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TOWARD AN EXPANDED CONCEPTION OF LAW REFORM: SEXUAL HARASSMENT LAW AND THE RECONSTRUCTION OF FACTS

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Feminist theorists and activists spurred a dramatic change in attitude over the past ten years that has forced courts to rethink and reformulate sexual harassment law. Their work has encouraged more women[1] to bring sexual harassment claims,[2] provoked society[3] and legal decision makers[4] to see the facts of sex-

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1. The overwhelming majority of sexual harassment victims are women and the overwhelming majority of perpetrators are men. *Cf. Wide Harrassment of Women Working for U.S. is Reported*, N.Y. Times, July 1, 1988, at B6, col. 1 (reporting a survey of government workers in which 42% of female employees, as opposed to only 14% of male employees, responded that they had experienced sexual harassment in the preceeding two years). Although some men have experienced sexual harassment in the workplace and some same-sex harassment occurs, this Note uses women as the paradigmatic examples of sexual harassment victims.

2. *See* Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go*, 10 CAP. U.L. REV. 445, 458-62 (1981) (surveying the development of and increase in sexual harassment case law); Kay & Brodsky, *Protecting Women from Sexual Harassment in the Workplace* (Book Review), 58 TEX. L. REV. 671, 687 (1980) ("The judgment by a person that he or she is being 'harassed' is subjective and, like all such judgments, is determined in part by the range of behavior acceptable to the culture."). *But see* K. BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 109 (1988) (arguing that antidiscrimination ideology reinforces the victimization of women and people of color because it requires acknowledging the powerlessness associated with victim status).

3. *See, e.g.*, American Psychiatric Board of Trustees, *Statement on Discrimination Based on Gender or Sexual Orientation*, 145 AM. J. PSYCHIATRY 1494, 1494 (1988) ("It is well known that sexual harassment and other forms of irrational gender-based employment discrimination are potentially severe occupational stressors."); Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling*, 52 AM. J. ORTHOPSYCHIATRY 539, 541 (1982) (presenting results of a study of 262 women sexual harassment victims: "[A]lmost all of the women experienced debilitating stress reactions as a result of the harassment," which affected their work performance and attitudes and their psychological and physical health); Goodman, *supra* note 2, at 446-48 (describing society's shift in attitude regarding sexual harassment).

4. The broad term "legal decision makers" applies a lesson from the Legal Realists that law is decided not only by judges, but by everyone, including, for example, adminis-

ual harassment differently, and convinced the United States Supreme Court to accept the hostile environment theory of sexual harassment.[5]

The reform of sexual harassment law illustrates how society has restricted itself to a conception of law reform that is too narrow. Law reformers concentrate on changing legal "doctrine," yet "facts" are just as important to legal decisions.[6] Changing the way society and legal decision makers think about facts can significantly affect legal decision making. In this way, feminists used consciousness raising,[7] a methodology that alters how we see facts, to reform sexual harassment law.[8]

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trative agency bureaucrats who determine governmental benefits of applicants, prosecutors who use their discretion to bring charges, police officers who use their discretion to arrest, and individuals who choose to bring cases. On Legal Realism, see generally W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (University of Oklahoma ed. 1985).

5. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). The United States Supreme Court upheld what had become by 1986 virtually unanimous lower court rulings that hostile environment sexual harassment is actionable under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2 (1982 & Supp. V 1987). Catharine MacKinnon was the primary proponent of using the hostile environment theory in sexual harassment cases. Her work influenced attorneys bringing sexual harassment cases in lower courts to argue the hostile environment theory, and she wrote the plaintiff's brief in *Meritor*. *See also infra* notes 33-36 and accompanying text.

6. *See* K. LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 87 (1988) [hereinafter K. SCHEPPELE, LEGAL SECRETS] (arguing that law consists of "legal texts" and "social texts" and both must be interpreted according to a theory); Scheppele, *Facing Facts in Legal Interpretation*, REPRESENTATIONS, 44 n.14 (Spring 1990) [hereinafter Scheppele, *Facing Facts*] ("[L]egal interpretation does not rest on some bedrock of facts. The interpretation of law and fact are mutually supporting 'all the way down.' ").

The distinction between doctrine (legal rules) and facts is overstated in this paper for the purpose of critiquing the standard view of law reform. No clear distinction as is drawn here exists. One author describes an analogous relationship this way: "[F]acts are small theories, and true theories are big facts." N. GOODMAN, WAYS OF WORLDMAKING 97 (1978) (citing N. HANSON, PATTERNS OF DISCOVERY (1958) (arguing that facts are theory-laden)).

7. *See infra* notes 15-18 and accompanying text for a discussion of consciousness raising; *see generally* C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 83-105 (1989) [hereinafter C. MACKINNON, TOWARD A FEMINIST THEORY].

8. It is artificial to discuss sexual harassment as a discrete problem separated from problems of racial harassment for women of color. Women of color who are subjected to harassment at work face a complex mixture of racial and sexual harassment in which it is impossible to separate what is racial harassment from what is sexual harassment. *See* King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS: J. WOMEN CULTURE & SOC'Y 42, 42 (1988) (arguing that "interactive oppressions" of race, class, and sex "provide a distinct context for black womanhood"). Unfortunately, the courts have not recognized these interactive effects. For a discussion of how courts treat multiple discriminations, see Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30, 45 (1981) ("Recognition that black women are a distinct group in American society and that sex-race discrimination in employment exists is the first step in eradicating that discrimination."); Scales-Trent, *Black*

The quiet revolution in sexual harassment law stands as a powerful example of the potential effectiveness of consciousness raising. In practice, consciousness raising and doctrinal law form a dialectical relationship.[9] Consciousness raising creates a social

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Women and the Constitution: Finding Our Place, Asserting Our Rights, 24 HARV.C.R.-C.L. L. REV. 9, 9-11, 15-19 (1989) ("Black women have not been seen as a discrete group with a unique history, unique strengths and unique disabilities."); Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457, 1473 n.113 (1989) ("A consideration of the experiences of Black women shows that they do not experience their discrimination merely as two discrete units 'piled upon each other.' The starting point should be that a Black woman, as a whole being—a member of a distinct class—can allege that she is being discriminated against as a 'Black woman.' "); *see also* Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980) (holding that sex-plus analysis applies when Black women as a subclass of women are subject to disparate treatment); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416-17 (10th Cir. 1987) (supporting a sex-plus analysis of discrimination claims of women of color as discussed in *Jefferies*); Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986) (adopting and narrowing the *Jefferies* sex-plus analysis by stating that a plaintiff in a Title VII case can claim only one plus characteristic; because women of color would use race as their plus characteristic, they would be precluded, unlike white women, from using pregnancy or marital status as a plus characteristic); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 944 n.34 (D. Neb. 1986) (adopting the *Jefferies* sex-plus analysis); Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) (same); Degraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976) (addressing a Black woman's claims of race and sex discrimination as two distinct and separate causes of action and finding that a consideration of the interaction of race and sex would create an unintended "super remedy" for Black women); *see generally* B. HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984) (arguing that feminist theory is inadequate because it has not accounted for the diversity of women's experience, including the experiences of women of color and poor women). I am indebted to Birgit Seifert for suggestions for this footnote.

9. *See* S. ESTRICH, REAL RAPE 101 (1987) (discussing the consciousness-raising power of law in relation to rape):

> We live in a time of changing sexual mores, and we are likely to for some time to come. In such times the law can bind us to the past or help push us into the future. It can continue to enforce traditional views of male aggressiveness and female passivity, continue to uphold the "no means yes" philosophy as reasonable, continue to exclude the simple rape from its understanding of force and coercion and nonconsent—until change overwhelms us. That is not a neutral course. In taking it, the law (judges, legislators, or prosecutors) not only reflects the view of (a part of) society, but legitimates and reinforces those views.
>
> Or we can use the law to push forward. It may be impossible—and unwise—to try to use the criminal law to articulate any of our ideal visions of male-female relationships. But recognition of the limits of the criminal sanction need not be taken to justify the status quo. As for choosing between reinforcing the old and the new in a world of changing norms, it is not necessarily more legitimate or neutral to choose the old. There are lines to be drawn short of the ideal. The challenge we face in thinking about rape is to use the legitimatizing power of law to reinforce what is best, not what is worst, in our changing sexual mores.

For a more pessimistic view on the relationship between life and law, see C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 57 (1979) [hereinafter C. MACKINNON, SEXUAL HARASSMENT]:

> Life becoming law and back again is a process of transformation. Legitimized and sanctioned, the legal concept of sexual harassment reenters the society to

climate for rethinking doctrine in which legal decision makers begin to construe facts differently. Reformulated doctrine reinforces social change and provokes more widespread consciousness raising.[10]

This Note uses feminist reform of sexual harassment law to show how the reconstruction of factual descriptions can lead to change in the law. Part I describes the feminist methodology of consciousness raising and analyzes Catharine MacKinnon's *Sexual Harassment of Working Women*[11] as an example of a successful consciousness-raising tool. Part II discusses sexual harassment doctrine and presents a case study illustrating how changing the way legal decision makers think about facts can lead to law reform. Part III discusses how social construction theory[12] aids understanding of changes in sexual harassment law.

