun.[403] Many sexual harassment claims draw powerfully and directly on the racial precedent of caste oppression.[404] Sexual harassment law cannot cohere when it neglects its debt to race-based perception, and a respectful person standard helps to keep this ancestry at the heart of doctrine.

B. Doctrinal Harmony: Respect Elsewhere in the Law

American law frequently encourages, and even requires, citizens to render respect of the sort described in this Article. This section suggests that analogies can be drawn between the ideas of respect that are implicit in many of the current legal doctrines and the respectful person standard proposed here. Frank acknowledgement of respect as a constituent of law, rather than a part of a system of morality that is

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400 Norman, *supra* note 241, at 325–26.

401 *See* LERONE BENNETT JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA 217 (5th ed. 1982) (citing Frederick Douglass's plea of "let him alone"); GEORGE M. FREDRICKSON, BLACK LIBERATION: A COMPARATIVE HISTORY OF BLACK IDEOLOGIES IN THE UNITED STATES AND SOUTH AFRICA 137–78 (1995) (discussing a utopian separatist movement led by Marcus Garvey).

402 *See* Alex M. Johnson, *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1432 (1993).

403 *See* sources cited *supra* note 49.

404 *See* Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977) (describing the plaintiff's effort to persuade the court, using statistical evidence, that the sexual harassment she suffered constituted race discrimination); Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 17–21 (1991) (describing the racial identity of Mechelle Vinson, the plaintiff whose experience of sexual harassment became famous following *Meritor*); *cf.* Conn, *supra* note 281, at 548–50 (arguing that "the sexual exploitation that accompanied slavery has merely evolved into sexual harassment").

wholly separate from the law, would refine understandings of law in many areas apart from sexual harassment.

1. Visual Artists' Rights. — The continental doctrine of *droit moral*, which recognizes an artist's unique rights of integrity, attribution, modification, and withdrawal relating to her work,[405] has long been acknowledged in the United States.[406] Under this doctrine, the artist retains rights that inhere in the work itself, even after she no longer possesses or owns the work.[407] One of these rights is known expressly as the "right of respect,"[408] but all of these rights fall within the category of recognition respect.[409]

The Visual Artists Rights Act ("VARA") refers specifically to the "honor" of the artist, noting that modifications and alterations of a work can be prejudicial to an artist's honor.[410] One commentator explains honor in this context as an entitlement "to preserve the authenticity of [a] visual message."[411] Another commentator notes that, consistent with the general obligation of recognition respect, the duties generated by "honor" are in essence negative, restraining harmful actions.[412] Although some object to the presence of this "medieval" and "arcane" term in the United States Code,[413] its presence is useful to reformers who seek to improve the law of hostile environment sexual harassment.

Drawing on VARA, its predecessors in the common law, and intellectual property agreements between nations, one can extract concepts pertinent to sexual harassment doctrine. One is the relation between separation and affiliation. The visual artist is separate from her work (for example, some rights conferred under VARA are waivable) but also bound up in that work (such that harm to a thing may be equated with harm to her).[414] A second pertinent concept is the repudiation of market-thinking and market analogies. VARA deems the artist connected to her work notwithstanding its sale. Similarly, claims of enti-

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405 *See* JESSICA L. DARRABY, ART, ARTIFACT & ARCHITECTURE LAW § 9.03[1] (1995).

406 This acknowledgement has been somewhat reluctant in the common law but has been mandated by federal statute since 1991. *See* Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128, 5132 (1991) (codified at 17 U.S.C. § 106A (1994)).

407 *See* DARRABY, *supra* note 405, at § 9.03[1].

408 *Id.*

409 On the extensive secondary literature discussing moral rights, see the sources cited in Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 81 n.6 (1996).

410 *See* H.R. REP. NO. 101-514, at 5 (1990). The word "honor" comes from the statute's predecessor, the Berne Convention.

411 Edward J. Damich, *A Critique of the Visual Artists Rights Act of 1989*, 14 NOVA L. REV. 407, 408 (1990).

412 *See* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 36–37 (1994).

413 *See* DARRABY, *supra* note 405, at § 9.03[1].

414 I make an analogous argument concerning products liability. *See* Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 43 (1995).

tlement to respect in the workplace should not be diminished by rejoinders that the plaintiff chose the job and was paid to accept working conditions.[415] Both VARA and the respectful person standard relegate reasonableness to a supporting role and, in particular, confine it to exceptions and defenses. Both VARA and the respectful person standard guard against incursions and boundary crossing, rather than impose affirmative duties. The visual artist is entitled to injunctive relief against intentional or grossly negligent distortion, modification, or destruction that would be prejudicial to the work;[416] the worker is entitled to respectful distance.

