A FEMINIST PERSPECTIVE: WHY FEMINISTS SHOULD GIVE THE REASONABLE WOMAN STANDARD ANOTHER CHANCE

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I. INTRODUCTION

Feminists have much to celebrate over the advancement of sexual harassment law. For example, over the last thirty years sexual harassment has grown from an unrecognized claim under Title VII of the Civil Rights Act of 1964[1] to a discrete form of sex discrimination that violates Title VII.[2] Moreover, an open dialogue about the sexual harassment that women[3] encounter in the workforce has emerged in the last decade. Since the infamous Anita Hill–Clarence Thomas hearings in 1991, discussions about sexual harassment have moved out into the open from behind closed doors to discussions on Capital Hill, in the media, around office water coolers, and in the courts.

But despite these successes, feminists are divided over a crucial aspect of how courts should handle this form of sex discrimination. At issue is the perspective a court should use to determine whether an employer's or a co-worker's behavior is sexual harassment. Specifically, should courts apply a reasonable person or a reasonable woman standard? Some feminists advocate the use of the traditional reasonable person over the reasonable woman standard because no two women share the same perspective, and because under a separate standard they will become

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[1] Codified at 42 U.S.C. §§ 2000e through 2000e-17 (1994).

[2] *See* The Equal Employment Opportunity Commission (EEOC), Facts About Sexual Harassment, *at* http://www.eeoc.gov/facts/fs-sex.html (last modified Jan. 15, 1997); *See also* Mona Harrington, Women Lawyers Rewriting the Rules, 210-12 (1993) (noting that in the mid-70s sexual harassment as a Title VII claim was a novel idea, but by 1980 sexual harassment law was on the books).

[3] Although both women and men can be victims of sexual harassment, see Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998, 1001-02 (1998), the number of female victims greatly outnumbers the number of male victims. *See generally* Katherine Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1202-03 (1989). Thus, this article will primarily focus on those sexual harassment claims that are brought by women. Therefore, the author takes the privilege of using the feminine pronoun to refer to unnamed plaintiffs in this article.

unequal to men in the eyes of the law.[4] Other feminists argue that it is appropriate to apply a reasonable woman standard in sexual harassment cases because that standard takes into consideration common female experiences and assesses them in light of the individual circumstances at hand.[5]

In this article, I will argue that the "reasonable woman" is the more appropriate standard for sexual harassment jurisprudence. A cause of action for sexual harassment under Title VII is "an invention of our times."[6] The law of sexual harassment developed thanks to the efforts of feminists and activists who were determined to convince the courts that sexual coercion and harassment in the workplace is a form of sex discrimination.[7] Today, feminists should continue to fight discrimination in the workplace by arguing for a legal standard that considers the views of women when a court determines whether the harassment a female plaintiff encounters is severe or pervasive enough to constitute sexual harassment.

I base my argument in favor of the reasonable woman standard on the understanding that the reasonable person, or even the reasonable victim, standard is simply inadequate. The goal of those two standards is to apply a

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[4] *See generally* Sharon J. Bittner, The Reasonable Woman Standard After Harris v. Forklift Systems, Inc.: The Debate Rages On, 16 Women's Rts. L. Rep. 127, 135-37 (1994) (stating that "feminists should be suspicious of classifications which purportedly give women preferential treatment" since it perpetuates the image that women are delicate, sensitive, and in need of protection).

[5] *See generally* Naomi R. Cahn, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice, 77 Corn. L. Rev. 1398, 1414 (1992); *See, e.g.*, Erin M. Lehane, Who is the Reasonable Plaintiff and What Does She Mean for the Rest of Us?, 19 Women's Rts. L. Rep. 229, 231 (1991). Erin Lehane notes that courts which use the reasonable woman standard recognize non-sexual gender-based harassment to be actionable while courts that apply the reasonable person standard often do not. *Id.* at 231. She explains the reasoning of courts using the reasonable woman standard to be that Congress intended Title VII to free the workplace of "artificial barriers and an anti-woman animus can certainly serve as such a barrier." *Id.* The author's discussion of non-sexual gender-based harassment demonstrates why the reasonable woman standard is necessary in sexual harassment jurisprudence. Harassment in the workplace does not always involve physical touching, sexual advances, or sexual jokes by co-workers or supervisors. Rather, harassment often includes offensive language, disparate treatment, non-sexual physical intimidation, and a sexually charged work environment. Although this harassment is non-sexual in nature, it may still be unwelcome and severe or pervasive conduct that alters the "purely psychological aspects of the workplace environment." Meritor Savings Bank v. Vinson, 477 U.S. 57, 58 (1986). Therefore, if courts do not apply the reasonable woman standard and thus fail to find non-sexual harassment actionable, sexual harassment jurisprudence will not prohibit a large portion of harassment common to women in the workplace.

[6] Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813, 816 (1991).

[7] *See* Harrington, *supra* note 2, at 209-16 (discussing the feminist campaign to develop the law of sexual harassment); *see, e.g.*, Estrich, *supra* note 6, at 817-18.

gender-neutral approach to the law.[8] However, sexual harassment is not a gender-neutral problem. In ninety percent of reported sexual harassment cases, women are the victims and men are the aggressors.[9] Moreover, because there remains an economic and social disparity between men and women, the impact of sexual harassment is uniquely devastating for women.[10] Under a gender-neutral legal standard, it would be irrelevant in the law of sexual harassment that women are the majority of sexual harassment victims and that sexual harassment impairs women's already injured interests. Thus a gender-neutral standard is inappropriate for the law of sexual harassment, since it will never reflect nor protect the unique interests of its victims.

I want to make clear, however, that I do not advocate applying a non-gender neutral standard—the reasonable woman—which would treat all women as identical persons in the law of sexual harassment. Women are not all alike and thus one woman's experiences, both personal and professional, are not identical to another woman's experiences. But women do have much in common. Despite their differences, one out of three women will be the victim of a violent crime.[11] Regardless of how women make a living, they still earn only three-quarters of the salaries made by their male counterparts.[12] Thus, I am not proposing that courts should consider each woman's claim against a static and inflexible model of a reasonable woman. Rather, I propose that feminists should argue for a legal standard that reflects the reality that all women encounter in American society.

In this article, I argue that the standard that best reflects the reality of women's differences and similarities is that of the reasonable woman. Section II briefly explains how the legal doctrine of sexual harassment developed under Title VII of the Civil Rights Act of 1964 and the two legal theories of sexual harassment that enforce that doctrine. Section III frames

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[8] For more a more detailed discussion on why the reasonable person standard is inadequate for the law of sexual harassment, see discussion, *infra* pp. 210-222 and accompanying notes. However, this article does not fully discuss the pros and cons of the reasonable victim standard. Because the reasonable person is the more traditional and often used standard in the American legal system, the author felt it was appropriate to the focus the discussion on the differences between the reasonable person and the reasonable woman standards.

[9] *See* Marion Crain, Women, Labor Unions, and Hostile Environment Sexual Harassment: The Untold Story, 4 Tex. J. Women & L. 9, 16 (1995) (citing Martha J. Langelan, Back Off! How to Confront and Stop Sexual Harassment and Harassers, 50-51 (1993) (citing statistics gathered by the National Association of Working Women)).

[10] *See id.* at 27-29 (discussing the effects of sexual harassment on women).

[11] *See* Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. Davis L. Rev. 1013, 1019 (1991).

[12] *See* Gender Inequality at Work 9 (Jerry A. Jacobs ed., 1997) [hereinafter Gender Inequality].

the debate over which legal standard is appropriate for the law of sexual harassment by introducing the reasonable woman standard. Section IV addresses why the past and present forms of the reasonable person standard are inadequate for determining whether conduct in the workforce constitutes sexual harassment. In Section V, I lay out the three main criticisms of the reasonable woman standard, and then I explain why each of the criticisms is fatally flawed. Ultimately, I argue that feminists should reconsider employing the reasonable woman standard to appropriately reflect and protect each woman in the American workforce.

II. THE LAW OF SEXUAL HARASSMENT

Under Title VII, it is unlawful for an employer[13] to discriminate against an employee "with respect to [her] compensation, terms, conditions, or privileges of employment" because of her sex.[14] This section will briefly discuss how sexual harassment became a form of sex discrimination prohibited under this language. First, I will explain what conduct the term "sexual harassment" encompasses and whom it affects. Second, I will set forth the two legal theories that a plaintiff can employ to bring forward a sexual harassment claim and, then, explain a significant difference between the two theories.

A. What is Sexual Harassment?

"Sexual harassment" is a term of art. Courts do not have before them a list of offensive or suggestive conduct or comments that are prohibited under Title VII. Rather, what constitutes sexual harassment depends on the facts of each particular case. I do not mean to suggest that there are no guidelines for courts to follow. On the contrary, there are two types of sexual harassment claims that a plaintiff can bring, each with its own definition.[15] In addition, the EEOC has developed guidelines to help courts decide what is sexual harassment.[16] But neither the two theories accepted by the courts, nor the Equal Employment Opportunity Commission (EEOC) guidelines, can give a concrete definition of sexual harassment that can

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[13] Title VII applies to both public sector and private employers. *See* 42 U.S.C. § 2000e.

[14] 42 U.S.C. § 2000e-2(a)(1); *see also* Diana P. Scott, Latest Developments in Sexual Discrimination and Harassment, SD34, 2ALI-ABA § IA, (1998) (discussing the development of the *quid pro quo* sexual harassment theory).

[15] *See* discussion *infra* pp. 200-204 and accompanying notes (discussing the *quid pro quo* and hostile environment theories of sexual harassment).

[16] *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1985).

begin to include all of the conduct and comments that the term encompasses.[17]

The inability of the legal system to define precisely the term "sexual harassment," however, is appropriate given the reality of sexual harassment. Sexual harassment is a term of art, because it is both "a legal wrong and a cultural colossus."[18] It is an exertion of power or pressure over those in society who have historically been powerless, and it is an abuse of power that violates the civil rights of its victims.[19] These power differentials most commonly occur between an employee and an employer, a supervisor, or even a co-worker.[20] Thus the term "sexual harassment" encompasses a broad continuum because there are so many words and actions a person with power can use to humiliate, subordinate, and dominate a vulnerable person. Therefore, if we try to narrowly define sexual harassment, we run the risk of failing to encompass all the conduct and comments that are inappropriate for the workplace.

