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AN OLD JURISPRUDENCE: RESPECT IN RETROSPECT

Anita Bernstein†

In *The New Jurisprudence of Sexual Harassment*,¹ Kathryn Abrams does one of my articles great honor, and I ought to acknowledge the tribute before beginning to carp. Professor Abrams regards my *Treating Sexual Harassment with Respect* (“*Treating*”)² as prominent in a vast landscape. All the big ideas appear. First Catharine MacKinnon, naturally, and the *Meritor* landmark.³ Then Abrams surveys post-*Meritor* scholarship, modestly obscuring her classic *Gender Discrimination and the Transformation of Workplace Norms*⁴ in a string cite.⁵ Over the last twenty years or so, Abrams explains, these much-studied writings have articulated the “why,” the “what,” and the “how” of sexual harassment law.⁶

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¹ Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998).

² Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 446 (1997).

³ See Abrams, *supra* note 1, at 1169-70 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979)).

⁴ Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989) [hereinafter Abrams, *Gender Discrimination*]. According to a Lexis search, *Gender Discrimination* has been cited in 156 articles and seven judicial opinions. Search of LEXIS, Genfed Library Mega file; Lawrev library, LRALR file (Mar. 3, 1998). It is included in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), the reasonable-woman landmark. *Id.* at 879 n.9. Although reasonable woman standards appeared in a few earlier sexual harassment cases, see *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987), *Ellison* is widely regarded as the great precedent, thanks to the influence of *Gender Discrimination*. *Ellison*, one of a handful of truly feminist federal appellate opinions, encouraged numerous observers to believe that the reasonable woman standard was a good idea and showed that courts are open to progress and willing to learn about the experience of women at work. See Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 122-23 (1992); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 798. Abrams has held different views on this question, recommending the reasonable woman standard in Abrams, *supra*, at 1209-15, then backing off the standard in Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1033-37 (1992) [hereinafter Abrams, *Social Construction*], and finally confessing her varying views in Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 365-66 n.243 (1995) [hereinafter Abrams, *Sex Wars Redux*].

⁵ Abrams, *supra* note 1, at 1170 n.6.

⁶ *Id.* at 1169-70.

Now enter two 1997 publications, *Treating*⁷ and Katherine Franke's *What's Wrong With Sexual Harassment?*⁸ Abrams faults both articles for insufficient concern with gender subordination.⁹ Although we are wrong, however, we are The New Jurisprudence of Sexual Harassment. Implicitly Abrams pairs *Treating* with the most majestic law-related writing on this subject, *Sexual Harassment of Working Women*: like MacKinnon, I have taken on the "why." Let's not overlook the source of this panoramic flattery: anyone who ever wrote or thought about American sexual harassment law owes a big debt to Professor Abrams, whose analytic clarity, bold command of doctrine, and fluency in both feminist scholarship and word-tools for judges and litigants are unsurpassed.

Amid this grandeur, *Treating*—which proposes to replace the "reasonable person" (and reasonable woman, man, target, victim, and so forth) of hostile environment sexual harassment doctrine with the "respectful person"¹⁰—is a narrow work, hardly Exhibit A of any New Jurisprudence. Franke's ambitious reconception of sexual harassment to accommodate postmodern insights about gender presents a theory in high style—it is new jurisprudence indeed—but as Abrams rightly notes,¹¹ *Treating* examines sexual harassment with an eye toward remediation, prevention, and other pragmatics; it builds theory only as secondary to description. Moreover, "new" is not in my judgment the correct modifier for a thesis that seeks to expand a venerable concept.

"What is [hostile environment] sexual harassment?" *Treating* queries.¹² It then paraphrases its question to something wordier like "What does it mean to say—for purposes of dispute resolution and the implicit function of private law as a source of communication between citizens and the state about justice—that a defendant ought to face liability for hostile environment sexual harassment?" True, there are a couple of moves here between the short and long versions, to which some might object.¹³ Professor Abrams is among the objectors. She thinks that the paraphrase neglects the central importance of the workplace as a site of sexual harassment.¹⁴ More important, the *Treat-*

⁷ Bernstein, *supra* note 2.

⁸ Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

⁹ Abrams, *supra* note 1, at 1171-72.

¹⁰ Bernstein, *supra* note 2, at 452-54.

¹¹ Abrams, *supra* note 1, at 1174.

¹² Bernstein, *supra* note 2, at 446 (abstract).

¹³ I probably have given away my enthusiasm about torts, for one thing. On that, see *infra* text accompanying notes 85-86.