2. Environmental Law. — As the phrase "hostile environment" suggests, environmental law can inform a respectful person approach to sexual harassment in the workplace. As the philosopher Paul Thompson writes, "a respectful person is a person who measures his or her action in terms of its consistency with[,] and [effect] on[,] a network or web of relationships."[417] Within this ecosystem — the worksite,[418] a larger social community,[419] or the physical world — the respectful person accepts the mediating effects of external circumstances. Thompson points out that both consequentialist ethical philosophy and Kantian absolutism tend to understate the impact the environment has on ethics. Noble character traits may become vices when taken to extremes, but the environment in which a virtuous person lives will reinforce the tendency of virtues to balance one another.[420] The environmental constituent of ethics, which Thompson calls the ecology of virtue, suggests that environmental law can inform and guide the development of a legal standard of respect.

Consider, for example, the precautionary principle,[421] an environmental tenet endorsed in the 1992 Rio Declaration[422] and by American courts.[423] The precautionary principle asserts that society should anticipate, rather than simply attempt to remedy, activities that harm the

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415 *See supra* pp. 469–70.

416 *See* 17 U.S.C. § 106A (a)(3)(A)–(B) (1994).

417 Electronic mail from Paul B. Thompson, Director of the Center for Biotechnology Policy and Ethics and Professor of Agricultural Economics at Texas A & M University, to Carolyn Raffensperger, Director, Science and Environmental Health Network (May 12, 1997) (printout on file with the *Harvard Law Review*).

418 *See supra* note 280 and accompanying text.

419 *See supra* p. 489.

420 *See* Thompson, *supra* note 417.

421 The precautionary principle, or *vorsorgeprinzip*, emerged in West Germany in the 1970s. *See* Konrad von Moltke, *The* Vorsorgeprinzip *in West German Environmental Policy, in* ROYAL COMMISSION ON ENVIRONMENTAL POLLUTION, TWELFTH REPORT: BEST PRACTICABLE ENVIRONMENTAL OPTION app. 3, at 58 (1988).

422 *See* David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599, 634 (1995). I elaborate on the precautionary principle in Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. (forthcoming 1997).

423 *See infra* note 427.

environment.[424] Urging policymakers to err on the side of nonencroachment and distance, the precautionary principle expresses respect.[425] This emphasis on avoiding harm rather than maximizing utility has affronted economics-focused critics, who argue that "better safe than sorry" as a policy provides little guidance about the optimal mix of risks and contains a tacit prejudice in favor of the status quo.[426] These criticisms stem from a utilitarian premise that runs contrary to the concept of recognition respect. Despite this utilitarian criticism, however, the principle retains strong appeal for courts, administrative agencies, and commentators.[427] Like the ethical duty to refrain,[428] the precautionary principle counsels hesitation; the respectful person understands the prudence of caution.

Elsewhere, current environmental law recognizes the tenet of respect. Animal rights, linked analytically to environmentalism,[429] are enforced by an array of laws. At the federal level, statutes protect vulnerable species[430] and provide for the humane transport of animals.[431] At the state level, anticruelty statutes declare the wrongful-

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424 *See* von Moltke, *supra* note 421, at 57–58.

425 I discuss the connection between the respectful person standard and the precautionary principle in a forthcoming work. *See* Anita Bernstein, *Precaution and Respect*, *in* STRATEGIES FOR IMPLEMENTING THE PRECAUTIONARY PRINCIPLE (Carolyn Raffensperger & Joel Tickener eds., forthcoming 1998).

426 *See* Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851, 859–61 (1996); *see also* Bernstein, *supra* note 422 (summarizing these criticisms).

427 Several courts have discussed the attraction of the precautionary principle. *See* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 656 (1980) (plurality opinion) (endorsing "risking error on the side of overprotection rather than underprotection"); ASARCO, Inc. v. OSHA, 746 F.2d 483, 495 (9th Cir. 1984) (deferring to agency cautions); Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1155 (D.C. Cir. 1980) (rejecting feasibility considerations in setting air quality standards and choosing "to err on the side of caution"); Central Platte Natural Resources Dist. v. City of Fremont, 549 N.W.2d. 112, 122 (Neb. 1996) (White, C.J., concurring) (supporting the decision to "err on the side of caution"); *see also* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 47 (1993) (describing the tendency to overstate risks); Cross, *supra* note 426, at 853 (finding a precautionary principle theme in California state law and the United Nations World Charter for Nature); *id.* at 857 (noting the conservatism of EPA risk-assessment procedures).

428 *See supra* pp. 486–92.

429 *See* THE ANIMAL RIGHTS/ENVIRONMENTAL ETHICS DEBATE: THE ENVIRONMENTAL PERSPECTIVE, at ix–x (Eugene C. Hargrove ed., 1992); JUDITH D. SOULE & JON K. PIPER, FARMING IN NATURE'S IMAGE: AN ECOLOGICAL APPROACH TO AGRICULTURE *passim* (1992); Laura Westra, *Ecology and Animals: Is There a Joint Ethic of Respect?*, 11 ENVTL. ETHICS 215 *passim* (1989).