Sexual harassment is also a predominantly female problem. I am not disputing that men sexually harass other men.[21] Nor am I disputing that women sometimes harass men.[22] But over ninety percent of the incidents of workplace sexual harassment involve male aggressors and female victims.[23] Moreover, fifty-three percent of working women report that they have experienced behavior that they define as sexual harassment.[24] Women

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[17] *See* Anita Bernstein, Treating Sexual Harassment with Respect, 111 Harv. L. Rev. 445, 446 (1997) (stating that the term sexual harassment "as doctrine . . . remains elusive, connoting no specific type of harm. Once thought of as a problem that has no name, sexual harassment is now a term that brings no clear image to mind").

[18] *Id.*

[19] *See* Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449, 1451 (1984) (explaining the theoretical framework of sexual harassment) [hereinafter Sexual Harassment Claims].

[20] *Id.* The author also notes that sexual harassment can take place between a professor, or teacher, and a student. *Id.* The power differential would still be the same: the professor is in a powerful position of overseeing a student's education, while the student is in a vulnerable position of not yet having financial and professional independence. Although this form of sexual harassment is troublesome and it violates a person's civil rights, it is not within the means of this article to address it adequately.

[21] *See* Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998 (1998).

[22] *See* Crain, *supra* note 9, at 16. The author states that only one percent of all sexual harassment cases involves women aggressors and male victims. *Id.* at n.22.

[23] *See id.*

[24] *See* Abrams, *supra* note 3, at 1198 (citing B. Gutek, Sex and the Workplace 47-48 (1985); *see also* Sexual Harassment Claims, *supra* note 19, at 1451 (citing U.S. Merit Sys. Protection Bd. Office of Merit Review and Studies, Sexual Harassment in the Federal Workplace: Is it a Problem? 5 (1981)) (noting that there is a high number of working women who perceive conduct in the workplace as constituting sexual harassment).

describe this "sexually harassing" behavior as sexual comments or touching, sexual epithets, sexual demands or offers, and the circulation or posting of pornography.[25] Thus, although men may occasionally be the victims of harassment, it is clear that the term of art "sexual harassment" generally encompasses conduct or comments directed at women.

B. The Legal Theories of Sexual Harassment Law

Two legal theories of sexual harassment are available to plaintiffs under Title VII: "*quid pro quo*" and "hostile environment." In what follows, I will briefly describe each theory and then discuss how the two differ. This distinction is important because the question of what perspective a court should apply to determine whether conduct in the workplace constitutes sexual harassment arises only in a hostile environment claim.

1. Quid Pro Quo: A "Tit for Tat" Theory

The theory of "*quid pro quo*" sexual harassment is predicated upon an obvious differential of power between a male and a female—a male employer or supervisor with authority over a female employee. The harassment can take two forms. First, an overt conditioning of the receipt or retention of employment benefits in exchange for a sexual relationship. Second, the male employer or supervisor makes subtle sexual suggestions and implied promises or threats to a female employee that employment benefits would be given or taken away conditioned upon her reception to the suggestions. In either situation, for the employee to reject the employer's or supervisor's demands or suggestions will cause a potential job loss or destruction, or other tangible employment action.

The *quid pro quo* theory was the first form of sexual harassment that the federal courts recognized as prohibited under Title VII.[26] By 1976 courts agreed that conditioning a woman's employment and job benefits on whether she complied with her employer's or supervisor's sexual demands violated her civil rights.[27] It is not surprising, however, that those federal courts first recognized *quid pro quo* sexual harassment as a form of sex discrimination. The concept behind *quid pro quo* harassment is easy to

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[25] *See* Abrams, *supra* note 3, at 1198.

[26] *See* Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976); *see also* Barnes v. Castle, 561 F.2d 983 (D.C. Cir. 1977) (accepting the new concept of sexual harassment as a form of sex discrimination). Prior to these decisions, sexual harassment as a form of sex discrimination was still a novel idea. *See* Harrington, *supra* note 2, at 210 (discussing the first round of sexual harassment cases in federal courts during the 1970s). The theory was dismissed time and again as feminist and activist lawyers brought the first cases into federal courts. *Id.*

[27] *See* Saxbe, 413 F. Supp. at 657.

understand: "put out or get out."[28] Moreover, many of the first sexual harassment cases before the courts involved egregious incidents in which women were coerced into having sex with their employers out of fear of losing their jobs or benefits.[29] As a result, this "tit for tat" scenario was an obvious form of sex discrimination for the courts to recognize.[30]

Similar to other disparate treatment[31] claims, a plaintiff making a *quid pro quo* sexual harassment claim must make an initial *prima facie* case[32] of

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[28] Catherine A. MacKinnon, Sexual Harassment of Working Women 2 (1979) [hereinafter Sexual Harassment].

[29] *See generally* Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980) (noting that the plaintiff alleged that she was fired because she did not consent to her supervisor's sexual demands); Miller v. Bank of Am., 418 F. Supp. 233, 234 (N.D. Cal. 1976) (alleging that the plaintiff was promised a better job by her male supervisor if she would sexually submit to him, and then was fired when she refused). *See also* Estrich, *supra* note 6, at 822 (suggesting that presenting the most overt cases of sexual harassment first naturally convinced courts that the conduct was sex discrimination).

[30] *See* Saxbe, 413 F. Supp. at 657 (recognizing *quid pro quo* sexual harassment as a cognizable claim under Title VII); *see also* Scott, *supra* note 14, at 37 (explaining that the essence of the *quid pro quo* claim is a "tit for tat" scenario and as such is an obvious form of sex discrimination).

[31] Disparate treatment is the practice of intentionally treating persons differently because they belong to a protected class. *See* Black's Law Dictionary 196-97 (pocket ed. 1996). In order for a plaintiff to succeed on a disparate treatment claim, she must prove the defendant had a discriminatory motive or intent. *Id.*

[32] A *quid pro quo* sexual harassment claim under Title VII is established through a burden-shifting paradigm. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (establishing the McDonnell Douglas framework to help courts determine the disposition of an employment discrimination claim). The plaintiff has the burden of proof in making a *prima facie* case of discrimination. Once a plaintiff satisfies this initial burden of proof, she has established an inference of discrimination, predicated upon the presumption that an adverse action is based upon impermissible factors unless otherwise explained. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (holding that "we are willing to presume [the defendant was motivated by discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting"). Once the employee makes her *prima facie* case of discrimination, the employer can rebut the presumption by putting forth a legitimate and nondiscriminatory reason for the adverse employment action. However, under the McDonnell Douglas framework, the defendant only receives the burden of production. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (holding that the employer's burden of rebutting the *prima facie* case of discrimination is only one of production). The defendant need only produce enough evidence to show the adverse employment action was motivated by a nondiscriminatory reason. *Id.* at 254. For example, the employer may argue that the adverse action was not in response to a rejected sexual demand, but was based upon the employee's poor work performance. *See* Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 336 (7th Cir. 1993) (noting that the employer's adverse action was motivated by the employee's poor performance of her primary responsibilities on the job); *see also* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987) (trial court found that the adverse job consequences arose from poor performance, and were not based upon whether the employee granted her supervisors sexual favors). Finally, the plaintiff has the opportunity to show the defendant's proffered reason is false and

discrimination.[33] A plaintiff must show that: (1) she belongs to a protected class; (2) she received an unwelcome sexual advance; (3) the advance was based on sex; (4) rejection of the advance resulted in an adverse employment action; and (5) the employer is ultimately responsible[34] for the adverse action.[35] A plaintiff is not required to show that the harassment was pervasive. That is, even a few incidents could still qualify as sexual harassment.[36]

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that the real motivation for the adverse action was discrimination. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (holding that a plaintiff may satisfy the burden of showing that the employer's reason was false and that racial discrimination was the real reason by combining proof of pretext with evidence in the *prima face* case).

[33] *See* Scott, *supra* note 14, at 39-40 (discussing a plaintiff's *prima facie* case under a *quid pro quo* theory). *See generally* McDonnell Douglas, 411 U.S. at 802 (holding that in order to successfully establish a Title VII claim, the plaintiff has the initial burden of establishing a *prima facie* case of discrimination).

[34] It is important to note that an employer's liability under *quid pro quo* sexual harassment has been clarified by two recent Supreme Court decisions. In Burlington Industries v. Ellerth, 118 S. Ct. 2257 (1998) and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), the Court held that "[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages." *See* Ellerth, 118 S. Ct. at 2270; *see also* Faragher, 118 S. Ct. at 2293 (stating that the same affirmative defense is available to employers when no tangible employment action is taken). Under this affirmative defense, the defendant must show that (1) it exercised reasonable care to prevent and correct the alleged sexual harassment, and (2) the plaintiff did not take advantage of these preventive or corrective opportunities. *See* Ellerth, 118 S. Ct. at 2270. However, the Court held that the affirmative defense is not available when the supervisor's alleged conduct resulted in a tangible employment action. *Id.*

[35] *See* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); *see also* Chamberlin v. 101 Realty, 915 F.2d 777, 783-84 (1st Cir. 1990); Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990); Jone v. Flagship Int'l, 793 F.2d 714, 719 (5th Cir. 1986); Highlander v. KFC Nat'l Mgmt. Co., 805 F.2d 644, 648 (6th Cir. 1986); Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986). *Compare with* EEOC Guidelines on Sexual Harassment, 29 C.F.R. §§ 1604.11(a)(1)-(2) (stating that the elements of a *prima facie* case of *quid pro quo* sexual harassment are (1) an unwelcome sexual advance, that (2) an employee submits to or rejects, and (3) that submission or rejection becomes a term or condition of employment or is used as the basis for an employment decision); *see, e.g.*, Nicols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) (adopting a *prima facie* case based upon the EEOC Guidelines).

[36] *See* Estrich, *supra* note 6, at 72-73 (discussing how to prove a *quid pro quo* claim, the author notes that although the plaintiff need not prove that the harassment was pervasive, she still has a heavy burden of establishing an actual threat and that her reaction to the threat caused the adverse action). Although *quid pro quo* plaintiffs do not have the burden of showing the harassment was pervasive, this does not mean that it is easy to establish a claim of *quid pro quo* sexual harassment. On the contrary, a *quid pro quo* plaintiff has two significant evidentiary hurdles: first, she must prove that there was a threat. Second, she must prove that it was her reaction to the threat that caused an adverse employment action. *Id.* ("[T]hese obstacles produce a working definition of *quid pro quo* harassment that may be so narrow as to make all but the perfect plaintiffs unable to establish the requisite nexus, and all but the most perfectly stupid defendants able to rebut successfully a *prima facie* case.").