¹⁴ Abrams apparently thinks it's the true site: *The New Jurisprudence* has much to say about remunerative work as a foundation, Abrams, *supra* note 1, at 1185-86, 1193-1200, 1205-13, but only a few dismissive words about harassment in families, prisons, rental hous-

ing query presents a "neutered wrong."¹⁵ Any attempt to consider hostile environment sexual harassment that does not put the subordination of women at center stage is a "moral and political" failure.¹⁶

The failure of *Treating* does not stop there: Abrams endorses the "reasonable person," a status-quo concept in which she has invested her labor for ten years, and rejects my "respectful person."¹⁷ Thus even if *Treating* had not revealed a baleful decision to neglect gender subordination, Abrams would still think it wrong for proposing a reform that could not improve doctrine, even in the neutered hypothetical universe it posits. Inasmuch as I have stated the thesis of *Treating* to be "Change the word reasonable to respectful," I will need to defend the respectful person standard below.

But let me return to the more significant charge, since Abrams does not seem to regard a rejection of "respectful person" as at the heart of her argument. *The New Jurisprudence of Sexual Harassment* blames *Treating* more for what it omits than what it commits: Abrams contends that "failing to highlight the fact that [sexual harassment] arises from a context of systematic gender inequality . . . diminishes the imperative for responding to it."¹⁸ A surprising claim. I abhor subordination as much as the next feminist—come the millennium we will eliminate it root and branch. *Treating* does not take this pledge explicitly, I admit, but Catherine MacKinnon wrote in 1979 that sexual harassment is (or can be) sex discrimination in violation of Title VII,¹⁹ and Justice Rehnquist, bless him, long ago agreed.²⁰ Must I recite a catechism before adding to the collection plate?

In law review writing one hopes to say something helpful. *Treating* does not restate an eloquent literature written by others but rather tries to read a statute, and related tort doctrines, in a way that would aid the struggle against subordination waged in workplaces, jury deliberations, judicial compromises, and ordinary conversations among lay people. I realize that Abrams disagrees with this description and reads *Treating* as a retrogressive dissent from the cause. But the re-

ing, or places of public accommodation like bars. *Id.* at 1185, 1194 n.144. (Or Chicago Blackhawks games, where one of my former students has endured a gauntlet on the walk from the aisle to her season-ticket seat for the last twelve years.) Although the workplace is indeed fundamental, and these other sites less important, I find it valuable to conceptualize sexual harassment in a way that follows civil rights statutes and tort doctrine: both "sex discrimination" and "tortious conduct" can exist outside of employment.

¹⁵ *Id.* at 1184-88.

¹⁶ *Id.* at 1187-88.

¹⁷ *Id.* at 1224; *see also id.* at 1183 n.85 (discussing Abrams's efforts on behalf of "reasonableness").

¹⁸ *Id.* at 1187.

¹⁹ CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 5-6 (1979).

²⁰ *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986).

spectful person, among other things "a noninflammatory proxy for sexist devaluation of the less powerful by the more powerful members of a sex and gender hierarchy,"²¹ works toward an end that Abrams esteems.

Treating suggests a more powerful adjective than "reasonable," amply precedented as a legal value, that resonates with people who have faced subordination and avoids old pitfalls.²² By moving the inquiry away from a complainant's reaction and turning it on the conduct of employers, the switch from "reasonable" to "respectful" avoids the victim-blaming that has marginalized and devalued women workers.²³ Neither endorsing nor rejecting the Abrams view of gender as "agonistic,"²⁴ the workplace as *Kriegschauplatz*, a respectful person standard offers help in the battle: the prevention of harassment, improved adjudicative remedies, and a day at work with fewer burdens for women and men of good faith. Those who would fight subordination through law in these dark times need a victory now and then.

I

On respectful person versus reasonable person, Abrams writes that it's unclear whether the new locution improves doctrine.²⁵ Although "language can be a powerful constructive force in life and law," she is "skeptical about our power to transform substantive understandings . . . through the alteration of a single term in a legal standard."²⁶ Abrams suspends part of this skepticism when praising "reasonable," however, calling it "workable," amenable to careful redefinition, and "enlisted to answer" all the pertinent questions about the nature of a hostile or abusive environment.²⁷ An activist²⁸ thus supplies what Albert Hirschman called "the rhetoric of reaction," finding futility (and later jeopardy) in a reform proposal.²⁹ According to Abrams, respect as a legal standard is simultaneously idle and danger-

²¹ Abrams, *supra* note 1, at 1187.

²² Bernstein, *supra* note 2, at 452-55 (critiquing reasonableness standards and arguing that a respectful standard is more inclusive).