This Note emphasizes two points. First, MacKinnon's analysis of male dominance and female subordination explains why courts more readily accept men's versions of the experience of sexual harassment and dismiss women's versions.[13] As a result of

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participate in shaping the social definitions of what may be resisted or complained about, said aloud, or even felt. Similarly, when a form of suffering is made a legal wrong, especially when its victims lack power, its social dynamics are not directly embodied or reflected in the law. Legal prohibitions may arise because of the anguish people feel or the conditions they find insupportable, but the legal issues may not turn on the social issues that are the reasons they exist. Distanced from social life, yet part of its imperatives, the law becomes a shadow world in which caricatured social conflict is played out, an unreal thing with very real consequences.

10. Judges espouse great diversity of opinion regarding the consciousness-raising power of law and the purpose of Title VII of the Civil Rights Act of 1964 in relation to sexual harassment. *E.g.*, Hall v. Gus Construction Co., 842 F.2d 1010, 1017-18 (8th Cir. 1988) ("Title VII does not mandate an employment environment worthy of a Victorian salon. Nor do we expect that our holding today will displace all ribaldry on the roadway. One may well expect that in the heat and dust of the construction site language of the barracks will always predominate over that of the ballroom."); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) ("Title VII is not a clean language act, and it does not require employers to extirpate all signs of centuries-old prejudices."); Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984) ("Title VII was not meant to—or can [sic]—change [sexual harassment]"); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984) ("The requirement that the harassment be unreasonable assures that Title VII does not serve as a vehicle for vindicating the petty slights suffered by the hypersensitive.").

11. C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9.

12. *See generally* P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966).

13. *See infra* note 43 and accompanying text. In general, theories of dominance and subordination suggest why some versions of the facts are accepted while others are dismissed. *See* Goodman, *supra* note 2, at 466:

The prevalence and acceptance of sexual harassment have its [sic] origins in a history that has, for the most part and until recently, left men and not women in

feminist consciousness raising by MacKinnon and others, however, women's versions have gained greater acceptance recently in the courts. Second, future efforts at law reform should focus on changing how legal decision makers think about facts.[14]

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positions of power, where they make decisions: as employers determining how to respond to sexual harassment charges, as judges hearing sex discrimination cases, and as writers and intellectuals expounding on sexual dynamics. As decision makers, such men determine and enforce cultural norms. To the extent their insights and experiences are different from those of women, women's perceptions are excluded and minimized.

See also Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2079-80 (1989) [hereinafter Scheppele, *Telling Stories*] ("Those whose stories are believed have the power to create fact; those whose stories are not believed live in a legally sanctioned 'reality' that does not match their perceptions. 'We,' the insiders, are those whose versions count as facts; 'they,' the outsiders, are those whose versions are discredited and disbelieved.") In relation to race issues, consider Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2438 (1989) ("The dominant group justifies its privileged position by means of stories, stock explanations that construct reality in ways favorable to it.") (citation omitted). In relation to gender issues, consider A. DWORKIN, INTERCOURSE (1987) (arguing that under our socially constructed system of male dominance and female subordination, sexual intercourse is necessarily an expression of inequality). In relation to race and gender issues, see B. HOOKS, *supra* note 8, at unnumbered preface:

> Living as we did [Black Americans in a small Kentucky town]—on the edge—we developed a particular way of seeing reality. We looked both from the outside in and from the inside out. We focused our attention on the center as well as on the margin. . . .Our survival depended on an ongoing public awareness of the separation between margin and center and an ongoing private acknowledgment that we were a necessary, vital part of that whole.

14. Areas of law that involve socially dominant and subordinate groups are most ripe for this type of reform. *See* Goodman, *supra* note 2, at 465 ("Success in continuing the development of the law will depend on some extent on success in educating judges further about the perniciousness of sexual harassment, but ultimately changing the law—or the fact—of the sexual harassment will depend on changing fundamental relations between the sexes."); *see also* Scheppele, *The Re-Vision of Rape Law* (Book Review), 54 U. CHI. L. REV. 1095, 1104, 1108-13 (1987) for a discussion of the "perceptual fault lines" that exist between men and women, particularly with regard to sexual relations, and how the law does not correspond to women's perceptions:

> Women and men *do* have very different perceptions of experience, but in the context of law one set of perceptions is hidden. Michel Foucault speaks of subjugated knowledges to describe such buried views. What remains—the perceptions acknowledged, recognized, *seen* in law—is the socially constructed "objective" point of view against which both men's and women's actions are judged by both men and women. That point of view *is* the law. But it is not the point of view of all.

Id. at 1112-13 (citations omitted). For a discussion of race and gender issues, see Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9 (1989) ("The multiple consciousness I urge lawyers to attain is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed."). In relation to race issues, see Scarborough, *supra* note 8, at 1474 n.118 ("[T]he problem with the current legal interpretation is that Black people's perspectives have not been used by judges in making their decisions.") (citing J. Culp, A Black Perspective on the Law and Economics of Title VII (1989) (unpublished manuscript)).

These efforts should encourage legal decision makers to consider how varying constructions of facts can produce different legal results.

I. FEMINIST CONSCIOUSNESS RAISING AND SEXUAL HARASSMENT

Consciousness raising plays an integral role in feminism and feminist movements.[15] Catharine MacKinnon called consciousness raising the "method" of feminism.[16] She defined it as "the collective critical reconstitution of the meaning of women's social experience, as women live through it."[17] In the 1970s in the United States, thousands of women formed consciousness-raising groups "to raise awareness and understanding . . . awareness that would prompt people to organize and to act on a mass scale."[18] Feminist consciousness raising attempts to integrate the theory and practice of changing the conditions under which women live.

The most prominent proponent of sexual harassment law reform is Catharine MacKinnon, who in 1979 wrote *Sexual Harassment of Working Women.*[19] In practice, the revolution in sex-

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15. Consciousness raising was also an important methodology of the civil rights movement and the Black Power movement. *Cf.* Sarachild, *Consciousness-Raising: A Radical Weapon* in FEMINIST REVOLUTION 144, 145 (1975).

16. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC'Y 227, 231 (1982) ("Consciousness raising is the major technique of analysis, structure of organization, method of practice, and theory of social change of the women's movement.") (footnote omitted) [hereinafter MacKinnon, *Feminism, Marxism*]. *But see* Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity* (Book Review), 68 B.U.L. REV. 217, 241-54 (1988) (critiquing consciousness raising and MacKinnon's use of it).

17. MacKinnon, *Feminism, Marxism, supra* note 16, at 255; C. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 7, at 83; *see also* Cole, *Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory*, 8 HARV. WOMEN'S L.J. 59, 88 n.120 (1985):

> The term consciousness raising is used in this Article to refer to all concrete situations in which the feminine (in women or men) plays an active role in critiquing the passive role by which society has defined the feminine. . . . Consciousness raising describes an endless series of concrete experiences which serve to deny the negativity of the feminine, to undermine restrictive social and personal roles, and so to affirm a woman's sense of self, and a person's sense of fullness and freedom.

According to Cole, consciousness raising can be "a woman suing her employer for sexual harassment" or a feminist book, like *Sexual Harassment of Working Women. Id.* As presented in this Note, consciousness raising is a process, not a concrete action, though an experience may be a part of the consciousness-raising process.

18. Sarachild, *supra* note 15, at 145.

19. C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9. MacKinnon is a practitioner as well as a theorist. She wrote the brief in *Meritor Savings Bank v. Vinson*, 477 U.S. 57

ual harassment law was a product of the work of thousands of women who devoted themselves to changing how our society thinks about sexual harassment. MacKinnon's book serves as a symbol and a profound example of their collective work.

A. Sexual Harassment of Working Women: *The Theory*

MacKinnon's book was a major conceptual breakthrough in feminist theory. She based her theory on the inequality of power between the sexes. She criticized the prevailing theory of sex discrimination—the differences theory—for failing to acknowledge that generally men have power in society and women do not.[20]

According to MacKinnon, the differences approach is the prevalent theory that has been espoused by the United States Supreme Court in discrimination cases.[21] It holds that when

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(1986), and included a sample brief in *Sexual Harassment of Working Women*. C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at 233 (Appendix B).

20. Feminism is not a monolithic theory. In her review of *Sexual Harassment of Working Women*, feminist Nadine Taub argues that in the short run MacKinnon's theory of inequality "poses tremendous risks." Taub, Book Review, 80 COLUM. L. REV. 1686, 1691 (1980). Taub proposes merging MacKinnon's theory of inequality with the predominate differences theory to address sexual harassment. Taub emphasizes the limits of consciousness raising. Part of her disagreement with MacKinnon is based on "a more pessimistic view of litigants' ability to educate the judiciary." *Id.* at 1695.