2. Hostile Environment: A Question of Severe or Pervasive

Although lower federal courts recognized *quid pro quo* sexual harassment in 1976, the Supreme Court did not affirm that there was a cause of action under Title VII for sexual harassment until 1986. However, when the Court affirmed there was such a cause of action, it went beyond merely recognizing *quid pro quo* sexual harassment. In Meritor Savings Bank v. Vinson,[37] the Supreme Court held that sexual harassment need not relate to a "tangible loss" of "an economic character."[38] Rather, an employer's Title VII liability for sexual harassment could arise from "purely psychological aspects of the workplace environment."[39] As such, the Supreme Court concluded, "hostile environment, like *quid pro quo* harassment, may violate Title VII."[40]

A hostile environment claim is predicated on whether an employee was forced to endure a work environment that substantially affected the terms and conditions of her employment.[41] As a result, the Supreme Court had to significantly alter the plaintiff's burden of proof in a *quid pro quo* harassment claim to correlate with the new hostile environment claim. First, it held that the harassment "must be sufficiently severe or pervasive" to alter a condition of the plaintiff's employment and to create a hostile working environment.[42] Second, the sexual advances or comments must be "unwelcome," which is judged by whether the plaintiff's conduct conveys non-assent to the advances or comments.[43] Finally, the Court held that an employer is not automatically liable for hostile environment sexual harassment unless the employer knew or should have known about the harassment.[44]

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[37] 477 U.S. 57 (1986).

[38] *Id.* at 64.

[39] *Id.*

[40] *Id.* at 65-66. In making its decision, the Supreme Court referred to the EEOC guidelines and appellate court decisions for support. *Id.*

[41] *Id.* at 64 (holding that an employer's discriminatory conduct violates Title VII even if it only affects the psychological aspects of a person's employment).

[42] *Id.* at 67.

[43] *Id.* at 68. Note that "unwelcomeness" is a requirement for a plaintiff's burden of proof in both *quid pro quo* and hostile environment sexual harassment claims.

[44] *Id.* at 72-73.

3. The Problem of Determining What Constitutes Sexual Harassment

When the Supreme Court affirmed that sexual harassment violates Title VII and adjusted the plaintiff's *quid pro quo* burden of proof to correlate with hostile environment claims, it failed to state the perspective from which a court should determine whether the alleged harasser's conduct constituted sexual harassment. One might argue the Court's silence on this issue is not as significant for *quid pro quo* harassment as it is for hostile environment harassment. As noted earlier,[45] the concept behind *quid pro quo* harassment is easy for courts to understand: "put out or get out."[46] Regardless of which perspective a court applies, courts can generally recognize "tit for tat" sexual harassment.[47] Hostile environment harassment, on the other hand, is not based upon such obvious ultimatums. Rather, hostile environment is based upon psychological aspects of the workplace, which are often discreet or subtle and almost always personal to the victim.

For example, although a woman's male co-workers may find sexual behavior at work to be harmless joking, the woman may find it severely offensive.[48] The woman might not complain about the behavior because she views it as a threat of violence, but her male co-workers may view her silence as welcoming the behavior. Thus, whereas an outsider to the incident may easily recognize *quid pro quo* harassment, an outsider may easily overlook the severity and unwelcomeness of the behavior at issue in hostile environment sexual harassment.

The Supreme Court's silence on which perspective a court should apply has left several important questions unanswered. Who should decide what is severe or pervasive? Who should decide what is unwelcome? The easy answer to these questions would be to default to the traditional reasonable person standard. But because hostile environment harassment is personal and often subtle in nature, applying the reasonable person standard raises one other significant question: can a genderless, seemingly objective

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[45] *See supra* discussion pp. 200-203 and accompanying notes.

[46] *See* Sexual Harassment, *supra* note 28, at 3.

[47] The author wants to make clear that although she puts forth the argument that *quid pro quo* harassment "may" be easier for courts to recognize, she is not arguing that this is true for all cases. For example, a *quid pro quo* plaintiff must show there was an unwelcome sexual advance and that her non-assent to the advance resulted in adverse employment action. Like the unwelcome and severe or pervasive conduct at issue in hostile environment cases, what is unwelcome and non-assenting conduct in *quid pro quo* cases may also depend upon discreet, subtle, and personal factors of the case. Thus, the argument in favor of applying the reasonable woman standard to the law of sexual harassment could also be made in the *quid pro quo* context. However, because the debate over which standard to apply has come up largely in the context of what constitutes hostile environment sexual harassment, this article focuses on applying the reasonable woman standard to hostile environment claims.

[48] *See* discussion *infra* pp. 215-219 and accompanying notes.

standard adequately determine what conduct constitutes this form of sexual harassment?

III. INTRODUCING THE REASONABLE WOMAN

In this section, I will explain why the Supreme Court's silence on the issue of perspective created both a significant problem and a great opportunity for the law of sexual harassment. First, I discuss how the Meritor decision created a split in the circuit courts over applying the traditional reasonable person standard and the new reasonable woman standard to sexual harassment claims. Second, I address the Court's silence on the question of perspective in Harris v. Forklift Systems, Inc., despite the split in the circuits.[49] Third, I conclude with a call to feminists to recognize the opportunity presented by the reasonable woman standard.

A. Split in the Circuits: Who is More Reasonable?

Following the Supreme Court's landmark decision in Meritor, the circuit courts split over whether the conduct involved in a sexual harassment claim should be judged from the viewpoint of the reasonable person or the reasonable woman. In Rabidue v. Osceola Refining Co.,[50] the Sixth Circuit held that, to prevail in a hostile environment claim, a plaintiff needed to show the harassment unreasonably interfered with her work and created a hostile or offensive work environment that affected her psychological well-being.[51] To determine whether a plaintiff satisfied this burden of proof, the Rabidue court made clear that the question for lower courts is how a reasonable person in similar circumstances would perceive the harassment.[52]

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[49] *But see* Stuart L. Bass & Eugene T. Maccarrone, Supreme Court Reaffirms Meritor and Refines Requirements for Hostile Environment in Sexual Harassment Suits: The Impact of Harris v. Forklift Systems, Inc., 16 Women's Rts. L. Rep. 53, 59 (1994) (discussing that the Supreme Court did not leave the question of which legal standard to apply to sexual harassment cases unanswered, but in fact applied a reasonable victim standard).

[50] 805 F.2d 611 (6th Cir. 1986).

[51] *Id.* at 619-20.

[52] Five other circuits followed the Sixth Circuit's lead and applied the reasonable person standard. *See, e.g.*, Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 575 (10th Cir. 1990); Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989); Blesedell v. Mobil Oil Co., 708 F. Supp. 1408, 1418-19 (S.D.N.Y. 1989). *See generally* Bittner, *supra* note 4, at 129-31 (discussing the courts that have adopted the reasonable person standard).

Four circuit courts rejected the traditional reasonable person standard applied in Rabidue in favor of a reasonable woman standard.[53] Because the courts found that the reasonable woman standard reflected the fears and perceptions of female victims, the four circuit courts held that this standard was more appropriate for the law of sexual harassment. For example, in Ellison v. Brady,[54] the Ninth Circuit found the reasonable person standard inadequate because it ran "the risk of reinforcing the prevailing level of discrimination."[55] The Ninth Circuit correctly assumed the reasonable person is not an ideal citizen who knows no gender. Rather, the reasonable person standard reflected a male perspective of what is reasonable behavior. As a result, the reasonable person standard cannot adequately reflect what women find offensive or frightening about the particular harassment.[56]

The four circuit courts that rejected the reasonable person standard in Rabidue were correct in adopting the reasonable woman standard for hostile environment sexual harassment claims. The reasonable woman standard is more appropriate for sexual harassment because it makes relevant the distinction between what men and women find offensive.[57] For example, a comment a woman would find threatening, a man may find flattering. Sexual harassment cases often turn on whether a woman's reaction to the harassment is justified or an overreaction.[58] Therefore, it is important for a court to look at the harassment from the woman's perspective to understand that her definition of inappropriate conduct may not be the same as her harasser's.[59]

B. Harris v. Forklift Systems, Inc.: The Supreme Court's Silence Continues

In Harris v. Forklift Systems, Inc.,[60] the Supreme Court addressed a sexual harassment issue highlighted by the Rabidue decision: must the

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[53] *See, e.g.*, Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962-65 (8th Cir. 1993); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 905 (1st Cir. 1988).

[54] 924 F.2d 872 (9th Cir. 1991).

[55] *Id.* at 878.

[56] *Id.*; *see also* Kathleen A. Kenealy, Sexual Harassment and the Reasonable Woman Standard, 8 Lab. Law. 203 (1992).

[57] *See* Lipsett, 864 F.2d at 898.

[58] *See, e.g.*, Estrich, *supra* note 6, at 845-46 (discussing how a court responds negatively to a woman it finds "hypersensitive").

[59] *See, e.g.*, Lipsett, 864 F.2d at 898.

[60] 113 S. Ct. 367 (1993).

harassment cause the plaintiff to suffer psychological injury for her to have an actionable Title VII claim?[61] However, because the Meritor decision left circuit courts split over whether to apply the reasonable person standard or the reasonable woman standard, it seemed likely that the Harris Court would address this debate as well.

The Court appeared to adopt a legal standard for sexual harassment claims when it put forth a two-step test to determine whether the alleged conduct was hostile. The Court held that a plaintiff does not have to suffer psychological harm to have a hostile environment sexual harassment claim under Title VII.[62] Rather, to have an actionable claim, the alleged conduct must be severe or pervasive enough that a reasonable person would find the environment hostile and abusive.[63] However, the plaintiff must also have subjectively found the environment hostile, otherwise the alleged conduct did not alter the terms and conditions of the plaintiff's employment.[64]

The Harris Court's two-part test addressed two questions. First, was the plaintiff offended? This is a subjective question and, thus the subjective perspective of the victim must be considered. Second, should the plaintiff have been offended? This is an objective question to which the reasonable person standard must be applied. As a result, the Harris Court put forth a subjective/objective test to assess the hostility of the alleged harassment.[65] Although it is appropriate to apply the perspective of the female victim to determine whether she was offended, it is more appropriate to apply the reasonable person standard to determine whether the female victim should have been offended.