²³ See *id.* at 501, 506-07; see also Abrams, *Gender Discrimination*, *supra* note 4, at 1206 (noting that the judicial search "for the ostensibly objective perspective" has entrenched "the male-centered views of harassment"); Abrams, *Sex Wars Redux*, *supra* note 4, at 364-66 (describing pitfalls for women in current sexual harassment doctrine). This change also harmonizes sexual harassment doctrine with legal doctrine generally. See Bernstein, *supra* note 2, at 507-08.

²⁴ Abrams, *supra* note 1, at 1172, 1196-97 n.154, 1198, 1205.

²⁵ *Id.* at 1178-79.

²⁶ *Id.* at 1184.

²⁷ *Id.* at 1175-76.

²⁸ Abrams refers to her "activism" in Abrams, *Gender Discrimination*, *supra* note 4, at 1184.

²⁹ ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991).

ous. Either courts and juries won't benefit from it,³⁰ or they'll misunderstand it.³¹

Elsewhere I have defended the project of creating new doctrine,³² and other writers have offered rich versions of the argument that language, even "a single term," is indeed a powerful, constructive social force.³³ The "substantive understandings" that a reasonable-to-respectful revision would "transform" create change in several ways. Abrams may have read *Treating* to prescribe doctrine exhorting citizens to render respect in the workplace, but I had in mind more of the converse: case law built from experiences and analogies that shape judicial understandings of sexual harassment.

Disagreeing, Abrams tries to see meaning in an opaque word. *Treating* offers sufficient evidence to show that whether "reasonable" means "governed by ratiocination" or "average and centrist," the reasonable person standard turns out inane or pernicious, or both, when courts apply it in sexual harassment cases.³⁴ Abrams does not quarrel with this claim but contends that a good rehab would save the adjective and achieve most of the benefits that I associate with a respectful person standard.³⁵ In my view, the word isn't worth saving. You could

³⁰ See Abrams, *supra* note 1, at 1178-80.

³¹ See *id.* at 1187-88.

³² Usually in the form of sympathetic, unsolicited how-to advice. See Anita Bernstein, *Better Living Through Crime and Tort*, 76 B.U. L. REV. 169, 184-90 (1996); Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1559-63 (1997).

³³ These scholars mix description and prescription to argue that social change generates, and also results from, doctrinal change. See, e.g., Abrams, *Gender Discrimination*, *supra* note 4, at 1209-15 (parsing "reasonable woman"); Jane E. Larson, *Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 NW. U. L. REV. 1252, 1252-53 (1993) (describing innovation in the law as a source of social progress); see also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 206, 213 (1890) (arguing that tort law does, or perhaps should, honor a privacy right); Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495, 498-99 (1984) (combining concepts of environmentalism, intergenerational equity, and fiduciary responsibility). See generally Lawrence M. Friedman, *The Concept of Legal Culture: A Reply*, in *COMPARING LEGAL CULTURES* 33, 34-35 (David Nelken ed., 1997) (describing the interrelation of social change, legal culture, and legal results such as changes in tort law).

³⁴ Bernstein, *supra* note 2, at 456-80. *Treating*, however, finds much value in the words "reason" and "reasonableness," albeit a peripheral value. *Id.* at 464 (explaining how reason works in the prevention and remedying of sexual harassment); *id.* at 507-08 (detailing the importance of the word "reasonable" in numerous areas of the law); *id.* at 497-504 (using the work of Joel Feinberg to build a role for reasonableness in sexual harassment doctrine).

³⁵ Abrams, *supra* note 1, at 1177. Abrams also makes a quick plea for ratiocination as integral to sexual harassment doctrine: "If sexual harassment is also understood as a barrier to women's professional progress, or, as a denial of their capacity for self-definition or self-direction, it seems quite capable of being apprehended by the faculties of reason." *Id.* at 1176. I am not sure I follow the point. If Abrams is saying that sexual harassment often obstructs women when they try to follow rational design and life-plans, I am happy to concur. But an affront to powers of ratiocination is neither necessary nor sufficient to establish hostile environment sexual harassment in the minds of any of the players, and I

study sexual harassment case law from now until the end of subordination and not find one judicial opinion that needs the increment of meaning added by the word "reasonable"—pick any definition you like—to convince its readers that a challenged work environment was, or wasn't, hostile or abusive. Academic writers have pointed out countless flaws in the reasonableness standards,³⁶ loosening the judicial commitment to this tradition.³⁷ Reformist jurists need a new term.³⁸ I am inclined to favor one that works against subordination by validating the life experiences of those disempowered by reasonable person standards—women and African-Americans in particular.³⁹