For a more expansive critique of MacKinnon, see Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 590-601 (1990) (critiquing MacKinnon's work because it essentializes the experience of all women as white women's experience, thereby silencing Black women); Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 134-44 (1989) (criticizing MacKinnon for failing to incorporate the perspectives and experiences of women of color into her theoretical framework). Unfortunately, this Note probably suffers the same limitations.

One does not need to agree completely with MacKinnon's analysis to appreciate its power and influence in reforming sexual harassment law, specifically, and sex discrimination law, generally.

21. C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at 107. The doctrinal test of Title VII in sex discrimination cases reflects the differences approach: to determine the presence of sexual harassment "courts scrutinize the rationality of the relationship between a sex differentiation and the requirements of employment." *Id.* at 102. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (holding that male-only draft registration did not violate the equal protection clause because women are not similarly situated with men regarding combat); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (holding that excluding pregnancy from disability coverage under an employer's insurance plan was not sex discrimination under Title VII because women and men are not similarly situated with regard to pregnancy); Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (holding that excluding pregnancy from coverage under California's disability insurance system did not violate the equal protection clause because every classification concerning pregnancy is not sex-based). The Court in *Gedulgig* held that "[t]he [California insurance] program divides potential recipients into two groups—pregnant women and nonpregnant

women and men are similarly situated, they should be treated similarly. Likewise, when women and men are not similarly situated, they should be treated differently.[22] Under the differences approach, sex discrimination occurs only when the sexes are treated differently based on inaccurate or overgeneralized grounds.

The inequality approach, on the other hand, begins with the understanding that the social situation of the sexes is unequal. "In this view," wrote MacKinnon, "men's and women's roles are not only different; men's roles are socially dominant, women's roles subordinate to them. The imagery of hierarchy, not just of distinction, animates the [judicial] opinions."[23] Legal doctrine comes closest to accepting the inequality theory in the disparate impact test of Title VII and the strict scrutiny test of the equal protection clause of the fourteenth amendment (which does not apply to classifications based on sex).[24]

The differences approach conceals how power inequality perpetuates sex discrimination because it does not comprehend the reality of social inequality.[25] To ask whether women and men are similarly situated (as the differences approach does) ignores the inequalities that prevent women from having the same opportunities as men in the first place. "Simply being a woman

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persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U.S. at 497 n.20. In response to *Gilbert*, Congress enacted the Pregnancy Discrimination Act, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)), which defined sex discrimination to include pregnancy discrimination.

Compare the standard of sex equality under the equal protection clause of the fourteenth amendment. Originally, the test was "whether sex bears a 'rational relationship to a state objective that is sought to be advanced.' " C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at 102 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)). In 1976 the United States Supreme Court adopted an intermediate standard of scrutiny in sex discrimination cases. Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). What difference this elevation in standard makes remains unclear.

22. MacKinnon accurately points out that the referent for the differences test is the male. By making the male the standard against which deviations are judged, the differences approach obscures inequality and "rationali[zes] the social subordination of women to men." C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at 119.

23. *Id.* at 102.

24. *Id.* at 102-03. Race, national origin, and occasionally alienage are suspect classifications under the equal protection clause of the fourteenth amendment. The strict scrutiny test is applied to classifications based on these categories. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Korematsu v. United States 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

25. C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at 119.

may mean seldom being in a position to be sufficiently similarly situated to a man to have unequal treatment attributed to sex bias," wrote MacKinnon.[26] By looking for discrimination only in cases of substantial similarity, the differences approach conceals the very inequalities that discrimination law is supposed to identify and eliminate.[27]

For MacKinnon, inequality theory implies a political strategy of redistribution of power. Her target is: "determinate acts, however unconscious, which preserve the control, access to resources, and privilege of one group at the expense of another."[28] One of those acts is the sexual harassment of working women.

MacKinnon defined sexual harassment as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power."[29] Her legal argument posited that sexual harassment of women at work is sex discrimination in employment.[30] She argued that work provides an opportunity for women to become economically self-sufficient and sexually self-determinate through independence from men. Sexual harassment, however, "undercuts woman's potential for social equality in two interpenetrated ways: by using her employment position to coerce her sexually, while using her sexual position to coerce her economically."[31] Sex discrimination law, she asserted, should provide a right and remedy for sexual harassment in employment.[32]

MacKinnon originated the distinction between quid pro quo and hostile environment sexual harassment[33] that was later adopted by the United States Supreme Court in *Meritor Savings Bank v. Vinson*.[34] The addition of the hostile environment

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26. *Id.*

27. *See also* C. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 7, at 216:
> Socially, one tells a woman from a man by their difference from each other, but a woman is legally recognized to be discriminated against on the basis of sex only when she can first be said to be the same as a man. A built-in tension thus exists between this concept of inequality, which presupposes sameness, and this concept of sex, which presupposes diference. . . . Sex equality becomes a contradiction in terms, something of an oxymoron. The deepest issues of sex inequality, in which the sexes are most constructed as socially different, are either excluded at the threshold or precluded from coverage once in.

28. C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at 127.

29. *Id.* at 1.

30. *Id.* at 4.

31. *Id.* at 7.

32. *Id.*

33. *See infra* notes 49-54 and accompanying text.

34. 477 U.S. 57 (1986) (holding that hostile environment sexual harassment is actionable under Title VII). "Women's experiences of sexual harassment can be divided into two forms which merge at the edges and in the world. The first I term the *quid pro quo*,

theory greatly expanded the progressive potential of sexual harassment law because, as MacKinnon noted, hostile environment harassment is "undoubtedly more pervasive."[35]

In *Sexual Harassment of Working Women* MacKinnon advocated a woman-centered perspective of sexual harassment. MacKinnon presented an alternative doctrinal theory, statistics of the segregation, stratification, and income inequality that women face in the workplace, and most important, women's personal stories of harassment. In describing her methodology of using women's own observations about their lives to understand sexual harassment, MacKinnon wrote:

> When an outrage has been so long repressed, there will be few social codifications for its expression. Depending upon who is asking them and how, victims may initially say (and believe) that they are not victims, so near is the denial to erasure. Women's consciousness erupts through fissures in the socially knowable. Personal statements direct from daily life, in which we say more than we know, may be the primary form in which such experiences exist in social space; at this point they may be their only accessible form.[36]

Given society's submerged understanding of sexual harassment, one of MacKinnon's goals was to validate the experiences of women and provide an alternative way for the courts to view the facts of sexual harassment.

In uncovering sexual harassment, MacKinnon tackled one of the most pervasive and accepted forms of oppression of women. Her theory of the inequality of power between women and men helps explain why courts more readily accept men's versions of the facts of sexual harassment and dismiss women's versions. MacKinnon's technique of using individual women's experiences provides a strategy that shifts the legal system's descriptions of sexual harassment to reflect more accurately the social reality of sexual harassment for women. The tool of consciousness raising has allowed MacKinnon to make the most persuasive case for changing how facts are framed by legal decision makers.

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in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity. The second arises when sexual harassment is a persistent *condition of work*." C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at 32. *See also infra* notes 39-41 and accompanying text.

35. C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at 40.

36. *Id.* at xii; *see also* K. BUMILLER, *supra* note 2, at 2, 4 (discussing the relevance of assessing the success of civil rights law from the victim's point of view).

B. Sexual Harassment of Working Women: *The Response*

MacKinnon's impact on sexual harassment law "must count as one of the more dramatic and rapid changes in legal and social understanding in recent years."[37] Numerous federal circuit courts cited *Sexual Harassment of Working Women* for originating the distinction between quid pro quo harassment and hostile environment harassment.[38] The United States Supreme Court accepted MacKinnon's argument that sexual harassment is a form of sex discrimination in 1986 in *Meritor Savings Bank v. Vinson.*[39]

When MacKinnon began the book, no court had held that sexual harassment was sex discrimination and several had held that it was not. In the preface she wrote, "Since then, some courts have agreed with the analysis presented here. The feeling that the manuscript has been useful, perhaps even pivotal, in litigation establishing sexual harassment as a legal claim and term of art has supported me in the rewriting."[40] MacKinnon's work, in conjunction with the efforts of thousands of women who changed

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37. Sunstein, *Feminism and Legal Theory* (Book Review), 101 HARV. L. REV. 826, 829 (1988). The claim that sexual harassment is a form of sex discrimination, "for which MacKinnon is given too little credit, seemed bizarre and radical to many when initially put forward. Remarkably, MacKinnon's basic position was accepted in 1986 by every member of the Supreme Court—with a majority opinion written by then Justice Rehnquist." *Id.* (citation ommitted).

38. *See* Henson v. City of Dundee, 682 F.2d 897, 908 n.18 (11th Cir. 1982) (citing MacKinnon for the proposition that two types of sexual harassment exist); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 618 (6th Cir. 1986) (citing *Henson* citing MacKinnon); Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (same); Bundy v. Jackson, 641 F.2d 934, 945-46 (D.C. Cir. 1981) (citing MacKinnon extensively on the existence of hostile environment sexual harassment). This was the first federal case to accept MacKinnon's classification. *See id.* at 943.