The problem with the Supreme Court's two-part subjective/objective test is that, although it appeared to resolve the debate over which legal standard is appropriate for hostile environment claims, in reality, the test only applied to the narrow issue of psychological well-being.[66] The Court saw its subjective/objective test as "a middle path between making

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[61] In Rabidue, the Sixth Circuit held the plaintiff must show that the harassment created a hostile work environment that affected her psychological well-being in order to have an actionable Title VII claim. *See* Rabidue, 805 F.2d 611, 619-20 (6th Cir. 1986). Thus, the Sixth Circuit effectively made psychological injury an element of hostile environment sexual harassment.

[62] *See* Harris, 114 S. Ct. at 371.

[63] *Id.* at 370.

[64] *Id.*

[65] *See* Sarah E. Burns, Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.?, 21 N.Y.U. Rev. L. & Soc. Change 357, 392 (1995) (discussing the two-part test put forth in Harris, the author notes that the Supreme Court declined to resolve the debate over which standard applies to sexual harassment jurisprudence by ignoring it).

[66] *Id.*

actionable any conduct that is merely offensive and requiring conduct to cause tangible psychological injury."[67] It wanted to ensure that lower courts would take this middle path and not presumptively require proof of psychological injury to provide the plaintiff with an actionable Title VII claim. Thus the Supreme Court directed lower courts to consider the frequency of the alleged harassment; its severity; whether it was physically threatening or humiliating; and whether it interfered with the plaintiff's work performance.[68] Therefore, although the Court mentioned the reasonable person and the reasonable female victim standards, the Court only applied those standards to the issue of what a plaintiff must present to have an actionable claim.

For example, under the first prong of the test, the plaintiff is required to have subjectively found the conduct hostile enough to be offended. Under the second prong, even if the plaintiff was subjectively offended, a court must find the conduct to be objectively hostile to determine whether the plaintiff had reason to be offended. Although a plaintiff can present proof of psychological injury to help satisfy the two-prong test, such proof is not required to have an actionable claim. Thus Harris' subjective/objective test clearly resolved the issue of what evidence a plaintiff must present to have an actionable Title VII claim. But the test failed to resolve the debate over whether the reasonable person standard or the reasonable woman standard should determine if the alleged conduct was severe or pervasive enough to constitute sexual harassment.

C. Why the Reasonable Woman?

The Supreme Court's decision in Harris left both feminists and courts still asking which legal standard is more appropriate for sexual harassment claims: the reasonable person standard or the reasonable woman standard? On the one hand, one could interpret the Court's opinion as favoring the reasonable person standard because it held that the conduct must be severe or pervasive enough that a reasonable person would find the environment hostile. But on the other hand, one could argue that the Court favored the reasonable woman standard because it also held that a court must consider the subjective viewpoint of the female victim. However, both interpretations of Harris may be a far stretch because, as discussed previously, the Supreme Court limited its decision to the narrow issue of psychological injury.[69] Thus although feminists have successfully convinced courts that sexual harassment is a form of discrimination under

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[67] *See* Harris, 114 S. Ct. 367, 370 (1993).

[68] *Id.*

[69] *See* discussion *supra* pp. 206-208 and accompanying notes.

Title VII,[70] the issue of which perspective courts should apply to determine whether the alleged harassment constituted discrimination remains unresolved.

The time has come for feminists to demand that courts resolve the issue of perspective in the law of sexual harassment. In doing so, I suggest that feminists begin by considering several factors. First, I think all feminists can agree that, to date, professional disparities exist between women and men.[71] Women on the whole earn seventy-one cents for every dollar earned by men, and men still maintain the majority of powerful positions in the labor market.[72] Second, social disparities exist between women and men due to the rampant violence and discrimination women encounter. For example, women are more likely to be the victims of gender related violence[73] than men, and women are more likely to encounter sexual harassment in the workplace than men.[74]

Third, legal disparities exist between women and men because when women bring legal action against their attackers or harassers, women are more likely to encounter a male judge than a female judge. If women are predominantly the victims and men are predominantly the aggressors, how can feminists expect male judges to properly enforce the law that prohibits sexual harassment unless the judges consider the alleged conduct from the female victim's perspective?[75]

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[70] *See* Bernstein, *supra* note 17, at 446; *see also* discussion *supra* pp. 200-204 and accompanying notes (discussing the *quid pro quo* and hostile environment theories of sexual harassment).

[71] *See* discussion *infra* pp. 219-222 and accompanying notes.

[72] *See* Jane L. Dolkart, Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards, 43 Emory L.J. 151, 182-83 (1994) (citing Bureau of Labor Statistics, U.S. Dep't of Labor, Bulletin No. 2385, Working Women: A Chartbook (1991)). The author notes that although there is a sharp growth in the number of women employed in professional occupations, in 1990, fifty-nine percent of employed women made up only three occupational groups: sales, administrative support, and services. *Id.* at 182 n.120. Moreover, Dolkart points out that men have generally not entered into traditionally female occupations. For example, in 1992, ninety-nine percent of secretaries, ninety-three percent of nurses, and eighty-two percent of administrative support workers were women. *Id.* (citing National Ass'n for Female Executives, Women in the American Workforce and Power Structure 2 (1993)).

[73] *See* Timothy Beneke, Men on Rape 1 (1982); *see also* Torrey, *supra* note 11, at 1019 (noting that one in three American women will be raped).

[74] *See* Dolkart, *supra* note 72, at 179 n.107 (citing Louise F. Fitzgerald & Alayne J. Ormerod, Breaking Silence: The Sexual Harassment of Women in Academia and the Workplace, *in* Psychology of Women: A Handbook of Issues and Theories 553 (Florence L. Denmark & Michelle A. Paludi eds., 1993)). The author notes that it is estimated that at least one out of two women will be the victim of sexual harassment during her educational or professional career. *Id.*

[75] *See* Abrams, *supra* note 3, at 1202-03.

I do recognize that, at least for the time being, no matter which legal standard courts apply to sexual harassment claims, feminists must rely upon these male judges to enforce the standard. But male judges per se are not the problem. The problem is that male judges apply a legal standard from a male perspective. For example, because men are often the aggressors in sexual harassment cases, most men do not know what it feels like to be the victim of such harassment.[76] Moreover, because men still maintain a majority of control in the workplace, their view of sexual harassment in the workplace is the norm and continues to shape policy.[77] Finally, because the majority of judges are men who have likely experienced, or have been leaders in, a male-dominated workplace, it is natural for male judges to accept the perspective of the male aggressor over the female victim.[78]

Feminists cannot demand that male judges step down from the bench. But feminists can demand that male judges purposely step outside the perspective of the male aggressor and, for perhaps the first time, consider the perspective of the female victim. Thus, regardless of the fact that the majority of judges are men, it is imperative for feminists to demand that courts apply the reasonable woman standard to decide if alleged conduct constitutes sexual harassment.

IV. THE BIASED "REASONABLE PERSON"

Although the reasonable person is proclaimed to be an ideal figure of objectivity and impartiality in the law, the reasonable person is inappropriate for the law of hostile environment sexual harassment for several reasons. First, prior to the adoption of the reasonable person standard, courts applied a reasonable man standard, which resulted in the exclusion of women, minorities, and members of the lower social strata from discussions on what is reasonable in the law. Second, because the reasonable person has historically been a male figure, reason in the law has acquired the traditional male trait of being unemotional. Finally, the reasonable person standard is inadequate for the law of sexual harassment law because it fails to recognize that the workforce is still not a level playing field for men and women, and that what is objectionable to women is not always objectionable to men.

A. The Legacy of the "Reasonable Man"

In what follows, I will argue that the legal definition of "reason" has long maintained a masculine identity and, therefore, is inappropriate for the

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[76] *Id.*

[77] *See id.*

[78] *See id.*

law of hostile environment sexual harassment. Reason was defined as a masculine trait centuries ago when Western philosophy adopted the belief that not all humans shared the trait of reason.[79] The great philosophers that shaped the political and legal theories of Western civilization found women incapable of thought, reason, and basic decision-making.

Women were seen as incompetent and therefore unable to govern or hold valuable roles in society. For example, because women were considered too incompetent, it was deemed justifiable to exclude them from education: if women are incapable of reason, then there is not much sense in attempting to develop their minds or in hearing their opinions.[80] Although women in the last century have eroded this notion of female incompetence and lack of reason, the masculine concept of reason that developed over several centuries had already influenced the creation of the American democratic government and rule of law.

The male bias in Western philosophy extended into the creation of the American legal system. For example, the phrase "reasonable person," used regularly by courts, is a relatively new phenomenon in the U.S. legal system.[81] Prior to its adoption, the courts applied a reasonable man standard to judge whether an individual's behavior lived up to the legal standard at issue.[82] The reasonable man was meant to be a generic figure, an icon of objectivity that would represent both sexes fairly and equally. However, Western civilization was developed upon the notion that women lacked the reason necessary to have a voice in society. This inherent male bias in the law was compounded by the fact that the judges applying the reasonable male standard were also male. Thus, if women were considered incompetent when the laws were created and were not later in a position to interpret the law, how could the reasonable man ensure a woman that the law would fairly and equally represent her interests?

Because the reasonable man standard was developed from the male point of view and was explicated by men sitting on the bench, feminists soon came to the conclusion that the reasonable man did not live up to the fair and objective expectations of the American legal system.[83] The reasonable man standard underwent heavy criticism from feminists, and lawyers and judges responded by changing the name of this generic figure

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[79] *See* Bernstein, *supra* note 17, at 456-57 (1997) (citing Allison Jaggar, Feminist Politics and Human Nature 36-37 (1983) (stating that reason is unable to remedy hostile environment sexual harassment because "[f]or centuries Western philosophers agreed that reason was not a widely and universally shared trait.")).

[80] *Id.* at 458 (citing Myra Sadker & David Sadker, Failing at Fairness: How America's Schools Cheat Girls 15-41 (1994)).

[81] *See* Harrington, *supra* note 2, at 213 (discussing how the "reasonable person" arrived in the law only recently).

[82] *Id.*

[83] *See* Harrington, *supra* note 2, at 212-13.

to the reasonable person.[84] But changing the name does not change the viewpoint. Although the reasonable person standard seemed to better personify the objective and fair goals of the American legal system, the standard maintained a male bias.