Where I see validation, however, Abrams finds sinister possibilities. *Treating* adverts—innocuously enough, I thought—to the emotional constituent of sexual harassment, stating that the experience cannot be recounted or understood without reference to emotion;⁴⁰ Abrams implies that I have called certain people "emotional" and have claimed sexual harassment "is a women's injury that cannot be apprehended by the rest of the population."⁴¹ *Treating* urges employers to heed a respectful person standard in the workplace; Abrams believes that I have given aid and comfort to "the man who places women on a 'pedestal'" and "[t]he male employer who treats women employees as he might his mother or sister, . . . declining to treat them as serious professional contenders."⁴² Although the word "respectability" appears nowhere in *Treating*, Abrams thinks that it lurks in the shadows, and associates the respectful person with Randall Kennedy's homily urging African-Americans to observe a "'politics of respectability,'" and specifically to mind "'the way they are perceived by [white] others'" before they do something boisterous, such as celebrate the O.J. Simpson acquittal in public.⁴³

This last bit is unworthy of attention—I despise respectability, if it means what I think Abrams says it means, and have never remotely commended it⁴⁴—but it does provoke me to contrast Respectful Ac-

don't think Abrams means to say that a plaintiff should have to plead and prove such an affront.

³⁶ See Bernstein, *supra* note 2, at 464-71 (documenting many of these works).

³⁷ See *id.* at 477-80.

³⁸ For a discussion of what is wrong with the old substitutes, see *id.* at 471-80 (addressing, *inter alia*, the reasonable woman).

³⁹ *Id.* at 456-60, 511-12.

⁴⁰ Cf. Bernstein, *supra* note 2, at 452 (discussing respect in terms of morality and self-esteem).

⁴¹ Abrams, *supra* note 1, at 1176.

⁴² *Id.* at 1183 n.84.

⁴³ *Id.* at 1182 (quoting RANDALL KENNEDY, RACE, CRIME, AND THE LAW 21 (1997)).

⁴⁴ Abrams does not disagree. Abrams, *supra* note 1, at 1183 ("Bernstein, of course, does not advocate the pursuit of respectability, as Kennedy does, or as 19th century middle-class domestic morality did."). Abrams's sources on "respectability" consist of Randall Kennedy's exhortations on African-Americans and unpublished manuscripts by Mary Louise

ording to Abrams with Reasonable According to Bernstein. Both Abrams and I have seized on a word and euded its flaws. We have identified futility and jeopardy in each other's doctrinal preference.⁴⁵ From there, we diverge. Abrams reaches fancifully into petit-bourgeois Victorian to caricature "respect,"⁴⁶ even though numerous judicial and statutory uses of the word are on record;⁴⁷ I restricted myself to those meanings of "reasonable" that courts and legal scholars have implemented to elucidate hostile environment sexual harassment. Abrams kicks the respectful person out of doctrine,⁴⁸ even though she admits that sexual harassment "is a failure of respect";⁴⁹ I looked for, and tried to preserve, the value of reasonableness within doctrine.⁵⁰

Regarding the other two threats—emotion and the pedestal—I am still unperturbed. *Treating* refers to emotion only to criticize ratiocination as radically incomplete for purposes of describing sexual harassment. I've hardly advocated an emotional person standard, or urged anyone to get in touch with his feelings, or argued that a sexual-harassment plaintiff should have to make a showing about emotion in her prima facie case. As for the pseudo-respectful Confederate soldier and the pedestals he erects in the path of progress, I have two ideas for stopping him, to the extent that he exists. One is the injury requirement, implicit in all of civil litigation.⁵¹ The pedestaled victim who gets past summary judgment will have a story of detriment and a claim for damages. The other is the jury.⁵² Jurors are pretty good at detecting condescension, hypocrisy, and smarm. They might mistake sugary misogyny for respect, but I confidently assert that they will not do so very often, and I call on their detractors to produce evidence of such bias.

Abrams seems uninterested generally in the role of the jury in sexual harassment cases, and this lack of interest is prominent in her apologia for reasonableness standards.⁵³ Filling in for the courts,

Fellows. *Id.* at 1180-82. To Abrams, these works describe respectability as a genteel, regressive trap for women and persons of color. *Id.* at 1181-82. The merits of "respectability" aside, I argue in *Treating* for a focus on the actor accused of harassment, Bernstein, *supra* note 2, at 506-07, and so mind-your-manners exhortations to subordinated groups have nothing to do with my thesis.

⁴⁵ See *supra* notes 25-31, 34 and accompanying text.

⁴⁶ Abrams, *supra* note 1, at 1183.

⁴⁷ See Bernstein, *supra* note 2, at 454.

⁴⁸ See Abrams, *supra* note 1, at 1184-88.