430 *See* Marine Mammal Protections Act of 1972, 16 U.S.C. §§ 1361–1421 (1994); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (1994); Wild Bird Conservation Act of 1992, 16 U.S.C. §§ 4901–4916 (1994).

431 *See* 16 U.S.C. § 3372 (1994).

ness of gratuitous animal suffering.[432] Even negligence vis-à-vis an animal may constitute a crime.[433]

Inanimate objects also receive recognition respect in the law.[434] From the archaic law of deodands, which attributed blame to an object that caused the death of a person, through modern forfeiture, American legal traditions affirm the separate identity of things distinct from the identity of their owners, makers, buyers, and users.[435] State statutes criminalizing graffiti and vandalism rest on the premise that a thing possesses a unique identity, even integrity, that is violated by meddling or alteration.[436] Statutory and judge-made law also enforces respect for corpses: negligent mishandling of a dead human body was an accepted basis of claims for emotional injury long before a general recognition of negligent infliction of emotional distress emerged in the common law of torts.[437] State statutes demand decent treatment of

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[432] *See* GARY FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 121–22 (1995). Professor Francione, an animal rights activist, notes that these laws are far from self-enforcing and, in any event, never challenge the flawed "humancentric" premise that animals may, or perhaps must, suffer when such suffering would benefit human beings. *See id.* at 129–30. Whether or not Francione is right to quarrel with the scope and enforcement of anticruelty statutes, their existence demonstrates a degree of recognition respect of animals.

[433] *See, e.g.*, COLO. REV. STAT. § 18-9-202(1) (1996) (criminalizing negligent overworking and confinement as well as "criminal negligence" in failure to feed or shelter an animal in one's charge); N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 1996) (referring to the "failure to provide proper sustenance").

[434] In a 1985 sequel to his classic claim that trees warrant respect, Christopher Stone grouped together entities that, though not persons and hence not moral agents, nevertheless command "legal or moral attention." Christopher D. Stone, Should Trees Have Standing? *Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 12–13 (1985). These entities include embryos, animals, corpses, living organisms, habitats, "species, tribes, nations, corporations," even intangibles like "the quality of the light in the Arizona desert at sunset." *Id.* at 21–22. Stone uses special language — "disinterested entities," moral "obligees," "moral patient[s]" — that elucidates the infirmities of a reason-based standard for judging offensiveness and harm to dignity. *See supra* pp. 456–71. The term "moral patient," for example, which Stone borrows from the philosopher Tom Regan, *see* Stone, *supra*, at 45 & n.125 (citing TOM REGAN, THE CASE FOR ANIMAL RIGHTS 151–56 (1983)), suggests a terrain of respect extending beyond the Kantian perimeter. Like the respectful person standard, Stone's argument about moral pluralism accepts that moral claims can be object-generated as well as subject-generated. At its crux, Stone's argument is that disinterested entities are fundamentally entitled to recognition respect. Such recognition varies depending on the entity — the entitlements of embryos differ from those of corpses, which differ from those of natural habitats — but the claims of all include attention, focus, awareness of separation, and combinations of universal and particularistic regard. *See* Dillon, *supra* note 43, at 108–10. On behalf of disinterested entities, Stone asserts the claim made in the respect-for-persons literature — the person's right to be treated as the person he or she is. *See* Spelman, *supra* note 261, at 152–53.

[435] *See* Bernstein, *supra* note 414, at 44.

[436] *See* CAL. PENAL CODE § 640.5 (West 1996) (criminalizing the making of graffiti); HAW. REV. STAT. ANN. § 298-27 (Michie 1996) (addressing vandalism on public school property).

[437] Some early judicial writing expressed respect for corpses. *See* England v. Central Pocahontas Coal Co., 104 S.E. 46, 47 (W. Va. 1920) (allowing a claim for unauthorized disinterment); Larson v. Chase, 50 N.W. 238, 240 (Minn. 1891) (allowing a widow's claim for unauthorized dissection); *see also* PROSSER & KEETON, *supra* note 387, at 362 (referring to "a series of cases allowing recovery for negligent embalming, negligent shipment, running over the body, and the like").

corpses, including decent burial,[438] and federal legislation recognizes sacred land.[439]

3. The First Amendment.

a. Speech. — Those who assert the primacy of civil rights over civil liberties,[440] or who argue that freedom of speech must be understood in conjunction with the Fourteenth Amendment promise of equality,[441] stake out territory covered by recognition respect. Robin West sketches a recognition respect approach in an article that defends the suppression of hate speech on communitarian grounds.[442] Rejecting pure civil-libertarian views of free speech, West and other writers identify the vast power and appeal of a countervailing concept of respect.