For example, modern law such as the Civil Rights Act of 1964 was developed only in the last thirty years, and was largely enacted by male congresspersons. In fact, there is very little legislative history on the inclusion of sex in Title VII, because it was introduced at the last minute by a congressman who expected that the inclusion of "sex" would kill the Act altogether.[85] Moreover, although there are more female judges sitting on the bench today, the bench is still predominantly male.[86] Thus, the question remains, how can the viewpoint of the reasonable person be anything but male? Therefore, as long as courts continue to apply this "male centric" reasonable person standard to sexual harassment claims brought by women, the reasonable person standard will be a vehicle to subordinate women instead of a way to elevate them to an equal position in the law.[87]

B. The Non-Emotional Reasonable Person

In addition to defining reason as a masculine trait, Western philosophy considered reason and emotion to be opposites of each other. Western philosophers defined reason as the essence of objectivity and fairness, which were essential principles for a free and democratic society.[88] In contrast, Western philosophers defined emotion as a subjective and biased viewpoint that benefited only a few.[89] Moreover, reason promoted order and justice in society, but emotion disrupted the calm.[90] Therefore, Western

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[84] *Id.*

[85] *See* 110 Cong. Rec. 2,577-84 (1964) (statements from Reps. Andrews, Smith, Rivers, and Tuten).

[86] *See* Abrams, *supra* note 3, at 1203.

[87] *See* Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination 540-42 (1987); *see also* Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 2 (1988) ("[B]y virtue of their shared embrace of the separation thesis, all of our modern legal theory . . . is essentially and irretrievably masculine.").

[88] *See* Bernstein, *supra* note 17, at 460 (citing Antonio R. Damasio, Descartes' Error: Emotion, Reason, and the Human Brain 191-96 (1994)).

[89] *Id.* (discussing the view that "[e]motion destabilizes justice. It can be a part of bias, distraction, or over-identification with another person.").

[90] *See* Bernstein, *supra* note 17, at 460 ("[T]he notion persists that reason fuels order and justice while emotion explodes, at irregular intervals, to disrupt the calm.").

philosophers concluded that, in order for Western civilization to survive, reason must rule over emotion.[91]

Women have long been deemed emotional creatures. Western philosophers characterized women as passionate, emotional, and consumed with their individual lives. Because of these traits, women were defined as weak, volatile, and incapable of creating a principled society. But Western philosophers did believe there was a way to diffuse the danger that female emotions posed to society: apply reason. Because Western philosophers defined men as the only creatures capable of reason, men have historically been seen as the only persons capable of establishing a just and lawful society.

Although the place of women in society has drastically changed in the last century, women are still associated with emotion, and emotion is still seen as a destructive trait.[92] Thus, in order to assimilate into the male domain of the American workforce and legal system, women have disassociated themselves from their ascribed emotional characteristics. As a result, most women in the workplace have become like the stereotypical male: all reason and no emotion. Therefore, although women today have powerful positions in the law and the workforce in general, women try to personify reason and leave their emotions at the courtroom or office door.

The problem is that emotion is an integral part of sexual harassment. A hostile environment claim is based upon the theory that a person's conduct can substantially alter another individual's workplace to the point that work becomes unbearable. Such conduct can induce fear of financial instability, sexual assault, and even isolation from one's peers.[93] Each of these fears is understandably charged with emotion. For example, many women suffer depression, which often causes physical discomfort, as a result of such harassment. Anger and post-traumatic stress are also symptoms women generally feel after they have endured offensive conduct in the workplace.[94]

However, as history has shown, the reasonable person standard was not designed to consider the subjective emotions of an individual. Rather, the standard's goal is to objectively determine whether the conduct at hand was severe or pervasive enough to constitute sexual harassment. Thus, if a female complainant presents her fears and emotions as proof that the alleged conduct made her work unbearable, her fears and emotions are

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[91] *See id.*

[92] Of course, one could argue that both men and women are capable of incorporating emotion and reason to establish a just and lawful society. But in light of the fact that women are new players in a male-dominated workforce and legal system, it seems unlikely that this argument will have much influence for the time being.

[93] *See* Crain, *supra* note 9, at 28-29.

[94] *Id.*

dismissed as trivial under the reasonable person standard.[95] The only thing that matters is whether the reasonable person, void of all emotion, would find the conduct offensive.

Because the reasonable person standard does not consider an individual's emotions, the application of the reasonable person standard in the law of sexual harassment raises two significant problems for women. The first problem is that the reasonable person standard deprives women of the opportunity to admit to themselves and to others that they are the victims of sexual harassment. For example, as women move into the workforce, they try to shed themselves of the historical stereotype that women are purely emotional creatures. In an attempt to be accepted by a male-dominated workforce, women try to portray themselves as non-emotional pillars of strength and reason. The problem is that when women are confronted with offensive conduct in the workplace, such as sexual jokes, comments, or propositions, it tells women that they are not seen as equals to their male counterparts and naturally invokes an emotional response.[96]

This puts women in a very difficult position. On the one hand, women encounter the fears and emotions that are natural consequences of hostile environment sexual harassment. But on the other hand, women live with the reality of a male-dominated workforce, which disapproves of women and emotion in the workplace. If women decide to complain about the offensive conduct, women face a male-dominated legal system and a reasonable person standard that finds emotion destructive to fairness and justice in the law.[97]

As a result, women are left with two options. First, they can complain about the sexually offensive conduct and risk rejection from both a male-dominated workforce and legal system.[98] Second, women can deny to themselves and to others that the offensive conduct is occurring and maintain the appearance of a unemotional pillar of strength. Unfortunately, because women want to assimilate into the male domain of American jobs, most women choose the second option and remain silent about the sexual harassment they encounter.[99]

The second problem for women is that if they do complain about sexually offensive conduct, it reinforces the stereotype that women are

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[95] *See, e.g.*, Sexual Harassment, *supra* note 28, at 86-87 (discussing how the term "personal" is used in sexual harassment cases to "undergird the sense of injustice in holding an employer responsible for the unauthorized misconduct of one 'individual' employee to another 'individual' employee").

[96] *See* Abrams, *supra* note 3, at 1207-08.

[97] *See, e.g.*, Estrich, *supra* note 6, at 844.

[98] *See, e.g.*, Crain, *supra* note 9, at 20 (noting that women's entry into formerly male-dominated jobs threatens men's monopoly on those jobs, which causes hostility towards women entering the workforce).

incapable of reason. For example, hostile environment sexual harassment substantially alters an individual's workplace to the point that work becomes unbearable. Thus, the very fears and physical strain that women encounter as a result of unwelcome conduct is proof that the conduct was in fact severe or pervasive.

However, the reasonable person standard does not consider the plaintiff's emotions. Rather, it only determines whether a reasonable person, void of emotion, would find the conduct offensive. Therefore, if women only have their emotions and fears as proof that their workplace became unbearable, history will be thought to have been correct as women seem incapable of using reason to determine whether certain conduct is lawful or unlawful. As a result, the reasonable person standard mischaracterizes the experience of sexual harassment and reinforces the notion that men are more capable than women of creating a stable and just society.

C. The Problem of Perception

The reasonable person standard suffers from a problem of perception and therefore is inadequate to address the law of sexual harassment for two important reasons. First, the reasonable person standard cannot properly determine what is "unwelcome" conduct because it fails to recognize that conduct objectionable to women is not always objectionable to men. Second, the reasonable person cannot properly determine when unwelcome conduct is "severe or pervasive" enough to constitute sexual harassment because it fails to consider that, to date, men and women are not on a level economic or professional playing field.

1. Who Decides What is Unwelcome?

To understand why the reasonable person standard has a problem of perception in the law of sexual harassment, one must first recognize that a female complainant's definition of "unwelcome" often clashes with her male harasser's definition. Studies have shown that, although women find a high incidence of conduct in the workplace to be sexually harassing, men perceive that same conduct to be harmless and innocent.[100] Several societal factors can help to explain this difference in perception.

The first factor is that women live under a constant threat of sex-related violence.[101] For example, it has been estimated that women face a twenty-

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[100] *See* Sexual Harassment Claims, *supra* note 19, at 1451 (citing Sexual Harassment . . . Some See it . . . Some Won't, Harv. Bus. Rev., Mar.-Apr. 1981, at 77, 92); *see also* Robin D. Wiener, Note, Shifting the Communication Burden: A Meaningful Consent Standard in Rape, 6 Harv. Women's L.J. 143, 145 (1983) (noting the differences in how men and women communicate).

[101] *See* Dolkart, *supra* note 72, at 178-79; *see also* Abrams, *supra* note 3, at 1204.

five percent probability of being raped and a forty-six percent probability of being sexually assaulted during their lifetimes.[102] Moreover, at a conservative estimate, fifty percent or more of all women are likely to be the victims of battery at some time in their life, and women are physically abused in at least twelve percent of all marriages.[103] Finally, the large American pornography industry puts forth images of women as willing participants in violent sexual coercion and objectification.[104] Although women have grown accustomed to this sex-related violence, the appearance of sexually offensive conduct in the workplace is a frightening and unsettling experience for all women.[105]

The second factor that explains why men define "unwelcome" conduct differently from women is the hostility that men feel towards women in the workplace.[106] Although not all men view women the same way, there is a common thread that runs through many men's views: women are different, if not unequal.[107] This attitude towards women in the American workforce causes some men to try to intimidate women, but it causes other men to simply ignore their presence in the workplace.[108] As a result, many men attempt to conduct themselves in the workplace as if they were in an all-male environment.[109] It is also important to remember that men are often the perpetrators and women are often the victims of sexual harassment.[110]

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[102] *See* Dolkart, *supra* note 72, at 178-79 (citing Diana E.H. Russell, Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment 49-50 (1984)).

[103] *See* Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 10–11 (1991).

[104] *See* Abrams, *supra* note 3, at 1205 (citing S. Griffin, Pornography and Silence: Culture's Revenge Against Nature (1981)) (noting that the unprecedented levels of sex-related violence that American women have grown accustomed to is attributed to "a vast pornography industry [that] creates continuous images of sexual coercion, objectification, and violence").

[105] *Id.*

[106] *See* Abrams, *supra* note 3, at 1202-03; *see generally* Dolkart, *supra* note 72, at 177-89 (discussing how gender roles and subordination of women in society influence the problem of sexual harassment).