⁴⁹ Abrams, *supra* note 1, at 1184.

⁵⁰ Bernstein, *supra* note 2, at 464, 497-504, 507-08.

⁵¹ Although an injury requirement seems somewhat at odds with her thesis, Abrams apparently endorses it. Abrams, *supra* note 1, at 1226-27.

⁵² *Treating* included a partial jury instruction. See Bernstein, *supra* note 2, at 522-24.

⁵³ A misguided inclination for a feminist activist. See generally Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 80 (1994) (praising the jury for "drawing other people into the interpretive project of adjudication"). According to Carrie Menkel-

which have shirked their task of defining "reasonable," Abrams draws up a definitional list of "four categories of knowledge" that the trier of fact "must know":⁵⁴ (1) sexual harassment is "but one example of the complex set of barriers" that continue to vex women in the workplace; (2) women associate sex in the workplace with "intimidation, objectification and devaluation;" (3) sexual harassment "produces a range of effects" in its targets; (4) we can infer from a target's response next to nothing about "whether the behavior was problematic or even whether the target felt distressed by the conduct."⁵⁵

These categories are newish ideas: Abrams would have trouble characterizing them as immanent in Title VII or easily derived by a common law method. Let us assume that this question of pedigree can be dealt with.⁵⁶ Let us further assume that all four assertions are both valid and relevant. Because Abrams published her list only after years of study, I assume she does not think that most jurors know what she knows, or that voir dire can work as a locus of either tutorials or quizzes about what venirepersons understand. Instead, Abrams must be placing her trust in the federal judiciary. Judges will screen out unreasonable cases and frame disputes appropriately.

It is odd that Abrams, who fears such bugbears as the word "emotion" and who dreads letting jurors near the concept of respect, can regard so blithely these entrenched mostly-white-and-male politicians, in the teeth of what she knows about where they came from and what they value. Appointees of Presidents Reagan and Bush make up a large percentage of the federal judges Abrams might reach. Filtered to exclude "liberals," the criminal defense bar, police brutality litigators, death penalty opponents, union-side labor lawyers, supporters of *Roe v. Wade* (in the early years), and persons unwilling to assure FBI interlocutors that they'd never tried marijuana,⁵⁷ these judges probably did not begin their tenure disposed to the MacKinnonism inherent in the Abrams list. Clinton judges are usually viewed as not much

Meadow, present discourse treats the judge as male (rational, justice-oriented, in command of abstractions) and the jury as female (empirical, care-oriented, immersed in particulars). Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 59 (1985).

⁵⁴ Abrams, *supra* note 1, at 1178 n.50.

⁵⁵ *Id.* I have rejected this line of thought, arguing that nowhere in "reasonable" can one find feminist activism. Bernstein, *supra* note 2, at 469 n.143.

⁵⁶ I laid the groundwork in *Treating* to argue that respect is a familiar legal concept, Bernstein, *supra* note 2, at 512-21, and I don't want to put another writer (or reader) through those paces. But anyone who would fault *Treating* for its deviance or novelty should apply this criterion consistently to the Abrams reform.

⁵⁷ See Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1117-22 (1994); Timothy B. Tomasi & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 767-70 (1987).

different.⁵⁸ Does Abrams propose to school these people in “the almost aesthetic distaste all hetero-patriarchs feel for individuals who transgress gender stereotypes,”⁵⁹ “the entrenchment of masculine norms,”⁶⁰ and the way in which sexual harassment “genders both men and women through a variety of dynamics commensurate with their individual and subgroup based variations”?⁶¹ If so, by what means? Is there a precedent?⁶² Life-tenured, politically vetted federal judges have little incentive to work at revising what they know.⁶³ A respectful person standard, by bringing common sense to doctrine, can educate judges—and everyone else in the workplace—incrementally and without bombast.

⁵⁸ See *Jurist Prudence*, THE NATION, Jan. 26, 1998, at 4, 5 (noting that of Clinton’s first 187 judicial appointments, 182 were unopposed by Republicans). Some say that Clinton did little in his appointments to reverse the Reagan-Bush criteria. See Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20. Others say he did nothing. See Alexander Cockburn, *Don’t Be Fooled Again*, THE PROGRESSIVE, Nov. 1996, at 19, 20; Nat Hentoff, *Bill Clinton’s Judges*, VILLAGE VOICE, Oct. 29, 1996, at 25; John Nichols, *The Clinton Courts: Liberals Need Not Apply*, THE PROGRESSIVE, Sept. 1996, at 25, 27. Even the American electorate, not reliably up on this kind of thing, horse-laughed Bob Dole’s 1996 complaint about “liberal Clinton judges” clear out of public discussion, maybe even off talk radio for all I know.