The respect-oriented side of this debate has lost several key Supreme Court cases, in which freedom of speech arguments have triumphed over statutory attempts to enforce recognition respect.[443] Although respect-based arguments often fail to carry the day, they have been influential in shaping understandings of what is at stake, as even their antagonists have admitted.[444] The debates over speech regulation thus describe recognition respect, showing that it is amply precedented in American law, and incidentally help to refute the claim that remedies for sexual harassment in the workplace violate the right to free speech.[445]

In *Toward a First Amendment Jurisprudence of Respect*, West contrasts a "communicative" interpretation of speech with the dominant,

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438 *See, e.g.*, ALASKA STAT. § 47.25.230 (Michie 1996) (mandating "decent burial"); N.Y. PUB. HEALTH LAW § 4200(1) (McKinney 1996) (decreeing that "every body of a deceased person, within this state, shall be decently buried or incinerated within a reasonable time after death"). *See generally* William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 704–07 (1995) (summarizing common law precepts regarding corpses).

439 *See* 42 U.S.C. § 1996 (1994) (mandating that land worshipped by Native Americans be protected and preserved).

440 For an expression of this dichotomy and a summary of the contrasting views, see OWEN M. FISS, THE IRONY OF FREE SPEECH 10–18 (1996), and Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL'Y 81, 81–83 (1991).

441 *See* 2 HATE SPEECH AND THE CONSTITUTION (Steven J. Heyman ed., 1996) [hereinafter HATE SPEECH].

442 *See* Robin West, *Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher's* Constitutional Identity, 14 CARDOZO L. REV. 759, 762 (1993). Although West rejects the idea of privileging equality over liberty, her hybrid equality/liberty argument describes many of the elements of recognition respect. *See id.*

443 *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 392–94 (1992); Texas v. Johnson, 491 U.S. 397, 411–14 (1989). The Supreme Court summarily affirmed a Seventh Circuit case that had struck down an ordinance defining pornography-caused harms as civil rights violations and creating a private right of action to redress these injuries. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324, 325 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

444 *See* Henry Louis Gates Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37, 46–47 (addressing the harms of racist speech).

445 *See* sources cited *supra* note 7 and accompanying text.

liberal understanding of speech as "expressive."[446] Speech "creates a bond, a relationship, or a community that was not there previously between speaker and listener or writer and reader, the creation of which is both the primary purpose and primary consequence of the speech."[447] Despite the importance of this community, West continues, it would be a mistake to suppress speech simply because it can have "belittling, injurious, endangering, subordinating, spirit murdering consequences."[448] What West calls the progressive alternative to the dominant liberal tradition should not use the Fourteenth Amendment as a weapon against the First and argue that equality outweighs liberty. By protecting communication rather than words themselves, West argues, the First Amendment is faithful to ideals of both liberty and equality.[449]

Similarly rejecting the premise of a zero-sum contest between liberty and equality, Steven Heyman offers another respect-focused account of speech rights.[450] According to Professor Heyman, society may restrict hate speech because of its tendency to deny recognition and personhood to its target.[451] The First Amendment, never understood as an absolute endorsement of unrestricted free speech,[452] is part of a wider social contract that mediates rights and restrictions based on a concern about harm to others.[453] Recognition-denying speech, Heyman continues, is a violation of the respect that ordinary citizens owe to one another.[454] Under the social contract, each speaker must recognize others as "co-rulers," and render "a minimal degree of civility and respect."[455]

Like other instances of recognition respect encountered in this Article, the duty Heyman identifies — to refrain from inflicting the disrespect of hate speech — is at odds with metaphors of the market. The marketplace of ideas, championed in famous Supreme Court opinions of the early twentieth century,[456] stands for an aggregation that con-

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446 *See* West, *supra* note 442, at 761.

447 *Id.*

448 *Id.* at 762. West credits PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 73 (1991), for the phrase "spirit murder." West, *supra* note 442, at 761 & n.7.

449 *See* West, *supra* note 442, at 765–66.

450 *See* Steven J. Heyman, *Hate Speech and the Theory of Free Expression*, *in* 1 HATE SPEECH, *supra* note 441, at ix, xli.

451 *See id.* at xv.

452 *See id.* at xvii.

453 *See id.* at xviii. For elaboration in another context, compare Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 690–99 (1994).

454 *See* Heyman, *supra* note 450, at lvii.