39. 477 U.S. 57 (1986) (upholding the use of the hostile environment theory of sexual harassment presented by MacKinnon).

MacKinnon's success in arguing that sexual harassment is a form of sex discrimination contrasts sharply with her failure in convincing others that pornography is a form of sex discrimination. She attributed this difference to a number of factors. First, pornography is a $10 billion a year industry whereas sexual harassment is not. Second, perpetrators of sexual harassment do not identify themselves as perpetrators. Users of pornography have a more difficult time ignoring their use of pornography. When "they all realize that you're making illegal something that they do," they mobilize. *The Pornographer's Nemesis,* 21 MICHIGAN TODAY 5, 6 (June 1989) (interview with Professor MacKinnon).

40. C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at xi. MacKinnon indicates that the manuscript was written and circulated as early as 1975, four years before its publication. This would account for the significant influence the work had, even prior to its general availability. *Id. See also* Kay & Brodsky, *supra* note 2, at 673.

the attitudes of those around them, was pivotal in altering the legal and social meaning of sexual harassment.[41]

The challenge for MacKinnon and other feminists was two-fold: to change legal doctrine to consider (if not reflect) women's perceptions of sexual harassment and to alter how legal decision makers view the facts of sexual harassment so women's points of view are reflected. The *Meritor* decision demonstrates partial success in response to the first challenge. The United States Supreme Court changed the legal doctrine of Title VII to encompass the most pervasive form of sexual harassment—hostile environment harassment.[42] In response to the second challenge, recent cases demonstrate that feminist consiousness raising has influenced some judges' descriptions of the facts in sexual harassment cases. The cases discussed in Part II confirm that feminists, by challenging the way that legal decision makers view the facts of sexual harassment, have succeeded in altering those views.[43]

A conception of how to think about facts was explicit in *Sexual Harassment of Working Women* and implicit in the doctrinal advances invented by MacKinnon. The courts, she argued, had viewed sexual harassment almost exclusively from a male point of view. In response, MacKinnon presented untold stories of women's personal experiences. She showed how male dominance and female subordination and the social construction of gender roles help explain women and men's differing perceptions

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41. *Sexual Harassment of Working Women* was reviewed in several major law journals. *See, e.g.* Kay & Brodsky, *supra* note 2; Taub, *supra* note 20; Book Note, 3 HARV. WOMEN'S L.J. 203 (1980). One review chronicled the turnabout in the Court's treatment of sexual harassment cases and gave credit for the "dramatic change" to MacKinnon. Kay & Brodsky, *supra* note 2, at 673. Her book "was widely circulated in manuscript as early as 1975 among many of the lawyers working on cases of sexual harassment prior to its publication by the Yale University Press in 1979." *Id.* The authors credited MacKinnon with encouraging victims to view sexual harassment as a form of sex discrimination and to bring suits:

> Even in such settings as the factory assembly line or the warehouse, the increasing number of female workers who enter the workplace with a raised consciousness concerning their rights and the demeaning implications of certain forms of behavior can be expected to produce changes in the work culture that will reduce the frequency and severity of harassment. MacKinnon's book undoubtedly will help to form that raised consciousness.

Id. at 693.

42. Minow, *The Supreme Court 1986 Term—Foreward: Justice Engendered,* 101 HARV. L. REV. 10, 65 n.257 (1987) ("Some efforts to remake old categories to capture women's experience have won success.") (citing C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9).

43. *See infra* Part II and accompanying notes. From the cases, one can infer that the task of changing how legal decision makers view facts of sexual harassment is enormous.

of the same events.[44] MacKinnon demonstrated that sexual harassment existed primarily in the form of hostile environment harassment, a form the courts had not yet recognized. Her factual understanding of sexual harassment influenced her doctrinal suggestions.

MacKinnon's book alone did not change how legal decision makers think about the facts of sexual harassment; it was an influential part of a more generalized process.[45] Consciousness raising as the methodology of the feminist movement relies on thousands of individual, everyday actions that encourage people to think differently about the socially embedded subordination of women. Women questioned how the legal process had been used to support the practice of sexual harassment and initiated doctrinal and factual reform to force the law to respond to their needs.

II. REFORMING SEXUAL HARASSMENT LAW BY ALTERING PERCEPTIONS OF FACTS

Sexual harassment law changed because judges and society at large began to look at facts differently, not because courts simply decided a new theory was more appropriate. Facts previously discounted could now be categorized under the rubric of sexual harassment. This change occurred primarily because feminists, particularly Catharine MacKinnon, used consciousness raising as a method to change how we view the facts of sexual harassment. The following discussion of sexual harassment doctrine and a case study illustrate this change.

A. Sexual Harassment Doctrine

Courts rely on Title VII of the Civil Rights Act of 1964 to prohibit sexual harassment in employment. Section 703 of Title

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44. C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at 101 (citing S. DE BEAUVOIR, THE SECOND SEX 249 (Bantam ed. 1970)), 105, 220-21; *see supra* note 14; *see also, Sexual Harassment in the Federal Government, Hearings Before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 64 (1979) at 93 (testimony of Eleanor Holmes Norton), 117 (testimony of Dorothy Nelms), 122-23 (testimony of Beryce MacLennan).

45. *See* MacKinnon, *Introduction to Symposium: Sexual Harassment*, 10 CAP. U.L. REV. i, ii (Spring 1981) ("[I]t took a feminist movement to expose [sexual harassment] as systematic and harmful in the first place, because feminism was the first politics to take women's point of view on our own situation as definitive of that situation.").

VII states that "[i]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ."[46] On its face this statute does not prohibit sexual harassment. It was entirely conceivable that sexual harassment would never have been found to constitute discrimination based on sex.[47]

Two analytically distinct forms of sexual harassment are recognized by federal courts.[48] First, when an employer conditions employment opportunities upon sexual relations, it violates Title VII under the "quid pro quo" theory.[49] If an employer threatens to dismiss, demote, or eliminate some employment opportunity unless the employee engages in sexual relations, the employer violates Title VII. Similarly, promising an employee an employ-

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46. 42 U.S.C. § 2000e-2(a) (1982).

Only equitable remedies are available under Title VII; plaintiffs may not receive compensatory or punitive damages. The point of equitable relief is to "restore the victim of discrimination to fruits and status of employment as if there had been no discrimination." Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988).

The Equal Employment Opportunity Commission (EEOC) is the administrative body charged with enforcing Title VII and other civil rights statutes in the employment context. In 1980 the EEOC promulgated guidelines addressing sexual harassment in employment. *See* 45 Fed. Reg. 74676 (1980) (now codified at 29 C.F.R. § 1604.11(a) (1989)). Those guidelines are not binding on the courts, but many courts have cited and applied the EEOC guidelines. *See* Coley v. Consol. Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982):

> Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that title. Although the guidelines are entitled to consideration in determining legislative intent, courts may properly accord less weight to such guidelines than to administrative regulations which have the force of law or to regulations which under the enabling statute may themselves supply the basis for imposition of liability.

Id. at 647 n.4; *see also* Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981).

47. *See* General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976) ("The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity."). Title VII was originally intended only to protect the rights of people of color. On the final day of consideration by the entire House, Representative Howard Smith (D. Va.) added an amendment to prohibit sex discrimination in an attempt to thwart passage of Title VII. His plan backfired. The amendment passed the House the same day, and the entire bill was approved two days later and sent to the Senate. 110 CONG. REC. 2577-84 (1964). *Contra* Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 428 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (presenting the view that sexual harassment "is within the clear letter—and probably the spirit—of Title VII" (citation omitted)). For a discussion of the legislative history of Title VII with regard to Black women, see Scarborough, *supra* note 8, at 1465-66.

48. State laws provide separate and additional bases for sexual harassment claims. *See, e.g.*, Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2102 (1985); Wisconsin Fair Employment Act, WIS. STAT. § 111.36 (1987-88).

49. "Quid pro quo" means "something for something." BLACK'S LAW DICTIONARY 1123 (5th ed. 1979).

ment opportunity in exchange for sexual relations is a violation. Title VII is offended in either case because the employee is treated differently than members of the opposite sex with regard to the allocation of benefits and the imposition of burdens of employment.[50]

Second, an employer violates Title VII if it subjects an employee to a hostile work environment.[51] Hostile environment harassment consists of harassment so severe or pervasive that it alters the conditions of employment. The United States Supreme Court, in *Meritor Savings Bank v. Vinson*, adopted the distinction that the lower federal courts had acknowledged since 1981.[52] The *Meritor* decision proved a major victory for feminists who argued that psychological (as opposed to economic) forms of sexual harassment constitute sex discrimination in the workplace.[53]

The United States Court of Appeals for the Eleventh Circuit formulated a widely used test to determine the presence of hostile environment sexual harassment in *Henson v. City of Dundee*.[54] Under the *Henson* test, a plaintiff carries the burden of demonstrating that: 1) "The employee belongs to a protected group";[55] 2) "The employee was subjected to unwelcomed sexual harassment . . . [in the form of] sexual advances, requests for sexual favors, [or] other verbal or physical conduct of a sexual nature";[56] 3) "The harassment complained of was based on sex";[57] 4) "The harassment complained of affected a 'term, con-

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50. *See* Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

51. The courts initially developed the hostile environment theory in a national origin harassment case, Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972):

> [E]mployees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and . . . the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . . .

Id. at 238.

52. 477 U.S. 57, 64 (1986); *see also* Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (first federal case to identify the distinction).

53. *Meritor*, 477 U.S. at 66; *Bundy*, 641 F.2d at 943-46.

54. 682 F.2d 897 (11th Cir. 1982).

55. *Id.* at 903. Individuals may bring a discrimination action under Title VII based on the following categories: race, color, religion, national origin, and sex. 42 U.S.C. § 2000e-2(a) (1982).

56. *Henson*, 682 F.2d at 903.

57. *Id.*

dition, or privilege' of employment";[58] and 5) "Respondeat superior."[59] In a hostile environment action, the harassment must be "sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment."[60]

More recent United States circuit court of appeals decisions modify the second element of the *Henson* test. Hostility not of an explicitly sexual nature also has been found to constitute sexual harassment. In 1985, one circuit court held that physically aggressive but not explicitly sexual acts by a male supervisor against a female employee may form a pattern of sexual discrimination.[61] Two other circuit courts have explicitly accepted this reasoning.[62]

To prove a claim of hostile environment sexual harassment, the plaintiff must show either that the perpetrator intended his actions or that his actions had the objectively predictable effect of unreasonably interfering with the plaintiff's work performance or work environment. In addition, the plaintiff must show that she was, in fact, adversely affected.[63] A plaintiff who encourages behavior that creates a hostile environment cannot succeed in a sexual harassment action. The test is whether the perpetrator's actions were "unwelcome."[64] The plaintiff must indicate by her conduct that the alleged sexual advances were unwelcome. Her claim is not moot if she voluntarily participates in sexual relations as long as she previously indicated that they were unwelcome.[65] Unfortunately, the plaintiff's "dress and personal fantasies" are relevant evidence on the issue of whether the advances were unwelcome.[66]

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58. *Id.* at 904. Harassment may affect employment if "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (1989).

59. *Henson*, 682 F.2d at 905.

60. *Id.* at 904.

61. McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985).

62. Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (holding that predicate acts underlying sexual harassment claim did not have to be sexual in nature: "Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances."); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) (remanding the case to consider evidence of threats of physical violence and incidents of verbal abuse).

63. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

64. *Id.* at 68-69.

65. *Id.*

66. *Id.* For a discussion of the problems women face in bringing sexual harassment claims in the wake of *Meritor*, see Dodier, Meritor Savings Bank v. Vinson*: Sexual Harassment at Work*, 10 HARV. WOMEN'S L.J. 203, 219-21 (1987) (arguing that allowing evidence of plaintiff's dress and personal fantasies "places the victim rather than the ac-

B. Sexual Harassment Facts: A Case Study

Fact descriptions from lower federal court opinions decided since *Meritor* reflect a shift in how legal decision makers view the facts of sexual harassment.[67] In addition to accepting the hostile environment theory, some judges have begun to describe the facts of sexual harassment cases differently to reflect women's understanding of sexual harassment. This real change in factual interpretation can profoundly affect the outcome of a case.

The following case study, *Rabidue v. Osceola Refining Co.*,[68] demonstrates how the same situation can be described differently by different judges and how these differences can affect the legal outcome. The trial court opinion and the majority and dissenting opinions of the appellate court illustrate this claim. The judges offer factual accounts that differ in describing the severity of the harm and in focusing on the plaintiff's or the defendant's behavior. The contrast between the lower court opinion, appellate court opinion, and the appellate court dissent supports the claim that law can be reformed by reinterpreting facts.[69]

1. The lower court opinion— In 1984 a federal district judge determined that Vivienne Rabidue did not prove a claim of sexual harassment against her employer. The trial judge shaded the facts to reflect that legal outcome. First, he downplayed the severity of the alleged perpetrator's behavior. He "noted" that evi-

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cused harasser on the defense"); Case Comment, *A Right with Questionable Bite: The Future of "Abusive or Hostile Work Environment" Sexual Harassment as a Cause of Action for Women in a Gender-Biased Society and Legal System*, 23 NEW ENG. L. REV. 263 (1988) (arguing that the malleable *Meritor* standard is not very useful to women fighting sexual harassment when women face pervasive gender bias in the courtroom). *See infra* notes 78-81, 91-99 and accompanying text for a discussion of how sexual harassment trials and rape trials are similar in that both focus on the plaintiff's actions.

67. K. SCHEPPELE, LEGAL SECRETS, *supra* note 6, at 95, 103 ("The study of facts reveals what the law values."). This Note uses the fact descriptions in federal case law as data because they are readily available. Interviews with victims and alleged perpetrators of sexual harassment could also provide relevant evidence of a shift in perception.

68. 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

69. For three different descriptions of the same event, see Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). The plaintiff argued that her supervisor "reached over and rubbed her thigh and said, 'I think you're going to make it.' " *Id.* at 1409. The supervisor argued that the employee had "misconstrued an innocent and harmless gesture of encouragement." *Id.* at 1410. The lower court found the same incident to be "an isolated incident in which there was no sexual advance intended." *Id.* at 1411. The appellate court remanded the case for further consideration of evidence evincing a hostile environment.

dence of sexual harassment consisted of "male employees occasionally display[ing] pictures of nude or partially clad women in their office and work area," to which the women employees were regularly exposed.[70] He described Douglas Henry, the alleged perpetrator, as a man who customarily made comments about women generally, and, on occasion, directed such obscenities to the plaintiff.[71] The court's language minimized the harm to the women employees.[72]

The trial judge described Henry's actions in much the same way as the appellate judges described him in their subsequent opinions:

> Mr. Henry was a crude and vulgar man. He habitually used vulgar language around the office. It was not unusual for him to make obscene comments about women, and to use words like 'cunt,' 'pussy,' and 'tits.' On at least one occasion Mr. Henry called plaintiff a 'fat ass.'[73]

But the trial judge described the women employees' reaction to Henry differently. He stated that the plaintiff and other women employees responded to Henry's behavior, not with outrage, but by acting "annoyed."[74] In downplaying the seriousness of the women's reactions, the trial judge minimized the harm done.

In its findings of facts, the district court discussed some "facts" that are actually legal conclusions under the sexual harassment hostile environment test. For example, one prong of the doctrinal test for hostile environment sexual harassment is whether the behavior was sufficiently pervasive to interfere sub-

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70. *Rabidue*, 584 F. Supp. at 423.

71. *Id.*

72. Compare this attitude with Bundy v. Jackson, 641 F.2d 934, 940 (D.C. Cir. 1981) (criticizing the lower court's characterization of sexual harassment as a "game" that the perpetrators did not take "seriously"; "The record, however, contains nothing to support [the lower court's] view, and indeed some evidence directly belies it."), and with Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984) (supporting the plaintiff's version of the facts as constituting sexual harassment, not a "personality clash," as the defendants argued, which would not violate Title VII because it was not behavior based on the plaintiff's sex).

73. *Rabidue*, 584 F. Supp. at 423. See Rabidue v. Osceola Ref. Co., 805 F.2d 611, 615 (6th Cir. 1986) for a similar description of the alleged perpetrator.

74. *Rabidue*, 584 F. Supp. at 423. For an example of a difference in characterization of the facts between the plaintiff and defendant, see Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988). "Appellants argue that the nickname 'Herpes' is analogous to the appellation 'Scarface,' which Al Capone wore proudly but which might bother a more sensitive person. Brief of Appellant at 16." *Id.* at 1013 n.4. The defendants argued that calling the plaintiff "Herpes" may have been cruel, but it was not sexual harassment. *Id.* at 1013.

stantially with the plaintiff's employment. This test requires a legal judgment. But the trial court instead employed a factual analysis: "The vulgarity clearly was a problem, but not so pervasive a problem as to substantially interfere with plaintiff's employment."[75] The court again lapsed into a legal conclusion when it suggested that the plaintiff's discharge was a "result" of her "many job-related problems—in particular, her inability to work harmoniously with customers and co-workers."[76] The district judge conveniently made factual findings against the plaintiff that were actually conclusions of law.