⁵⁹ Abrams, *supra* note 1, at 1199.

⁶⁰ *Id.* at 1210.

⁶¹ *Id.* at 1220.

⁶² Fueled with plenty of money and favored by political winds that blew gently at his back—advantages that Abrams may never have—Henry Manne didn’t get far in his quest to make federal judges believe in prescriptive microeconomics. The Manne manifesto for judges appears in James A. Dorn & Henry G. Manne, *Editors’ Preface to ECONOMIC LIBERTIES AND THE JUDICIARY* at xix (James A. Dorn & Henry G. Manne eds., 1987); see also *Jurist Prudence*, *supra* note 58, at 5 (documenting attempts by the “right-wing” Scaife, Olin, and Bradley foundations to influence judges through “educational” means). On the limited nature of Manne’s success, see Margaret V. Sachs, *Freedom of Contract: The Trojan Horse of Rule 10b-5*, 51 WASH. & LEE L. REV. 879, 886-87 & n.44 (1994) (noting the percentage of federal judges who had been trained at one of Manne’s “economics institutes”; estimates were 40% in 1987 and “one-third” in 1993); Chris Klein, *Manne’s an Island*, NAT’L L.J., Dec. 30, 1996, at A16 (reporting the ouster of Manne at George Mason University Law School). Although law and economics has a reputation for influence and has certainly played a prominent role in the academy, many writers describe its effect on judges as moderate. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 360-61 (1995) (reporting measured gains); Sachs, *supra*, at 887-88 (describing limits of economic analysis in the Supreme Court’s interpretation of securities statutes).

⁶³ It is hard to gauge the quantity of resistance that federal judges manifest. Although many of them work hard to accrete new learning, those proposals for the continuing education of judges that I’ve seen are made with a tact that suggests barriers of inertia and disinclination. See, e.g., *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1513-16 (1995). Four-fifths of district court judges have never edified themselves with a court-appointed expert under Federal Rule of Evidence 706, which provides judges with the opportunity to be educated on a discrete point of their own choosing, an opportunity that can help them make a correct decision and look good in print. See Joe S. Cecil & Thomas E. Willging, *Accepting Daubert’s Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1004-05 & tbl.1 (1994).

II

These references to judges, juries, summary judgment, and "the injury requirement" bring me to the larger criticism that sexual harassment is really about the gender agon—a struggle, Abrams says, that *Treating* mischievously subverts by emphasizing what private law can do. *Treating* "individualizes the wrong,"⁶⁴ recommending a myopic focus on one workplace at a time—one plaintiff, one employer accused of disrespect. The problem, Abrams reminds us, is collective and entrenched: the wrong of sexual harassment extends deep into a history that precedes any individual lawsuit.⁶⁵ "This is not simply an abstract point," Abrams warns, "but an issue with ramifications for public education, legal enforcement, and private efforts at prevention."⁶⁶

She takes me back fondly to our shared days at law school. Like many influential scholars, Abrams learned about the law from Owen Fiss. *The New Jurisprudence of Sexual Harassment* is at least indebted to, if not directly descended from, a vision expressed in *Groups and the Equal Protection Clause*,⁶⁷ *The Supreme Court, 1978—Foreword: The Forms of Justice*,⁶⁸ and *The Civil Rights Injunction*.⁶⁹ Another probable ancestor, *The Role of the Judge in Public Law Litigation* by Abram Chayes,⁷⁰ seems to inform Abrams's conception of sexual harassment as more of a threat to "group rights" than to individual rights.⁷¹

What's wrong, to cadge a phrase from Professor Franke, with conjoining group rights and sexual harassment law? Nothing, maybe. *Treating* tried to stay neutral on the question, and my aversion to group rights is not strong. No one can deny that women belong to a group that receives extra harm from sexual harassment.⁷² Moreover, as Franke has shown, this "technology of sexism"⁷³ inflicts gender-related injury on more people, and in more ways, than current case law

⁶⁴ Abrams, *supra* note 1, at 1187.

⁶⁵ *Id.* at 1187.

⁶⁶ *Id.* at 1187.

⁶⁷ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (exploring the structure and limitations of the anti-discrimination principle).

⁶⁸ Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (describing relations among citizens, state bureaucracies, and the judiciary).

⁶⁹ OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978) (examining the hierarchy of remedies in the American legal system).

⁷⁰ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

⁷¹ *Id.* at 1316 (referring to "the deep and durable demand for justice" that groups present to the courts); Fiss, *supra* note 68, at 19 (commending "the group perspective on the victim").