[107] *See* Abrams, *supra* note 3, at 1202-03; *see also* Helen Hemphill & Ray Haines, Discrimination, Harassment, and the Failure of Diversity Training: What to Do Now 33 (1997) (noting that the problem of sexual harassment is largely attributed to the deeply held belief of many men that women should not be in the workforce, which allows them to sexually harass women without realizing that it is sexual harassment).

[108] *Id.* (stating that men who choose not to recognize women's presence in the workforce as legitimate ultimately feel that women should not be in the workplace).

[109] *Id.*

[110] *See* Sexual Harassment Claims, *supra* note 19, at 1451; *see also* Abrams, *supra* note 3, at 1197-98.

Thus, most men cannot begin to know, let alone define, what it is like to be the recipient of unwelcome conduct. Because men still control the workplace,[111] it is their attitudes toward unwelcome conduct that establish the norm.[112]

Even when men are on the receiving end of sexually explicit comments or conduct, empirical evidence shows that they are less likely to be negatively affected by it than are women. For example, men are more likely to feel amused by sexual teasing or comments in the workplace, but women are more likely to feel insulted.[113] One root of the problem is that deep-rooted social conventions teach men to be sexually aggressive and to interpret women's resistance as acceptance.[114] Thus, although sexual behavior at work is normal or harmless joking to men, women find it offensive.[115] A related root of the problem is that women are more likely to be the victims of rape or assault than men.[116] Therefore, a woman may find a sexual comment or gesture a threat of violence, but a man may be flattered by it.[117]

In light of these two factors, it is clear that the reasonable person standard suffers from a problem of perception that is at odds with the law of sexual harassment because it fails to consider that men define unwelcome conduct differently than women. For example, to determine whether unwelcome conduct is severe or pervasive enough to constitute sexual harassment, the court asks whether a reasonable person in that situation would find the alleged conduct unwelcome. To make that decision, the court considers the nature of the alleged harassment and how it affected the work environment, such as the type of sexual comments, jokes, or

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[111] *See* Hemphill & Haines, *supra* note 107, at 33 (noting that ninety-five percent of the senior board and executive positions in American companies are filled by men).

[112] *See* Abrams, *supra* note 3, at 1202-03 (stating that the male view of sexual harassment, which controls the workplace, establishes the attitude that inappropriate behavior is "business as usual").

[113] *See* Bernstein, *supra* note 17, at 465-66 & n.122.

[114] *See* Lucinda M. Finley, A Break in the Silence Including Women's Issues in a Torts Course, 1 Yale J.L. & Feminism 41 (1989).

[115] *Id.*; *see also* Abrams, *supra* note 3, at 1202; Bernstein, *supra* note 17, at 465-66.

[116] *See* Torrey, *supra* note 11, at 1019 (noting a study that estimates one in three women in the U.S. will be raped); *see also* Bernstein, *supra* note 17, at 465–66. As discussed previously, women live in a culture full of sex-related violence. *See* discussion *supra* pp. 215-216 and accompanying notes. Thus, a woman is not likely to find a sexual comment or joke from a male counterpart a friendly gesture, but rather a threat to her safety.

[117] *See* Abrams, *supra* note 3, at 1202; *see, e.g.*, Lynn Hecht Schafran, Is the Law Male?: Let Me Count the Ways, 69 Chi.-Kent L. Rev. 397, 406-07 (1993) (providing an example of how men's and women's concerns regarding sexual assault differ).

propositions the harasser made and whether it made the complainant's work unbearable.

The court will also consider the female complainant's conduct surrounding the alleged harassment. For example, the court looks at whether the complainant laughed at the sexual comments made in the workplace, or whether the complainant herself told dirty jokes. Moreover, a court may consider whether the woman wore high heels and short skirts to the office to determine whether the complainant's conduct in the workplace demonstrated that she would find sexually provocative conduct unwelcome.

However, under the guise of the reasonable person's objectivity, the court will not consider why the female complainant conducted herself the way that she did. That is, the court will not consider evidence that shows the woman laughed at the dirty jokes and comments because she was afraid of her alleged harasser and did not want to upset him. Nor will the court consider evidence that the woman told dirty jokes in the office because she wanted to fit in, or that she dressed provocatively to attract a person outside of work. A court will not consider these circumstances surrounding the alleged harassment because they are too subjective. That is, they reflect the emotions and feelings of the female complainant and, thus, are unimportant to whether the reasonable person would find the conduct unwelcome. But why are they unimportant? Or perhaps more appropriately, who are they unimportant to—the mythical reasonable person or the male judge sitting on the bench?

To answer these questions, feminists must accept that the mythical reasonable person and the male judge sitting on the bench are the same person. Although courts continue to claim that the reasonable person has no gender, legal scholars agree that the reasonable person began as a man and has always maintained masculine roots.[118] Thus, in order to truly objectively decide whether the conduct was unwelcome, severe, or pervasive enough to constitute sexual harassment, feminists must demand that judges separate themselves from this male bias.[119] To accomplish this, feminists must demand that judges recognize that conduct unwelcome to women is not always unwelcome to men. If feminists fail to make these demands, judges will continue to apply the male-biased reasonable person

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[118] *See* Guido Calabresi, Ideals, Beliefs, Attitudes, and the Law 22-23 (1985); *see also* Hilary Allen, One Law for All Reasonable Persons?, 16 Int'l J. Soc. L. 419, 422-24 (1988); Finley, *supra* note 114, at 57-65; Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. Legal Educ. 3, 22-23 (1988).

[119] *See, e.g.*, Jan Hoffman, Plaintiffs Lawyers Applaud Decision, N.Y. Times, Nov. 10, 1993, at A22 (quoting Lynn Hecht Schafran, of the National Organization for Women Legal Defense and Education Fund, that the courts should sharpen the focus to "the behavior of the alleged harasser and how this behavior alters circumstances in the workplace," instead of focusing on how the victim reacted to the behavior).

standard and courts will continue to suffer from a problem of perception that is at odds with the law of sexual harassment.[120]

2. The Workforce is Not a Level Playing Field

The reasonable person standard also suffers from a problem of perception in the law of sexual harassment because the standard does not consider that, to date, men and women are not on a level economic or professional playing field. The reasons for this are two-fold. First, the reasonable person's objective viewpoint fails to consider the economic and professional disparity between men and women. Second, it fails to recognize that this disparity creates unequal positions in the workforce for men and women.

For example, disparity in the amount of professional education, mobility, and opportunities for men and women has historically plagued working women. By 1979, sectors of the labor force became "feminized." That is, women took jobs where they would be employed as women and treated like women. Women were secretaries (ninety-nine percent female), domestics (ninety-eight percent), child-care workers (ninety-eight percent) nurses (ninety-eight percent), and typists (ninety-seven percent).[121] These jobs did not require professional education or advanced skills and were on the low end of the pay scale.

By 1990, women had moved into professional and executive careers, but women working full-time for the whole year still earned three-quarters of the take-home pay that their male counterparts made.[122] The 1990 Census indicated that more than half of all women would have to start new jobs before the salary of men and women would begin to even out.[123] Although some women have increased their salary, women and minorities make up only three percent of the executive positions in the top 1000 corporations.[124] In the top 2000 corporations, women and minorities make up only five percent of the executive workforce, while men make up ninety-five percent of the senior board and executive positions.[125]

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[120] *See* Bernstein, *supra* note 17, at 466-67.

[121] *Id.*

[122] *See* Gender Inequality, *supra* note 12, at 9.

[123] *Id.*

[124] *See* Hemphill & Haines, *supra* note 107, at 33

[125] *Id.*; *see also* Enormous Change in the Last Decade, Executive Female, Sept./Oct. 1996, at 27 (noting a study that showed women who worked in management and administration positions earn an average of fifty percent of earnings as men in the same positions). *But see* Trendwatch, Executive Female, Sept./Oct. 1996, at 27 (citing a different survey of graduates from top business schools, where the average salary of women now exceeds that of males).

This discussion is not meant to suggest that the only obstacle women face in the workplace is a discrepancy in pay and position with their male counterparts. On the contrary, a second major obstacle for women is that their male counterparts themselves fail to see women as equal in the workplace.[126] Today, women are stretched between two distinct roles: women are breadwinners in the workforce, but they are also caregivers at home. This dual role can produce negative results for women trying to succeed in the workplace. For example, many men still believe that women should stay at home.[127] Politicians and community leaders who call for a return to "family values" fuel this attitude.[128] A return to "family values" generally refers to more traditional times when women stayed at home and men were the only breadwinners in the house. Although men may not express these viewpoints, the fact is that many men still fail to see women as their professional equals.[129]

These viewpoints perpetuate sex discrimination in the labor market and as a result, hold women back.[130] Because many men secretly share the attitude that women should stay at home,[131] men remain blind to the strides women have made both inside and outside the work world. This blindness allows men to sexually harass their female counterparts without recognizing that it is sex discrimination.[132] Therefore, even if more women move into higher paying jobs or executive positions, sexual harassment of women will still permeate the workforce because men will still not see women as their equals.

The disparity in the positions, salaries, and viewpoints between men and women demonstrates that women face unique obstacles in the workplace. Moreover, it demonstrates that these obstacles are based purely

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[126] *See* Hemphill & Haines, *supra* note 107, at 33.

[127] *Id.*

[128] For example, recall the comments made by former Vice President Dan Quayle following an episode of the television series "Murphy Brown" in which the main character—a single and professional newswoman—gave birth to a son. Quayle suggested that the moral breakdown of society is linked to the breakdown of the American family and criticized CBS, the network which aired the show, for irresponsibly glamorizing single moms. In fact, Quayle continues to criticize the values of American popular culture. During his recent presidential campaign, Quayle noted, "Murphy Brown is gone and I'm still here fighting for the American family." Adam Clymer, With Words, Gore and Bush Stake Out the Middle Ground, N.Y. Times, June 20, 1999, at A11.

[129] *See* Hemphill & Haines, *supra* note 107, at 33.