455 *Id.*

456 *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (arguing that open debate pursues truth), *overruled on other grounds by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

centrates power without necessarily promoting the fittest and best objective truth.[457] Just as notions of transaction misdescribe the objective criterion of hostile environment sexual harassment claims[458] and the nature of visual artists' rights,[459] they do not build a satisfactory ideal of free speech. For purposes of recognition respect, however, metaphors of market and transaction retain value in that they describe the free discussion among persons who credit one another with freedom and reason.[460]

The free speech debate in general explores the limits of recognition respect, a quest that I describe in this Article but do not try to resolve except with specific reference to the area of sexual harassment law. A respectful person standard, implicit in the West and Heyman visions of the right to free speech, may eventually enter First Amendment doctrine. But rather than argue here in favor of this migration, I connect respect and free speech only to contend that one cannot posit a right of free speech without considering a distinction between expression and communication. The idea of recognition respect sums up what makes free speech a valuable right, what limits the right to free expression, and what is at stake in construing the First Amendment guarantee.

b. Religion. — The Free Exercise and Establishment Clauses of the First Amendment similarly link recognition respect with civil liberties. One famous metaphor envisions the boundaries that characterize recognition respect[461] by perceiving constitutional religious protection as shielding a garden from the encroachment of wilderness.[462] The respectful person, as discussed above, maintains a distance from others and recognizes that individual will arises uniquely in each human being.[463] Pointing occasionally in opposite directions, the Free Exercise

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457 *See* Heyman, *supra* note 450, at lix–lxi.

458 *See supra* p. 488.

459 *See supra* p. 513–14.

460 *See* Heyman, *supra* note 450, at lxii.

461 *See supra* p. 509.

462 *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS (1965). James Madison, whose view of the Religion Clauses commands strong allegiance today, *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1159–61 (2d ed. 1988), maintained that in the United States religions must stay separate from one another and from the state. *See* Letter from James Madison to Rev. Adams (1832), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 107, 107–08 (Philip B. Kurland & Ralph Lerner eds., 1987) (urging that the government abstain from dealing with religious establishments, except to preserve the "public order" and to protect "each sect [against] trespasses on its legal rights by others"). Laurence Tribe identifies the main themes of constitutional religious freedom as "voluntarism" and "separatism," both of which are central to recognition respect for persons. *See* TRIBE, *supra*, at 1160–61 (defining voluntarism as the freedom from "compulsion in matters of belief" and separatism as the principle that "religion and government function best if each remains independent of the other").

463 *See supra* p. 492.

and Establishment Clauses express a common concern about autonomous human will and the danger of disrespectful encroachment.[464]

In recognition of the value of commitments to — or principled stances against — religion, the American judiciary has lent support to conscientious postures and practices, favoring the perspective of respect for persons over alternative buttresses for religion that other societies have chosen.[465] And as with free speech, the Supreme Court cases that strike down statutory attempts to achieve recognition respect for religious practices or institutions illuminate the ways in which American law seeks to foster recognition respect. The Establishment Clause may be seen as a constraint on statutes that advance recognition respect for religions, but when the Court invalidates such statutes, it renders respect to the religion in question while insisting on the principle of separation between church and state.[466] The recent invalidation of the Religious Freedom Restoration Act similarly reveals a solicitude for liberty of conscience: in deeming this statute unconstitutional, the Supreme Court based its decision on congressional powers under section 5 of the Fourteenth Amendment, taking care not to impugn religious freedom as a legislative goal.[467] Failed claims for exemption likewise reveal the Court's respect for religious liberty: every one of the great free-exercise precedents ruling against conscientious practitioners of religion contains at least a bow, if not a paean, to spiritual freedom.[468] The tangled claims of religious liberty and religious neutrality continue to vex judges and scholars, who struggle over which value comes first. These writers have found common ground in recognition respect.[469]

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464 *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168 (1992) ("The great evil against which the Religion Clauses are directed is government-induced homogeneity . . . .").

465 *Cf.* Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 23 (1997) (noting that the Western legal tradition, unlike other legal systems, relies on a separation of law from religion); Sheldon H. Nahmod, *The Public Square and the Jew as Religious Other*, 44 HASTINGS L.J. 865, 867–68 (1993) (describing role played by anti-Semitism in European nationalism leading up to the Holocaust); Richard Smith, *Why the Taint to Religion? The Interplay of Chance and Reason*, 1993 BYU L. REV. 467, 468 (adverting to religion-state relations in Germany).

466 *See, e.g.*, Board of Educ. v. Grumet, 512 U.S. 687, 690 (1994) (observing that tenets of Satmar Hasidic faith do not require a separate school district); Engel v. Vitale, 370 U.S. 421, 431 (1962) (noting that a union of church and state would threaten "to destroy government and to degrade religion").

467 *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997).

468 *See, e.g.*, O'Lone v. Estate of Shebazz, 482 U.S. 342, 344, 352 (1987) (discussing efforts of prison administrators to cooperate with inmates' "sincerely held" Muslim beliefs); Bowen v. Roy, 476 U.S. 693, 700 (1986) (quoting with approval congressional resolutions concerning American Indian religious freedom); Reynolds v. United States, 98 U.S. (8 Otto) 145, 166 (1878) (noting that laws "cannot interfere with . . . religious belief and opinions").