⁷² I said as much. Bernstein, *supra* note 2, at 456, 460-61; see also *id.* at 482 (noting indirectly that the respectful person standard would work fine in class actions).

⁷³ Franke, *supra* note 8, at 693.

reveals.⁷⁴ I would have preferred to condemn disrespect in the workplace without disparaging anyone else's conception of injustice. But now that I have been pressed to account for my emphasis on individual collisions, a short survey of those objections to group rights that pertain to sexual harassment doctrine is in order.

For openers, we have the familiar problem of framers' intent. Back in the heady seventies, when much more seemed possible, Owen Fiss stopped short of Title VII, limiting his group-rights innovation to constitutional claims based on the Equal Protection Clause.⁷⁵ Abram Chayes's article is a eulogy in two senses, praise and lament for the dead. While Chayes applauded public-law expansion, he also knew that the school, housing, and prison cases had started to wane.⁷⁶ It doesn't matter, of course, what Fiss and Chayes "intended"; I mention their hesitation only to suggest that even visionaries could see the horizon in 1976—and 1976 was a better time for antisubordination activists than the New Jurisprudence year of 1997.

A related point is judicial disinclination. Most contemporary judges do not want to use their courts to promote political activism, and many believe that constitutional doctrines prevent them from taking up the work that Abrams wants done.⁷⁷ For decades Supreme Court justices have endorsed this preference,⁷⁸ although I suppose a good constitutional scholar like Abrams could propound a different reading of their statements or call them dicta. She cannot, however, get federal judges (whose jurisdiction is supposed to be limited) to impose an agenda they do not share on a citizenry that pays Congress and the state governments to protect the interests and consider the

⁷⁴ *Id.* at 693-94.

⁷⁵ See Fiss, *supra* note 67, at 168-70; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1058-65 (1978) (faulting both Fiss and the Supreme Court for the small steps they took toward eliminating discrimination through law). In another article that addresses the employment statutes at a general, unnamed level, Fiss argues that intent is not part of the plaintiff's burden but employer motives and psychology can be relevant from time to time. Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 297-300 (1971). *Treating* is in accord. Bernstein, *supra* note 2, at 492-97 (situating employer responsibility for harassment between a fault-based and a strict liability standard); *id.* at 498 (noting that Title VII must not be read to demand proof of intent to injure).

⁷⁶ See Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 648 (1988).

⁷⁷ See John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1137-41 (1996).

⁷⁸ See *Missouri v. Jenkins*, 515 U.S. 70, 92-93 (1995) (limiting remedial scope of federal courts); *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (holding that black plaintiff did not have standing to sue for injunctive relief that would limit the authority of police to use choke holds); *cf.* *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955) (*Brown II*) (endorsing a slow remedial pace that would not push hard against the resistance of white citizens).

demands of well-organized activist groups.⁷⁹ Courts use many labels to avoid the level of abstract debate that Abrams favors: whether the named reasons are "standing,"⁸⁰ "federalism,"⁸¹ "separation of powers,"⁸² "the case and controversy limitation,"⁸³ or anything else, courts aren't heeding the call.⁸⁴

But ultimately, I am convinced by a separate argument, rooted in my sub-occupation. As a torts teacher, I tend to look for the defining elements of a citizen-initiated lawsuit,⁸⁵ expecting to see a plaintiff, a defendant, an injury (usually), and a rationale for holding that this defendant ought to be forced to restore to this plaintiff what she wrongfully lost.⁸⁶ Torts teachers prefer that the plaintiff prove fault, although we accept strict liability in limited form, when the defendant chooses to engage in certain activities from which the plaintiff does not gain a commensurate benefit.⁸⁷ Abram Chayes speaks slightly about this old-time model, ticking off its traits with some disdain. Private parties, private rights. Bipolar. Retrospective. Right and remedy are interdependent. Party-initiated, party-controlled.⁸⁸

Now I know that a description of private-law characteristics doesn't demonstrate what Title VII should mean; nor, in general, can one infer "the ought" from what is. But the tort model raises issues of competence that Abrams neglects. The public-law contrasts to private litigation that Chayes recites—rights independent of remedies, sprawling controls, management rather than resolution⁸⁹—can be moved to any locus of political power, whereas private law avails itself of traits unique to the courts.⁹⁰ Sexual harassment falls within the judicial

⁷⁹ Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 148-69 (1980) (advocating a limited judicial role in the enforcement of rights, especially where claimants are numerous and well organized).

⁸⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

⁸¹ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 237-40 (1985).

⁸² *Schweiker v. Chilicky*, 487 U.S. 412, 426-27 (1988); see also Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 712-18 (1978) (explaining how the Supreme Court has been "sensitive to separation of powers considerations").