[130] *Id.*

[131] *Id.*

[132] *See id.*

on gender.[133] As a result, women will perceive their work experiences and interactions with co-workers and supervisors differently than men. In the context of sexual harassment, women may find certain offensive conduct to be a threat to their professional status, earnings, and disposition, but men would not. This is a testament to the fact that men and women are not treated as, nor do they see each other as, equal members in the American workforce. As long as this disparity exists, sexual harassment will be inevitable for women.[134]

To prevent these obstacles from further justifying hostility toward women in the workplace, feminists must demand a legal standard that is as unique as women's position in society. The reasonable person is not such a standard. Purporting to represent an idealized citizen, the reasonable person standard claims to use reason based on fairness and justice to determine whether an individual's behavior is lawful or unlawful. It is not cognizant of individual emotions, circumstances, or sympathy. But this purely objective position causes the reasonable person standard to overlook the reality of sexual harassment: what constitutes severe or pervasive conduct that substantially alters a person's work environment generally depends on the specific person involved.

For example, if a woman is continually the object of sexual remarks and gestures from several of her co-workers, before taking action the woman may consider that the position she is in now pays more than her last two jobs. Moreover, in weighing the consequences of complaining, she may consider her upcoming promotion for a position that few women currently fill. The fear of losing her job, her adequate compensation, and the opportunity for career advancement may cause the woman such emotional stress that the continual remarks and gestures begin to substantially alter her work environment.

Although a court may find the conduct to be inappropriate for the workplace, under the reasonable person standard, the court would most likely not define it as sexual harassment. The standard is whether the reasonable person would find the alleged conduct severe or pervasive enough to substantially alter the work environment. The general presumption is that if the conduct were severe or pervasive, the reasonable person in a similar situation would have complained. Because this woman did not complain, the court presumes that the alleged conduct was not severe or pervasive enough to constitute sexual harassment.[135] Thus, under the reasonable person standard, a court is likely to find that if a woman does

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[133] *See* Dolkart, *supra* note 72, at 224-26 (discussing sexual harassment in the context of gender-based abuse).

[134] *See* Sexual Harassment, *supra* note 28, at 18.

[135] *See* Estrich, *supra* note 6, at 845-46 (discussing how those who suffer sexual harassment in silence have their silence used against them by the courts).

not complain, the conduct was not so severe or pervasive as to constitute sexual harassment.[136]

Is this a "reasonable" conclusion? Of course, just because a plaintiff perceives conduct to be harassment does not guarantee that it legally qualifies as sexual harassment. But if we accept as true that the sexual comments and conduct caused the woman concern over losing her promotion or job and thus altered her work environment, then is it reasonable to conclude that the conduct was not sexual harassment because the mythical reasonable person would have complained? Perhaps it is reasonable, but only if we continue to define the reasonable person as one void of all emotion, economic considerations, and knowledge of discrepancies in the workforce.

The reality of sexual harassment is that unwelcome, severe, or pervasive conduct is not directed towards a blank slate. It is directed towards women who are poor or rich, white or African American, college or high school educated. If feminists are to continue to demand from courts that women be given a cause of action for sexual harassment under Title VII, then they must also demand that courts determine whether the harassment occurred from a woman's perspective. Otherwise, on the face of Title VII, a woman has protection from sexual harassment but in reality that protection is meaningless.

V. TAKING ANOTHER LOOK AT THE REASONABLE WOMAN

In this section, I will argue that if feminists take another look at the reasonable woman standard, they will realize it is the more appropriate legal standard for the law of sexual harassment. I will begin by noting the main criticisms of the reasonable woman standard offered by some feminists. Then, I will address each of those criticisms as I point out the benefits of having a reasonable woman standard for the law of sexual harassment.

A. Criticisms of the Reasonable Woman

In the past, feminists have posed three main criticisms of the reasonable woman standard. First, the reasonable woman standard does not reflect the interests of all women. Second, men cannot apply the reasonable woman standard and remain objective. Third, the reasonable woman standard characterizes women as weak and vulnerable in the eyes of the law.

1. Who is the Reasonable Woman?

One criticism of the reasonable woman standard is that no two women have identical interests. If feminists agree that each woman is an

[136] *Id.*

individual, then feminists must also agree that no two women will define or perceive unwelcome conduct in the same way.[137] Moreover, is the reasonable woman white and middle class, or does she reflect persons of color and of various economic positions? Liberal feminism is often criticized for being white, heterosexual, and middle class, ignoring the interests of women of color, women of blue-collar status, and lesbians.[138] How can the reasonable woman standard in the law of sexual harassment guarantee that the same disregard for disparate interests will not occur in this context?

2. How Can Men Apply the Reasonable Woman Standard?

A second criticism of the reasonable woman standard is that men will not be able to adequately apply the standard. As I have argued, men and women define differently conduct that constitutes sexual harassment. How then can male judges and jurors adequately adopt the viewpoint of a woman?[139] Moreover, if a man can adopt a woman's viewpoint, he does so subjectively; "how would my wife, my daughter, or my girlfriend perceive the conduct?"[140] A subjective viewpoint conflicts with the requirement of the law that the trier of fact must make objective and impartial decisions—if a male judge or juror has sympathy for a woman plaintiff because she reminds him of his wife, then the judge or juror has lost his objectivity. A related point is that many scholars find it objectionable for courts to apply a reasonable woman standard for female plaintiffs and yet reject a reasonable man standard for male plaintiffs.[141]

3. Is the Reasonable Woman Too Vulnerable?

A final criticism of the reasonable woman standard is that it has paternalistic implications. That is, the standard gives women preferential treatment in the law because they are too weak or vulnerable to handle a legal standard that is also applicable to men.[142] It characterizes women as

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[137] *See* Bernstein, *supra* note 17, at 472-73.

[138] *See* Elizabeth M. Schneider, Particularity and Generality: Challenges of Feminist Theory and Practice on Woman-Abuse, 67 N.Y.U. L. Rev. 520, 563 n.185 (1992); *see also* Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 Colum. L. Rev. 304, 334-37 (1995).

[139] *See* Paul B. Johnson, The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?, 28 Wake Forest L. Rev. 619, 636 (1993).

[140] *See* Bernstein, *supra* note 17, at 474.

[141] *See* Todd B. Adams, Universalism and Sexual Harassment, 44 Okla. L. Rev. 683, 685-89 (1991).

[142] *See* Bittner, *supra* note 4, at 135-36.

fragile and as individuals who need to be rescued by a mostly male bench.[143] Moreover, the reasonable woman standard gives men an excuse for their behavior: it is not that what they did was wrong, but simply that they did not understand that a woman might find it offensive.[144] Thus, the harassment becomes a trivial issue and instead the focus of the inquiry becomes the sensitivity and vulnerability of the woman in question.

B. Defending the Reasonable Woman

Although the three criticisms of the reasonable woman standard discussed above raise valid concerns for feminists, each of the criticisms can be easily dispelled and reworked to empower women's position in the law of sexual harassment.

1. The "Reasonable Woman" is a Term of Art

The reasonable woman is not static nor a model of the ideal woman. She is a member of all races, religions, economic classes, and sexual orientation.[145] The reasonable woman encompasses all of these traits because the reasonable woman is based in part upon the individual woman before the court and in part upon the relevant societal factors that all women experience.[146]

The initial reaction to this explanation may be that this strangely resembles the reasonable person—a generic individual that represents each of us. But upon closer reflection, one will realize that the two standards are drastically different. The reasonable woman does not pretend to be gender-less, rather she is un-bashfully female. Moreover, the reasonable woman does not pretend to be a blank slate with no emotions, no past, and no future. She admits to having feelings and a personality, but she adopts the

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[143] *See* Adams, *supra* note 141, at 686.

[144] *See* Kenealy, *supra* note 56, at 204-08.

[145] The reasonable person standard is also supposed to satisfy these requirements. However, as the author has discussed, the reasonable person is not a neutral standard but is in fact male-biased. *See* discussion *supra* pp. 210-222 and accompanying text. Moreover, the concept of reason was developed over centuries of inequality, monarchy, and white-male superiority. *See* Bernstein, *supra* note 17, at 460. Thus, the American legal concept of reason not only excludes women, but it also excludes persons of color and lower economic status. Therefore, in reality, the reasonable person is not traditionally a member of all races, religions, economic classes, and sexual orientations.

[146] As will be discussed, the author believes that the reasonable woman standard is an objective standard. *See* discussion *infra* pp. 225-227 and accompanying notes. However, she argues that because the American legal system has had a male bias since its inception, a court must first consider subjective factors about the particular female complainant before it, as well as general societal factors that affect all women, before the court can truly make an objective decision in the law.

feeling and personality of the female complainant before the court. Thus, the reasonable woman would not represent only white, middle-class, and heterosexual executive victims of sexual harassment unless the only women who are harassed are white, middle-class, heterosexual executives. We know that is not the case.

I am advocating that feminists define the term "reasonable woman" like we define "sexual harassment": as a term of art. Similar to the broad spectrum of conduct and comments that can constitute sexual harassment, the legal standard for sexual harassment should encompass a broad spectrum of personalities, heritages, and lifestyles. If feminists agree that all women are different and in fact aim to celebrate those differences, we should demand that the legal standard for sexual harassment do the same.

But feminists must also recognize that there are common traits all women share. Women receive less compensation than their male counterparts, they are more likely to be raped, and they are more likely than men to be harassed in the workplace. Even if feminists celebrate the individual differences between women, feminists cannot turn a blind eye to the societal factors that bond women. Thus, the reasonable woman standard reflects the individual woman, but as a broad term of art it also reflects all women.

Applying a reasonable woman standard as a broad term of art will help relieve women of the problems created by the non-emotional reasonable person. As discussed previously, emotion is an integral part of sexual harassment.[147] Yet, under the reasonable person standard, emotion is deemed destructive to fairness and justice[148] and thus it deters women from complaining about sexual harassment. Under the reasonable woman standard, however, the court would adopt the feelings and personality of the female complainant before it. Thus, because emotions are not taboo under the reasonable woman standard, women will feel more comfortable admitting to themselves and to others that they are the victims of sexual harassment.

2. Reaching an Objective Decision Through a Subjective Channel

The trier of fact, whether a female or male judge or juror, can apply the reasonable woman standard through an appreciation of the individual. A trier of fact's job is to make a determination under the law based on the facts before it. We trust judges and jurors to make such determinations every day in American courtrooms, predicated upon the notion that judgment from our peers is a fair and equal source of justice. The facts of a case are similar to the characteristics that define an individual. If we trust the triers of fact to make judgments based on the facts in other contexts,

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[147] *See* discussion *supra* pp. 212-215 and accompanying notes.