469 *See* JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 31–32 (1995) (referring to "indignation" and "offense"); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1643

c. *Association.* — First Amendment doctrine connects personhood and human dignity to build a freedom of association:[470] in the words of Laurence Tribe, "virtually every invasion of personhood is also an interference with association . . . ."[471] For Charles Fried, the essence of privacy — another constitutional liberty linked with the First Amendment — is the power of an individual to share and withhold intimacy based on individual choice.[472] Supreme Court case law on the freedom of association expounds on these values, connecting associational rights with boundaries,[473] self-definition,[474] and protected sanctuaries.[475]

Like the concept of respect, freedom of association rests on both liberal and communitarian bases. From a liberal vantage point, associational rights recognize that persons cannot flourish in isolation. A communitarian perspective emphasizes that association in groups is more than a right: communities are as central as individuals are to this First Amendment-guaranteed liberty.[476] Here the contrast between reason and respect reappears. Successful claims of associational rights have come from groups and communities united around various values and characteristics — religion, gender, sexual orientation, ethnicity, family status — all of which, like sexual harassment, have little or nothing to do with reason. The impulse to associate comes from a desire of individuals to find their place in a community. This place can be identified, expressed, confirmed, refined, modified, and rejected only through the function of respect.

V. Common Sense and Respect

Having discussed respect as a matter of philosophy and sociocultural history as well as legal doctrine, we may now explore respect as a commonsensical norm that lay persons understand and apply. The proposed jury instruction below, interspersed with commentary,

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(1993) (concluding that political participation rights depend upon a recognition of religious conscience as well as a stance against religious establishment); William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 Ind. L.J. 351, 373 (1991) (noting, with disapproval, the theme of offensiveness in Religion Clause case law).

470 *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (noting that although the freedom of association "is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful").

471 Tribe, *supra* note 462, at 1400.

472 *See* Charles Fried, An Anatomy of Values 142 (1970).

473 *See Griswold*, 381 U.S. at 483; *see also* Eu v. San Francisco County Democratic Century Comm'n, 489 U.S. 214, 224 (1989) (identifying a right to determine the boundaries of a political association); Tashjian v. Republican Party, 479 U.S. 208, 214 (1986) (applying an associational right to political parties); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) (holding that an associational right protects organizations from government "attack" and "interference").

474 *See* Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984).

475 *See Griswold*, 381 U.S. at 484–85.

476 *See* Soifer, *supra* note 138, at 51–52.

describes the respectful person standard in ordinary language. Following the pattern set elsewhere in this Article, I have written this model jury instruction with Title VII claims in mind, but one may readily alter this instruction to fit dignitary-tort actions.

> *X [the plaintiff] has alleged that she has been forced into a hostile work environment because of sexual harassment. To establish a claim of hostile environment sexual harassment, X must prove by a preponderance of the evidence that the workplace was permeated with discriminatory intimidation, ridicule, and insult that is related to sex, and that is sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. Examples of such conduct are sexual propositions, sexual innuendo, the display of sexually explicit materials, and sexually derogatory language.*

Comment: This summary introduction would follow a more general opening, readily available in the pattern books and not of direct concern here, that would describe the nature of a Title VII claim.[477] The above paragraph quotes almost verbatim an ABA-authored model jury instruction.[478] Tellingly, the passage contains no reference to reason and reasonableness.[479]

> *Under the law, an employer must provide a working environment in which men and women are treated equally, and that is not hostile or abusive. You may need some guidance about what it means to treat people equally and to provide an environment that is not hostile or abusive. To help you in your deliberations, I ask you to ask yourselves: Did ABC [the employer] behave as a respectful person toward X? If ABC treated X as a respectful person would, then ABC is not liable to X.*

Comment: Following the contention that the duties of a respectful person are principally negative — the respectful person refrains and forbears, and stands back from boundaries[480] — this part of the instruction includes negative locutions. Evidence suggests that although multiple negative statements can harm jurors' comprehension of instructions,[481] judges can reduce or eliminate these harmful effects by

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477 *See, e.g.*, 3 EDWARD J. DEVITT, CHARLES B. BLACKMAR & MICHAEL A. WOLFF, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL § 104.01, at 1012–13 (4th ed. 1987 & Supp. 1996).

478 *See* Employment & Labor Relations Comm., *Model Jury Instructions: Employment Litigation*, 1994 A.B.A. SEC. LIT. 40.

479 These terms appear in the ABA model jury charge. *See id.*

480 *See supra* pp. 486–92.

481 *See* Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1324–25 (1979) (finding only small effects on comprehension when instructions use single negatives, but identifying double and triple negatives as particularly incomprehensible to jurors).

stating the negatives as contrasts.[482] In this model instruction, negative locutions are therefore accompanied by contrasting affirmatives.