In a manner reminiscent of rape trials, the district court emphasized the plaintiff's behavior and minimized the relevance of the alleged perpetrator's behavior.[77] Although the court stated that she "doubtless was an intelligent and ambitious person,"[78] the phrasing made it apparent that the court intended to criticize the plaintiff. The inevitable "on the other hand" follows the court's praise: the plaintiff was a "troublesome employee," a person who was "abrasive, extremely willful, and difficult to get along with."[79] The judge ultimately held that the plaintiff was not a victim of sexual harassment, finding that her work troubles stemmed from her temper and stubbornness. The court found that the plaintiff was not fearful at work; that the language and posters did not affect her psychological well-being because they were merely annoying, not shocking; and that the vulgarity constituted a "fairly insignificant" part of the total job environment.[80]

2. *The appellate majority opinion*— The plaintiff appealed *Rabidue* to the United States Court of Appeals for the Sixth Circuit, which affirmed the trial court.[81] One member of the three-judge panel, Judge Damon Keith, concurred in the court's judgment because of a technical argument that the successor corporation was not liable for the actions of its predecessor.[82] But Keith wrote a dissenting opinion on the merits of the sexual harassment and sex discrimination claims.[83]

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75. *Rabidue*, 584 F. Supp. at 423.

76. *Id.*

77. For another example, see *infra* notes 91-99 and accompanying text; *see supra* note 66 and accompanying text for a discussion that the dress and personal fantasies of the plaintiff are relevant evidence under *Meritor*.

78. *Rabidue*, 584 F. Supp. at 423.

79. *Id.*

80. *Id.* at 432-33.

81. Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986).

82. *Id.* at 623 (Keith, J., concurring in part and dissenting in part).

83. *Id.* at 628 (Keith, J., concurring in part and dissenting in part).

A well-established rule of law provides that an appellate court shall only overturn factual findings of a district court if they are "clearly erroneous."[84] As a result, facts tend to become reified on appeal.[85] The appellate court in *Rabidue* applied this standard,[86] describing the facts similarly to how the district court had described them. The appellate majority description, therefore, sounds even further removed from the details and nuances of the case.

Like the lower court, the appellate court concluded that even though Henry's vulgar behavior was annoying, it was "not so startling as to have affected seriously the psyches of the plaintiff or other female employees."[87] In a footnote the court characterized the facts of this case and distinguished them from cases in which plaintiffs presented "more compelling circumstances" for relief.[88] After describing the facts of three successful sexual harassment cases, the court provided a description of the facts in *Rabidue* that minimized the harm suffered by the plaintiff, similar to the district court's description.[89] The court summarized the evidence of harassment as being "limited to pictorial calendar type office wall displays of semi-nude and nude females and Henry's off-color language."[90]

In a fashion similar to the trial court's, the appellate court focused its factual account on the plaintiff. The majority implied that the plaintiff was to blame for Henry's behavior. The plaintiff had an "abrasive, rude, antagonistic, extremely willful, uncooperative, and irascible personality."[91] Her charge of sexual harassment "arose primarily as a result of her unfortunate acrimonious working relationship with Douglas Henry."[92] Rabidue and Henry "were constantly in a confrontation posture."[93] The court's phrasing illustrates its position that Rabidue was as much or more at fault than Henry for the treatment she suffered at Osceola Refining Company.

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84. *See, e.g.*, FED. R. CIV. P. 52(a); Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

85. *But see* Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 645-46 (1988) (arguing that in practice the clearly erroneous standard is flexible and variable). Appellate courts may have substantially more control over the facts than the standard implies.

86. *Rabidue*, 805 F.2d at 615-16.

87. *Id.* at 622.

88. *Id.* at 622 n.7.

89. *See supra* notes 70-74 and accompanying text.

90. *Rabidue*, 805 F.2d at 622 n.7.

91. *Id.* at 615.

92. *Id.*

93. *Id.*

The court of appeals's doctrinal test also focused on the plaintiff. It adopted a subjective test within an objective test to determine the presence of actionable sexual harassment,[94] stating that the standard varies with the "personality" of each individual plaintiff and each work environment.[95] The court listed the factors that must be taken into account in determining the presence of sexual harassment:

> [T]he nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.[96]

The list concentrates on the plaintiff. The defendant's absence from the court's description of the relevant factors implies that his actions are less important in determining whether sexual harassment occurred than the plaintiff's actions.[97]

The trial court and appellate majority's emphasis on the plaintiff's behavior parallels the focus on the victim in rape trials.[98] Much of the testimony in rape trials has focused on the victim's prior sexual relations and whether she consented to the sexual contact. Feminists argued that this process put the victims of sexual assault on trial instead of the alleged perpetrators. As a result of feminist activism, rape shield laws have been implemented in numerous jurisdictions to restrict the use of testimony regarding the victim's sexual history.[99]

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94. The court stated that the trier of fact "must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances." Plus, "the particular plaintiff would nevertheless also be required to demonstrate that she was actually offended by the defendant's conduct and that she suffered some degree of injury as a result of the abusive and hostile work environment." *Id.* at 620.

95. *Id.*

96. *Id.*

97. *See supra* notes 71-75, 77-79 and *infra* notes 99-104 and accompanying text.

98. *Cf.* S. ESTRICH, *supra* note 9, at 47-51; Note, *Rape Shield Laws—Is It Time for Reinforcement?*, 21 U. MICH. J.L. REF. 317, 318-21 (1988) (authored by Catherine L. Kello).

99. *See* Galvin, *Rape: A Decade of Reform*, 31 CRIME & DELINQ. 163, 163 (1985); *see, e.g.*, FED. R. EVID. 412. *But see* S. ESTRICH, *supra* note 9, at 88-90 (reforming rape law to focus on the defendant's behavior, instead of the victim's, was largely unsuccessful).

Both the trial court and the appellate majority decisions in *Rabidue* expressed the view that Title VII cannot and should not be used to change the status quo. According to the trial judge, Title VII cannot change behavior;[100] it was not "designed to bring about a magical transformation in the social mores of American workers."[101] In fact, what some persons consider to be sexual harassment is a natural part of some work environments, he claimed.[102] In this view, "it cannot seriously be disputed that in some work environments, humor and language are rough-hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound."[103] Accordingly, from the trial judge's point of view, statutes cannot and should not be used to change behavior that naturally "abounds" in many work environments.

Similarly, the appellate majority reasoned that the defendant's behavior was not sexual harassment in the context of our society. The sexually explicit posters did not affect the workplace "when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places."[104] The judges' general attitude about sexual harassment in the workplace seems to be: lump it or leave it.[105]

3. The appellate dissenting opinion— The dissenter, Judge Damon Keith, found that "[t]he overall circumstances of the

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100. *See supra* note 10 and accompanying text.

101. Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984).

102. *Id.* Socially constructed gender roles are routinely claimed to be "natural" because they are so pervasive and because they confirm the dominant role of the male gender. "That the sex division seems natural may measure how deeply sex divides social consciousness better than it measures the givenness of characteristics of the sexes or justifies sex as a foundation for social disparity." C. MACKINNON, SEXUAL HARASSMENT, *supra* note 9, at 109.

103. *Rabidue*, 584 F. Supp. at 430. The Court of Appeals for the Sixth Circuit quotes this language in agreement. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620-21 (6th Cir. 1986).

104. 805 F.2d at 622.

105. Another federal district court took a contrary attitude in Arnold v. City of Seminole, 614 F. Supp. 853 (E.D. Okla. 1985). The *Arnold* court ordered a unique remedy to counteract pervasive sexual harassment in a police department. "[I]n such a workplace," the court stated, "where sexual harassment is not only condoned by those in authority but also is not admitted to be harassment and discrimination, it is imperative that *educational efforts* be instituted to prevent future occurrences." *Id.* at 870 (emphasis added). As the court noted, the intent of the EEOC Guidelines is preventative, so the employer must develop "methods to sensitize all concerned." *Id.* at 872 (quoting 29 C.F.R. § 1604.11(f)). Those methods include affirmatively raising the subject of sexual harassment with all employees to inform them that it violates federal law and developing a procedure to address claims of discrimination.

plaintiff's workplace evince an anti-female environment."[106] He interpreted the same evidence considered by the majority very differently, and he discussed evidence from the record that the majority chose to ignore. Judge Keith's dissent attempts to describe the experience of sexual harassment with greater attention to a woman's perspective.[107]

As evidence of the "anti-female" environment, Judge Keith noted that the plaintiff worked for seven years as the only woman in a salaried management position.[108] The plaintiff and other women were "exposed daily" to sexually explicit posters.[109] Judge Keith employed a technique similar to those used in consciousness raising to describe the working conditions of the plaintiff and other female employees of Osceola Refining Company. He presented in explicit detail two examples of the type of material to which the plaintiff was exposed:

> One poster, which remained on the wall for eight years, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling "Fore." And one desk plaque declared "Even male chauvanist pigs need love." Plaintiff testified the posters offended her and her female co-workers.[110]

That he discussed this graphic evidence, available to the majority as well, shows that, unlike the majority and the trial court, Judge Keith found it particularly significant in deciding the legal issues.

In contrast to the majority's description, Judge Keith wrote that Rabidue's co-worker and sometimes supervisor Henry "regularly spewed anti-female obscenity."[111] He "routinely referred to women as 'whores,' 'cunt', 'pussy' and 'tits.' "[112] In relation to Rabidue, Henry "specifically remarked 'All that bitch needs is a good lay' and called her 'fat ass.' "[113]

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106. *Rabidue*, 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J. concurring in part and dissenting in part).