[148] *See, e.g.*, Estrich, *supra* note 6, at 844.

then they should also be trusted to apply the reasonable woman standard based on the individual before them.

Will the reasonable woman standard cause male judges and jurors to make some subjective considerations in order to apply the perspective of a woman? Yes, to some extent. And it should. The traditional legal standard of the reasonable person is predicated upon the notion of an ideal citizen who is a blank slate: genderless, emotionless, without race or religion, and without a past or a future. But I do not know one person who satisfies that description.[149] Moreover, as I have argued throughout this article, the reasonable person itself does not satisfy that description, because the reasonable person is, without a doubt, male.

However, the subjective considerations a male judge or juror initially makes under the reasonable woman standard do not take away their ability to make objective decisions in the law of sexual harassment. On the contrary, I believe that in order for male judges or jurors to ultimately make objective decisions in sexual harassment cases, they must first make subjective considerations. For example, if a male judge or juror is not required to consider a woman's perspective—the individual woman's emotions or response to the alleged harassment and the relevant societal factors that all women experience—how do we know he is not looking at the incident from his own perspective? While a male judge or juror may claim that he is looking at the alleged harassment from the perspective of the reasonable person, we cannot be sure he is not looking at it from his own perspective, which is the perspective of the reasonable male.

I am not suggesting that when a woman brings a sexual harassment claim she must submit a description of herself to the trier of fact. Rather, under the reasonable woman standard, the trier of fact will adopt the viewpoint of the female plaintiff as it is presented to them in the facts of the case and in the broader context of society. For example, a female employee endures sexual comments and conduct daily from her co-workers. Her current employment position pays more than the last two jobs she held and she is up for a promotion for a position that is currently not filled by any female employees. The woman does not initially inform her supervisor of the harassment out of fear of losing her job and the potential promotion. Adopting the reasonable woman standard, the trier of fact would consider

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[149] Nor does the author know of anybody who defines "reasonable" in such terms. For example, a mother takes away one toy from a child who has two toys and gives the toy to another child of the same age who has no toys. Would not most persons say that this was reasonable? The mother has made a reasonable judgment based on the facts before her and a common societal knowledge that children like toys. Make the two children equal—with one toy each. The author does not mean to trivialize the problem of sexual harassment by comparing the disparities between men and women with two squabbling children—but note that, in her scenario, both men and women would be children of equal status, who are ultimately treated equally. The author believes this simple analogy makes a significant point: what people determine as reasonable every day is not based on a blank slate. Rather, our reasonable judgments are based upon whom we are dealing with, what they do and do not have, and how they are likely to react to the situation at hand.

the testimony of the woman about her fears of unemployment and relevant societal factors, such as pay and power differentials between men and women.

To be objective is to not be influenced by personal opinion. However, the law has traditionally had a male bias and the legal system itself is still male dominated. Thus, feminists must consider that, in order for male judges or jurors to apply the law objectively to sexual harassment claims, male judges or jurors need to first consider harassment from the female's perspective. Therefore, feminists should demand that courts apply the reasonable woman standard, even if it means that a male judge or juror subjectively considers how his wife, mother, or sister would feel in a similar situation as presented to him in a sexual harassment claim.

If a male judge or juror must consider how a woman he knows would feel if she were the victim of the alleged harassment to avoid being influenced by his male opinion of sexual harassment, then I would err on the side of him making such a subjective consideration. I believe that any danger posed by male judges or jurors taking subjective viewpoints are outweighed by the possible benefits: men stop narrowly viewing harassment and thus truly become objective, and a woman's perspective becomes equal in status in the law of sexual harassment.

3. Is There Paternalism in the Reasonable Woman?

In light of the reasonable person standard's male bias in the context of sexual harassment, different treatment under the reasonable woman standard may be more "equal" than the same treatment under the traditional reasonable person standard.[150] Feminists need to recognize that in order for male judges or jurors to apply the law objectively to sexual harassment claims, male judges or jurors must first consider harassment from the reasonable woman's perspective. Perhaps the ultimate goal of Title VII is that sex discrimination in the workplace, on the whole, will be objectionable to both men and women. However, we do not live in an ideal

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[150] The Supreme Court has recognized that, in some circumstances, different treatment for men and women may be more "equal" than the same treatment. *See* California Federal Savings and Loan Association v. Guerra, 479 U.S. 272 (1987). At issue in Guerra was whether the Pregnancy Discrimination Act, which prohibits employers from discriminating against employees on the grounds of pregnancy, superseded a California statute that required employers to give employees the right to return to their jobs after going on unpaid maternity leave. Critical to the case was the "sameness" standard for measuring equality: did the California statute not treat women and men the same? The majority of the Supreme Court's plurality opinion held that "[b]y 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs." *Id.* at 289. Thus, granting women rights to pregnancy leave does not treat women differently than men. Rather, it is an attempt to put women in the same position as men who do not need to choose between having children and keeping their jobs. *See generally* Christine Littlejohn, Reconstructing Sexual Equality, 75 Cal. L. Rev. 1279, 1299 (1987).

world. The continual need for Title VII alone is proof of the reality that men and women live in: sexism is alive and well in America's workforce.[151]

The reasonable woman standard does not take the position that women are inherently weaker and more vulnerable than men. Rather, it takes into account the different circumstances of life that men and women face in order to ensure that women have an opportunity to be understood and thus treated equally. Thus if feminists would consider the reasonable woman from this viewpoint, they would realize that the reasonable woman does not patronize women but instead liberates them from a male-biased legal tradition.

The arguments that the reasonable woman standard does not hold men accountable and in fact is unfair to men go appropriately hand-in-hand. These arguments overlook two important aspects of the reasonable woman: first, if it is correctly applied, the standard will require men to understand that what they did was wrong, not simply upsetting to a woman. Combining a woman's economic, professional, and safety concerns with societal facts about the rates of violence towards women, pay discrepancies, and general discriminatory behavior does not make a woman seem oversensitive. Instead, it introduces to the men involved, perhaps for the first time, the fact that women have valid interests and rights protected by the law. Moreover, for a man to infringe upon those interests and rights is not teasing or flirting, but a violation of Title VII.

Second, courts have historically considered the facts of a case from a male viewpoint. As discussed above, the reasonable person began as the reasonable man. Moreover, the majority of judges applying the law are male. Thus, after centuries of a dominant male perspective in the law, there should not be much concern that the interests and rights of males will suddenly be subordinated under the reasonable woman standard. If male victims of harassment are worried that the reasonable person standard will not adequately represent their interests in the law of sexual harassment, then perhaps men should argue in favor of a reasonable man standard.

I am not arguing in favor of separate standards based on gender for all crimes and civil rights violations. The law of sexual harassment is distinct from the laws that cover criminal, tort, and other civil rights violations. Sexual harassment, like few other unlawful acts, is based upon sex. Whether sexual harassment is defined as unwelcome sexual comments or as unwelcome sexual acts, sexual harassment in the workplace secludes and subordinates its victims through some sexual means.[152] As a result, sexual harassment violates its victims' dignity in the workplace and ultimately

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[151] *See, e.g.*, Harrington, *supra* note 2, at 218 (noting that the reality of pervasive sexual harassment in the workplace today has brought many feminists to take action towards adapting gender-neutral standards—like the reasonable person—to take into account the different circumstances of life that men and women face).

[152] *See* Catherine MacKinnon, Only Words 46 (1993).

deprives them an equal opportunity to compete and succeed in the American workforce.[153]

The problem of sexual harassment is grounded in a complex web of personal, societal, and legal issues that cannot easily be judged by the same blank slate that is used in other cases. Thus, because sexual harassment is a unique area of the law, perhaps men should argue in favor of a standard that will reflect their perspective in the law of sexual harassment. However, in light of the fact that ninety percent of the victims that report sexual harassment are women, I do not believe that feminists should temper their efforts to ensure that women are adequately protected from sex discrimination under Title VII to fit the needs and complaints of men.

VI. CONCLUSION

Feminists need to remember that it was not so long ago when sexual harassment was not considered sex discrimination. In the early 1970s, the notion that a sexual harassment claim could qualify as discrimination under the Civil Rights Act of 1964 was quite novel. The language of Title VII itself only requires an employer not to discriminate against its employees on the basis of sex and does not include a prohibition of *quid pro quo* or hostile environment sexual harassment. On the contrary, these one-time novel issues became what we know today as sexual harassment jurisprudence because feminists and activist lawyers convinced the courts that Title VII must adapt to the needs of the discriminated.

Today, the issue before feminists is whether they will demand that the law of sexual harassment be adapted to reflect the needs of those still discriminated against—America's working women. That is, should feminists demand that courts determine whether alleged harassment is severe or pervasive enough to constitute sexual harassment from a legal standard that reflects the perspective of women or the perspective of men? Although the reasonable person standard is a tradition in the American legal system, the reasonable person standard has traditionally reflected the perspective of the reasonable male. Thus, in the context of sexual harassment, the reasonable person standard allows courts to determine whether a woman was sexually harassed from the perspective of the male-harasser: would the reasonable male-harasser believe that the woman's conduct demonstrated that the comments or gestures were unwelcome?[154] Would a reasonable male-harasser consider his conduct to be severe or pervasive?

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[153] *See id.*

[154] *See* Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) ("Unless the fact finder keeps both the man's and woman's perspective in mind, 'defendants as well as courts will be permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders.'") (quoting Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting)).

Feminists need only look at how sexual harassment jurisprudence grew in the past twenty-five years to realize that the legacy of change in sexual harassment jurisprudence must continue if the law is to successfully protect women from discrimination. Thus, to ensure women a legal remedy that will eliminate the seclusion and subordination that results from sexual harassment, feminists should decide that the reasonable person standard is inappropriate in the law of sexual harassment. As an alternative, feminists should embrace a legal standard that reflects the perspective of women and, therefore, demand that courts apply the reasonable woman standard to determine if alleged conduct is severe or pervasive enough to constitute sexual harassment.[155]

[155] *See, e.g.*, Andrews v. City of Phila., 895 F.2d 1469, 1482-83 (3d Cir. 1990) (noting a standard that asks whether the harassment "would detrimentally affect a reasonable person of the same sex in that position," will prevent "hypersensitive" employees from prevailing on frivolous claims while still giving women an equal opportunity to hold their employers liable for the discrimination they encounter in the workplace).