To be a respectful person is to treat other human beings as persons who are as valuable as you are — even if you have had advantages that they have not had. It is to acknowledge their dignity and humanity, to recognize that they are like you, yet have their own goals and wishes. It is to pay attention to other people — how they react and what they say. When we respect people we accord them basic dignity, and we acknowledge their stake in how we behave.

For purposes of the law, the respectful person must refrain from doing to other people what he or she would not want done to him or her, except when that is impossible to avoid. For instance, it may be necessary to fire an employee, and the respectful person may do so when this decision is necessary.

The respectful person does not humiliate another person. The respectful person appreciates the dignity of another person. This obligation does not mean that X is entitled to feel good about her job all the time, nor that ABC must spare her feelings at all times.

A respectful person does not have to be perfect. An employer acting as a respectful person is entitled to do unpleasant things, to make a profit from employment, to hire and fire, and to act as it needs. The respectful person does not have to be generous or patient, for instance. Nor does the respectful person need to have a high opinion of everyone. Respect is not the same as admiration. You might respect Q [name an athlete] because he is so good at his game. That's the kind of respect that comes with admiration for a person's special skills or talents. Respect in the workplace, however, means the fundamental dignity due to every person regardless of unique ability or exceptional talent.

Comment: Jurors are likely to want guidance on the outer boundaries of a respectful person standard. The instruction lists delineated virtues to clarify what the respectful person is *not*,[483] by specifically contrasting appraisal respect. The instructions also condone workplace capitalism, the absence of altruism at a worksite, and general unsaintliness, all of which are ubiquitous in employment.

You know what it means to be a respectful person outside the courts of law. You have been called to jury service because of your daily life experiences — because you have known both respectful and disrespectful persons in real-world situations. You

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[482] See Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 TEMP. L.Q. 1159, 1167 & n.28 (1986).

[483] Wilcox incorporates contrasts in his proposed model instruction on obscenity, stating that such an instruction, "in telling the juror to reject certain ideas, helps the juror to make some important distinctions." *Id.*

should draw on your own experience as you determine whether ABC acted toward X as a respectful person would.

CONCLUSION

Outside the precincts of law, sexual harassment is understood to be a kind of disrespect. Examples of this understanding abound. Of the multitude of statements about respect in relation to harassment — from ancient literature to conversations with friends, in employment manuals and in television programming, through newspapers and all other media[484] — I have pulled one example from the business community for this Conclusion. This statement of harassment as disrespect indicates an understanding that has yet to permeate legal doctrine.

The American Management Association, addressing managers concerned about accusations of harassment, urges them to think before they speak:

> Would you say [a dubious remark] in front of your spouse, parent, or child?
>
> Would you say it if you were going to be quoted on the front page of the newspaper?
>
> Would you behave that way toward a member of your own sex?
>
> Why does it need to be said at all? What business is it furthering?[485]

Would you say that in front of your mother? Taken as more than rhetorical, this question identifies sexual harassment as wrongful conduct, a simple assertion that many courts and scholars have declined to make. The management association criteria state burdens in terms of an actor rather than his target. They allude to public reaction — "the front page of the newspaper" — and thereby express concern with public humiliation and threats to one's good name. The criteria have nothing to say about reason and reasonableness. They understand the basic sexual harassment duty to be built around restraint. In short, this commonsense understanding about sexual harassment rests on the idea of respect. The American Management Association invites the reader to be or become a respectful person, as a way to avoid both the

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484 A vast array of references to respect in the context of harassment appear in the media. *See, e.g., Sexual Harassment and Misconduct in the United States Army: Hearing Before the Senate Comm. on Armed Services*, 105th Cong. (Feb. 4, 1997) (statement of General Dennis J. Reimer, Chief of Staff, United States Army), *available in* LEXIS, Legis Library, Cngtst File; *Women Readers React*, BANGOR DAILY NEWS, Jan. 28, 1997, at A8 (gathering comments from women newspaper readers); *Crossfire* (CNN television broadcast, Feb. 16, 1997), *available in* LEXIS, New Library, Script File (debating whether opening combat positions to women would result in greater respect for women soldiers and reduced sexual harassment).

485 Thomas Head & Mickey Veich, *Would You Say That in Front of Your Mother? Sexual Harassment*, SECURITY MGMT., Feb. 1994, at 43, *available in* 1994 WL 2823114.

practice of harassment and the accusation that one has committed this violation of employment law.

Sexual harassment law needs to absorb the teachings of common sense and daily experience. Doctrine in this subject must be *trued*, brought honestly into alignment with good sense. This process includes several discrete steps.