⁸³ *Rescue Army v. Municipal Court*, 331 U.S. 549, 567-68 (1947).

⁸⁴ See Marcus, *supra* note 76, at 666-68.

⁸⁵ See generally Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990) (noting that federal courts have not developed an overarching definition of article III's case requirement).

⁸⁶ Another torts teacher criticizes *Missouri v. Jenkins* from a similar vantage point, although his conclusions are not mine. See Richard A. Epstein, *The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri*, 84 CAL. L. REV. 1101, 1113-16 (1996).

⁸⁷ See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 543-48 (1972).

⁸⁸ Chayes, *supra* note 70, at 1282-83.

⁸⁹ *Id.* at 1284.

⁹⁰ Cf. L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 513, 518-28 (1931) (emphasizing the importance of historical continuity in common-law decisionmaking); Edward L. Rubin, *The*

framework of tort law and tortlike actions under Title VII. The post-1991 version of the statute fits closely within this paradigm, but the 1964 original, with its faith that lawsuits promote equality and that courts (not just legislatures and administrators) need broad equitable powers, also affirms the power of private litigation.

Title VII is not a tort statute—*Treating* took pains on this point⁹¹—but the statute does depend on the players, practices, and strengths of citizen-initiated litigation. Abrams knows as much.⁹² Her posture against private-law attributes resembles the claim by Marvin Jones that in Title VII litigation the employer is “a fiction,” an “invisible discursive barrier.”⁹³ The tort influence on Title VII, Jones argues, rests destructively on the Nietzschean motto of “every event a deed.”⁹⁴ Following this criticism to its logical conclusion, Jones dissolved the adjudicative model altogether and argued in favor of a new legal language that would “demonstrate a concern for equality as a poetic dream.”⁹⁵ I’m too hardheaded to accompany Jones down that road, even if my only alternative companion is a syphilitic proto-Nazi crackpot. Adjudication can’t do anything without a deed.⁹⁶ Citizens learn principles from individuals and their actions, including the principle of antisubordination.

CONCLUSION

The war against sexual harassment—to evoke an Abrams metaphor—has many fronts and needs an array of weapons. I would wage the war in segments, moving group-related concerns to the theaters of

Concept of Law and the New Public Law Scholarship, 89 MICH. L. REV. 792, 799-800 (1991) (arguing that judges are on the strongest ground when they move in small increments and work with the facts of a case).

⁹¹ Bernstein, *supra* note 2, at 448, 496-98.

⁹² In a section on doctrinal applications, Abrams offers reforms that either echo *Treating*'s respectful person standard or collapse into slogans that have nothing to do with adjudication. For examples of the former tendency, see Abrams, *supra* note 1, at 1220 (stressing “agency,” a concept I underscored in *Treating*, Bernstein, *supra* note 2, at 491-92); Abrams, *supra* note 1, at 1221 (arguing that the current rule about unwelcomeness should be abandoned; instead, in the case of sexual touchings or requests for favors, the plaintiff should have to prove that the conduct was “‘unilateral or disregarding of her desires’”); cf. Bernstein, *supra* note 2, at 489-92 (making a similar argument using the concepts of “personhood” and “humiliation”). The requirement under current law that the plaintiff must prove that the challenged conduct was “based on sex” provides an example of the latter sloganeering. Abrams prefers that she prove it was “‘connected with the enforcement of a sex and gender hierarchy.’” Abrams, *supra* note 1, at 1223. Alas, everything is in this way connected to everyone; we are all plaintiffs and defendants now.

⁹³ D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 VAND. L. REV. 349, 357 (1992).

⁹⁴ *Id.* at 358-66.

⁹⁵ *Id.* at 395.

⁹⁶ Cf. George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 127-29 (1995) (arguing that some sense of intent always flavors the verb “to discriminate”).

legislatures, workplaces, unions, and public opinion, while saving courts for the functions they best serve. Thus it was quite right of Abrams to speak out in a law review rather than as an attorney for a client, and I am honored to join her here, where I continue to defend an adjudicative approach to sexual harassment law.

In my view, adjudication is progressive. An old-jurisprudence concept such as legal recognition of respect links the conflicts of the moment, such as strife in the workplace, with traditions that have been articulated in courtroom accounts of the past. Precedents become instruments. Working with—but separate from—groups and their causes, private law is a fulcrum that moves the world. Abrams and I can agree on the question of where to move. The difference of opinion between us is not a zero-sum contest in which either group rights or respect for individuals must vanquish the other. We have proposed two routes to the same destination.