107. Judge Keith presented two independent reasons to support his dissent: he disagreed with the majority's characterization of the facts, and he would apply common-law principles of agency to prove employer liability as instructed by the United States Supreme Court. Although Judge Keith had a doctrinal disagreement with the majority, he would have dissented solely on the differences in factual interpretation. *Id.* at 623-28.

108. *Id.* at 623.

109. *Id.*

110. *Id.* at 624.

111. *Id.*

112. *Id.*

113. *Id.*

According to Judge Keith, Rabidue complained repeatedly about Henry. She arranged a meeting with other female employees to discuss Henry and filed written complaints for herself and other women who feared retaliation.[114] Although the vice-president knew that employees were offended by Henry's language, their solution was not to reprimand or fire him but to give him " 'a little fatherly advice' " about his prospects for advancement if he learned to become " 'an executive type person.' "[115]

Judge Keith presented evidence from the record in his dissent that the majority must have discounted because they did not discuss it. He stated that the "plaintiff was consistently accorded secondary status" as an employee.[116] She was the only female in management, and unlike all male employees in management, she did not receive perquisites like free lunches, free gasoline, a telephone credit card, or an entertainment account.[117] In addition, plaintiff was excluded from weekly golf matches. She was not allowed to take clients to lunch, a practice common to all of her male predecessors, because her supervisor thought it was improper for a woman to take men to lunch. At the same time, the supervisor complained that the company needed a man in Rabidue's job because " '[s]he can't take customers out to lunch.' "[118]

Plaintiff was "frequently told to tone down and discouraged from executing procedures she felt were needed to correct waste and improve efficiency."[119] In contrast to the encouragement Henry received from upper management, Rabidue was told that she had "set her goals too high."[120] According to Judge Keith, "[n]ot only did plaintiff receive minimal support, but she was repeatedly undermined," including an incident in which Henry told his employees to ignore plaintiff's procedures and also permanently transferred some of her duties to a male employee who filled in during her vacation.[121]

The dissenter did not ignore evidence regarding the plaintiff's personality. He stated that "[t]he record establishes plaintiff possessed negative personal traits."[122] Judge Keith, however, used this evidence not to blame the plaintiff as the majority had,

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114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 625.
121. *Id.*
122. *Id.*

but to poke holes in the reasonableness of the employer's actions. One of Rabidue's supervisors stated that she was not forceful enough to collect on some accounts, but as Judge Keith questioned, "how plaintiff can be so abrasive and aggressive as to require firing but too timid to collect delinquent accounts is, in my view, an enigma."[123] Negative personality traits cannot justify discriminatory treatment, according to the dissent.[124]

Judge Keith's fact descriptions influenced his doctrinal conclusions. First, he supported the rule that hostile environment claims should be judged from the perspective of the reasonable victim, not the reasonable person. He cited legal commentary to support his view that women and men interpret behavior differently and the reasonable person perspective does not account for that "wide divergence."[125] Judge Keith observed that, as a general matter, women and men would provide different "factual" accounts of the same situation. He concluded that the legal standard of the reasonable person is a male standard, and that sexual harassment must be judged according to a reasonable victim standard.[126]

Second, according to Judge Keith, Title VII must actually serve its purpose of preventing discriminatory "behavior and attitudes from poisoning the work environment of classes protected under the Act."[127] Judge Keith criticized the majority for upholding a standard under which "a woman assumes the risk of working in an abusive, anti-female environment."[128] He challenged the majority's view that the behavior Rabidue was subjected to has "an innate right to perpetuation."[129] Judge Keith analogized sexual harassment to slavery in that some men con-

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123. *Id.* at 624.

124. *Id.* at 625. Judge Keith concluded:

> [T]he misogynous language and decorative displays tolerated at the refinery (which even the district court found constituted a "fairly significant" part of the job environment), the primitive views of working women expressed by Osceola supervisors and defendant's treatment of plaintiff as the only female salaried employee clearly evince anti-female animus.

Id.

125. *Id.* at 626.

126. Judge Keith assumed that the reasonable victim is a woman. "[U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men." *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

done and wish to perpetuate the behavior to their own advantage.[130]

Judge Keith viewed the facts of *Rabidue* differently than the appellate majority or the trial court. His description focused on women's experience of sexual harassment, which influenced his views on sexual harassment doctrine. His dissenting opinion illustrates how legal decision makers can see the facts of sexual harassment from a woman's point of view.

Rabidue illustrates how varying factual descriptions in the same case can lead to different legal results. It shows how judges can select and shape facts to fit their purposes. The trial court, appellate majority, and dissent all had access to the same record, but drew divergent pictures of what occurred. After framing different factual pictures, they reached different legal conclusions.

III. LAW REFORM AND THE SOCIAL CONSTRUCTION OF FACTS

When we think of law reform, most of us think of altering legal "doctrine"—the rules of law. In recent United States history, numerous progressive changes have been achieved through doctrinal reform.[131] Despite these successes, the political strategy of reforming law by concentrating solely on legal doctrine is too simplistic.

Law is unique because of its dual concern with simultaneously understanding and manipulating complex concepts and detailed fact patterns. An additional method of law reform involves focusing on facts—the complementary strand to doctrine in the legal weave. One method to change how legal decision makers think about facts is consciousness raising. Feminists used consciousness raising to alter how some decision makers view the facts of sexual harassment.

If facts are half of the legal equation, we need a way to think about and understand them. Social construction theory addresses how the "facts" of the same event can be described in

130. Judge Keith wrote that "[t]he presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy." *Id.* at 627.

It is significant that Judge Keith uses the analogy of slavery. As a Black man, Judge Keith is a member of a socially subordinated group and his own experience of subordination may help him understand the experience of women's subordination.

131. The civil rights movement of the 1960s illustrates the benefits of doctrinal reform. Activists lobbied Congress to pass key pieces of legislation, including the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Age Discrimination in Employment Act.

multiple ways. It helps explain how three judges considering *Rabidue* could describe the facts so differently. Social construction literature can also help explain how works like *Sexual Harassment of Working Women* influence the legal system by altering how legal decision makers view facts.[132]

In his book *Frame Analysis,* Erving Goffman articulates a theory of the social construction of reality.[133] Goffman argues that each of us "frames" particular events according to the social constraints on our lives.[134] When two persons describe a situation differently, neither of them is necessarily trying to deceive. Instead, each person sees the same event through a different frame.[135]

A social constructionist, while recognizing that some things happen in the world and other things do not, focuses on how each individual observes, processes, and retrieves information differently.[136] Our perceptions are the products of myriad factors, including our gender, race, class, social and physical environment, stress level, and past experiences.[137] This is not to say that we all would describe every event or situation differently.

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132. This analysis attempts to capture how sexual harassment law was reformed through consciousness raising. A similar but future-looking analysis discusses rape law. In her book *Real Rape,* Professor Susan Estrich argues that society and the courts must reconstruct the law of rape. S. ESTRICH, *supra* note 9, at 4-7. Estrich delineates two types of rape—real rape and simple rape—and shows that in practice even though real rape is taken seriously by society and the courts, simple rape, rape involving acquaintances and no weapons, is dismissed. Estrich's book is a consciousness-raising tool to encourage us to rethink the facts and doctrines of rape law. *See also* Scheppele, *supra* note 14, at 1100-04 (discussing how Estrich successully "captures the worldview" in which real rape and simple rape can co-exist).

133. E. GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE (1974).

134. *Id.* at 21-26; *see also* Minow, *supra* note 42, at 45-50 (debunking the assumption that an observer can see without a perspective and discussing how members of the United States Supreme Court adopt this assumption); Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases,* in IS THERE A TEXT IN THIS CLASS? 268-92 (1980) (arguing that words only have meaning because of their context).

135. Works of art and literature persuasively illustrate the social construction of reality. *See, e.g.,* R. AKUTAGAWA, *In a Grove,* in RASHOMON AND OTHER STORIES 19 (1952) (Japanese short story revealing the subjectivity of truth through retelling the story of the rape of a woman and the murder of her husband from numerous different perspectives); *Rashomon* (Voyager Company 1950) (Japanese film based on *In a Grove*) (I am indebted to Dora Rose for suggesting that I see this film); Glaspell, *A Jury of Her Peers,* in THE BEST SHORT STORIES OF 1917 (E. O'Brien ed. 1918) (by discussing her life, two women discover why Minnie Foster killed her husband, while the men, who focus on "evidence" at the "scene of the crime" are unable to do so).

136. *See, e.g.,* E. LOFTUS, EYEWITNESS TESTIMONY (1979) (arguing that eyewitness testimony is frequently unreliable).

137. *Id.* at 32-48 (describing factors that influence witness perception).