As this Article has detailed at some length, the respectful person must replace the reasonable person as the gauge by which courts determine whether the alleged harasser has violated the law. Respect and reason are neither mutually preclusive nor oriented in contrary directions. However, centuries of experience have connected reason with various biases — relating to gender and race in particular and caste oppression in general — that obstruct the remediation of sexual harassment. Emphasis on reason also neglects the emotional and sexual nature of sexual harassment. Standards that demand reasonableness, in the sense of shared understandings or centrist views, have proved problematic in both theory and practice. Indispensable elsewhere in the law, the reasonable person must play a lesser role in sexual harassment doctrine.

Another step is more theoretical and must be taken slowly. Recognizing respect as a legal concept comes close to treading on the principle that the law ought to refrain from teaching or enforcing virtue, except in the minimal sense of deterring citizens from endangering one another. Philosophical conflict between those who favor the right and those who emphasize the good has been underway for centuries, with insufficient application to specifics.[486] Sexual harassment law should enter this liberal-communitarian debate at a point near the edge of liberal minimalism.[487] I have suggested that the respectful person falls within the boundary of what the liberal state is competent to undertake. The path of such a person may be stated in narrow and negative terms: the respectful person has a legal duty to refrain from disrespect, rather than a duty to affirm or esteem another person. Respect in this sense — I have used the philosophical label "recognition respect" — is consistent with various relations now mandated by longstanding doctrine.[488] Embedded legal rules of respect are taken for granted. A stronger understanding of the way in which the law demands respect-

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[486] Authors have explored the liberal-communitarian spectrum in specific areas of law and policy. *See, e.g.*, Troyen A. Brennan, *An Ethical Perspective on Health Care Insurance Reform*, 19 AM. J.L. & MED. 37, 47–5 (1993) (extrapolating from medical ethics to create an ethic of access to health care); Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 278–310 (1994) (rejecting the strict liberal/communitarian dichotomy to argue that vulnerable groups are entitled to services necessary for the good life); Fox, *supra* note 246, at 171–78 (criticizing welfare reform).

[487] *See supra* notes 41–42 and accompanying text.

[488] *See supra* pp. 512–21.

ful behavior will clarify values now obscured and shed light on liberal political theory in American law.

To complement this theoretical advance, working lawyers should continue to introduce new extralegal understandings about sexual harassment into the development of the law. One source of input comes from the jury, standing by in both Title VII and dignitary-tort actions. Jurors grapple with respect in their daily lives. The formality of a courtroom, though a workaday setting for lawyers and judges, causes persons in the jury pool to think about what Robin Dillon has called institutional respect;[489] although legal scholars and courtroom regulars may find respect an alien concept in tort or antidiscrimination law, those persons assembled to serve on a jury bring a heightened sense of the word into the court proceedings.[490] Other influences on the development of respect in sexual harassment proceedings may come from the work experiences of those familiar with other respect-focused domains of the law. Environmental lawyers and intellectual property specialists, for instance, might be well positioned to explain the legal concept of respect.

Treating sexual harassment with respect must begin with the acknowledgment that sexual harassment is wrong. Such a statement, far from impeding the progress of women workers or mixing tort improperly into civil rights law,[491] is essential to the prevention and remediation of sexual harassment. Only after it is deemed wrong can sexual harassment be abjured and condemned. Injurers and recipients of harassment will then be able to locate their decisions and behavior in a design that is congruent with morality.

The two legal domains that address sexual harassment — tort and antidiscrimination law or, put more quaintly, law and equity — conjoin to demand this moral design. Once it is agreed that sexual harassment is a wrong and hence warrants a claim at law, the principle of equity behind the civil rights statutes "lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is because of this emphasis upon the defendant's duty that equity is so much more ethical than law."[492] The obligations of sexual harassment law derive from

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489 *See supra* note 232; *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 249 (1986) ("[Jury service] imbues all classes with a respect for the thing judged, and with the notion of right." (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835)) (internal quotation marks omitted)).

490 Several articles discuss jurors' experience of respect in the courtroom. *See, e.g.*, Stephanie B. Goldberg, *Caution: No Exemptions*, A.B.A. J., Feb. 1996, at 64, 65; Joseph H. Hoffman, *Where's the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L. REV. 1137, 1155 (1995); Bob Sablatura, *Sword and Shield: Grand Juries in Texas*, HOUSTON CHRON., Nov. 25, 1996, at A5.

491 *See supra* note 39.

492 Ames, *supra* note 52, at 106. Although the emphasis of Title VII enforcement has shifted toward law from equity since the passage of the Civil Rights Act of 1991, *see Developments in the*

the tenets of ethical personal relationships. A standard of respect for sexual harassment cases would emerge from this origin in day-to-day life, improving the American workplace on its way to improving the law.

Law — Employment Discrimination, 109 HARV. L. REV. 1568, 1573–74 n.26 (1996), pre-1991 Title VII enforcement provided exclusively equitable remedies, *see* Note, *supra* note 199, at 1464.