Many of us tend to describe facts similarly because we share similarities in social background and experience (some to a greater extent than others).[138]

To a social constructionist, each situation, including each legal situation, can be described in an infinite (or at least a very large) number of ways.[139] These multiple descriptions of the same event pull in different normative directions because the law evaluates varying factual situations differently. In law, the doctrine tells an advocate how best to write a fact description given her particular purposes.[140] The doctrine suggests what information is relevant to the outcome and how to structure a description to achieve a favorable result.

Legal opinions are similarly affected by the socially constructed character of our world.[141] Opinions follow a standard format of presenting a facts section followed by a discussion of how the law applies to the facts of this particular case. A judge's "findings of fact" represent the judge's resolution of conflicts between the fact descriptions of the plaintiff (or the State) and the defendant. Sometimes a judge will discuss each party's "story"[142] and present an analysis of why she did or did not accept one party's version of the facts. Judicial opinions reify facts that could have been presented from another point of view.[143]

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138. W. JAMES, *Pragmatism's Conception of the Truth*, in PRAGMATISM, 131-53 (R. Perry ed. 1955) (arguing that truth is a process: we evaluate truthfulness according to whether one thing is coherent with other things).

139. *See* Delgado, *supra* note 13, at 2418-35 (telling five different stories based on the same events); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 410-11 (1987) ("[I]t really is possible to see things—even the most concrete things—simultaneously yet differently"); *see also* E. LOFTUS, *supra* note 136, at 40-42 (discussing a psychological study that highlighted people's perceptions of a football game: " 'It seems clear that the 'game' actually was many different games and that each version of the events that transpired was just as 'real' to a particular person as other versions were to other people.' ") (citing Hastorf & Cantrill, *They Saw a Game: A Case Study*, 97 J. ABNORMAL & SOC. PSYCHOLOGY 399 (1954)).

For a feminist critique of social constructionism, see Colker, *supra* note 16, at 217-22 (arguing that feminism helps each of us discover our "authentic" self, but social constructionists, including MacKinnon, deny that we each have an authentic self).

140. *See, e.g.*, W. BENNETT & M. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 93-106 (1981) (discussing the reasonable doubt standard of proof from the prosecution and defense perspectives).

141. Unfortunately, theories of legal interpretation generally ignore the interpretation of facts. Scheppele, *Facing Facts*, *supra* note 6, at 43 ("[W]riters on interpretation in law have generally adopted a rather flat view of the law/fact distinction. Law is what needs to be interpreted, but facts are simply true or false.") (citing, *e.g.*, R. DWORKIN, LAW'S EMPIRE (1986)).

142. See W. BENNETT & M. FELDMAN, *supra* note 140, at 93-115 for an analysis of the American trial system as storytelling. *See generally Legal Storytelling: A Symposium*, 87 MICH. L. REV. 2073 (1989).

143. *See* Minow, *supra* note 42, at 15:

The three differing *Rabidue* opinions illustrate that legal decision makers can describe the same events differently and that different factual descriptions can lead to different legal outcomes. On one hand, the trial judge noted that "male employees occasionally displayed pictures of nude or partially clad women in their office and work area."[144] Similarly, the appellate majority suggested that the evidence of harassment was "limited to pictorial calendar type office wall displays of semi-nude and nude females and Henry's off-color language."[145]

The appellate dissent, on the other hand, characterized these same incidents quite differently. Judge Keith wrote that Rabidue's co-worker and sometimes supervisor "regularly spewed anti-female obscenity,"[146] with such epithets as " 'fat ass' " spoken directly to the plaintiff.[147] He vividly described the "anti-female" environment by pointing out that the plaintiff was "exposed daily" to sexually explicit posters.[148] These two descriptions of the evidence of sexual harassment from *Rabidue*, one relying on general descriptors like "calendar type wall displays" and "off-color language"[149] and the other emphasizing specific details of the posters and language, point out that different descriptions connote real changes in the law. Differing characterizations of the same events can lead to different legal outcomes.[150]

> Once we see that any point of view, including one's own, *is* a point of view, we will realize that every difference we see is seen in relation to something already assumed as the starting point. Then we can expose for debate what the starting point should be. The task for judges is to identify vantage points, to learn how to adopt contrasting vantage points, and to decide which vantage points to embrace in given circumstances.

Id.

144. Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 423 (E.D. Mich. 1984).

145. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622 n.7 (6th Cir. 1986).

146. *Id.* at 624 (Keith, J., concurring in part and dissenting in part).

147. *Id.*

148. *Id.* at 623-24.

149. *Id.* at 622 n.7.

150. Changing how society and legal decision makers view facts will not necessarily change victims' willingness to use legal strategies to vindicate discrimination. K. BUMILLER, *supra* note 2, at 110-11:

> [S]trengthening the rule of law may not empower victims. The hostile image of the law held by respondents considering legal recourse is a harsh reality compared to the spirit of protective law that promises to give purpose and justice to its beneficiaries' lives. In contemporary American society it is typically assumed that the "rule of law" is strengthened by the increase in enforcement powers, the clarification of goals, or the elimination of discretion, so that the right-bearer is protected. Yet when people contemplate invoking the right of "equal treatment under law," they find themselves in a position with only undesirable alternatives. The bonds of victimhood are reinforced rather than broken by the intervention of legal discourse.

Understanding the socially constructed nature of our world helps explain how changing the way legal decision makers think about facts can reform law. Generally, the law favors the fact descriptions of socially dominant groups.[151] In the case of sexual harassment, legal decision makers accept men's versions of the facts as more true than women's versions. Given this power to define facts, the male perspective has dominated sexual harassment law. Changing this privileged view of facts, as Judge Keith does in his dissent in *Rabidue,* can reform the law.[152]

Social construction theory also explains the consciousness-raising potential of works like MacKinnon's *Sexual Harassment of Working Women* to influence the legal system. If facts are constructed, they can always be reconstructed. MacKinnon's book uses women's personal stories of sexual harassment to explain how the facts could be otherwise. MacKinnon opens up the possibility of seeing sexual harassment from the perspective of the sexual harassment victim. Merely presenting a new way of looking at sexual harassment does not ensure acceptance of that view. *Rabidue,* however, demonstrates that consciousness raising can change how some legal decision makers view the facts of sexual harassment.

In the context of sexual harassment law, some legal decision makers now view evidence that previously was not found to con-

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Id.

Professor Bumiller continued by asking whether the language of rights is inherently disempowering. She concluded that what is important is that rights are not self-enforcing; they are realized within a social context. This Notes argues that consciousness raising changes the social context of sexual harassment. For a further discussion of rights in this context, see Williams, *supra* note 139, at 405 ("CLS has ignored the degree to which rights-assertion and the benefits of rights have helped blacks, other minorities, and the poor."); *see also* Matsuda, *supra* note 14, at 8 ("Unlike the post-modern critics of the left, however, outsiders, including feminists and people of color, have embraced legalism as a tool of necessity, making legal consciousness their own in order to attack injustice.").

151. *See supra* note 13.

152. Consider an analogous case, the influence of the increasing numbers of women jurors in rape trials:

> Studies have shown that men and women have decidedly different perspectives on the crime of rape that translate into differential willingness to convict rape defendants. In general, women tend to have greater empathy for rape victims while men are more likely to see the defendant's point of view. Women are also less likely to believe many of the rape myths. . . .
>
> [W]omen's greater likelihood to convict is not explained by consistent differences between men and women in punitiveness toward rapists. Rather, it can be accounted for by differences in the way men and women view the strength of the evidence in rape cases. It is therefore critical that both male and female perspectives are represented on juries, as they usually are today. Conviction rates for rape may be rising in part because of this better balance of perspective on the jury.

V. HANS & N. VIDMAR, JUDGING THE JURY 211 (1986) (citations omitted).

stitute sexual harassment as a violation of Title VII. Using the same doctrinal theories, decision makers look differently upon similar external data and describe similar events differently. Changing an outcome without changing doctrine is possible because facts are socially constructed by their creator. A person can learn to look at the same evidence differently.

IV. CONCLUSION: TOWARD AN EXPANDED CONCEPTION OF LAW REFORM

An expanded conception of law reform acknowledges the importance of facts in legal decisions. Altering doctrine alone is often insufficient to reform law because legal decision makers remain free to select and shape facts in accordance with their socially influenced vantage point. To develop more effective strategies of reform, activists should address the social construction of facts and work to change how legal decision makers view facts. Legal decision makers should recognize how they construct facts to lead to certain legal outcomes and how facts could be described otherwise.

Sexual harassment law illustrates this process. MacKinnon's theory of the power inequality between women and men explains why past courts have more readily accepted men's versions of the facts of sexual harassment. Feminist consciousness raising altered this view and allowed reformers to influence how society and legal decision makers perceive the facts of sexual harassment. The different factual descriptions in *Rabidue* illustrate that judges vary in their acceptance of a feminist conception of sexual harassment law. An increase in judicial opinions like Judge Keith's dissent in *Rabidue* would provide one measure of success in the effort to reform law through factual reconstruction.