Notre Dame Journal of Law, Ethics & Public Policy

Volume 12
Issue 1 *Symposium on Legal Issues in the Workplace*

Article 6

1-1-2012

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GENDERED SPACE AND THE REASONABLENESS STANDARD IN SEXUAL HARASSMENT CASES

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From the momentous judicial recognition that sexual harassment in the workplace was not a "personal urge"[1] or an "inharmonious personal relationship"[2] but rather employment discrimination violative of Title VII of the Civil Rights Act of 1964, courts have struggled with the problem of perspective, particularly in hostile environment cases. Through whose eyes should workplace conditions be seen and evaluated? Who is the even more elusive "reasonable person," for whom the working environment becomes so uncomfortable that the ability to do one's job is undermined to the extent that illegal sexual discrimination has occurred? If different workers have differing interpretations of workplace conduct, whose interpretation should prevail? With each new court-created standard—welcomeness,[3] severe or pervasive,[4] alter the conditions of employment,[5] abusive working environment,[6] totality of the (workplace) circumstances[7]—a troubling question arises: according to whom? The Sixth Circuit has suggested that the workplace behavior and environment be measured according to the average reasonable person who typically works in that particular work environment,[8] the Ninth Circuit and the New Jersey Supreme Court have created a reasonable woman standard,[9] the Third Circuit requires "[a] reasonable person of the same sex in that position,"[10] and the

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1. Corne v. Bausch & Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

2. Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123, 123 (D.D.C. Aug. 9, 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

3. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

4. *See id.* at 67.

5. *See id.*

6. *See id.*

7. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986).

8. *See id.*

9. *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 453-54 (N.J. 1993).

10. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

Supreme Court thus far has mentioned only a "reasonable person."[11]

The question according to whom is not a trivial one. Sociological and psychological studies show that women and men experience workplace behavior differently:[12] remarks and behavior that are offensive, demeaning, and threatening to women are often harmless jokes and even compliments to men. In fact, one judge has suggested that "[u]se of vulgar and obscene language" actually builds workplace morale.[13] What is clear is that the discriminatory impact of workplace behavior is contingent on personal perspective: what is "reasonable" to one person is "unreasonable" to another. It is not surprising, then, that courts are on uncertain ground in attempting to develop a standard of reasonableness that is fair and that takes into account varying perspectives.[14]

Beyond perspective, though, and intertwined with it, is space. What is inoffensive to a person in one place is offensive in another place. Why is it that certain conduct is merely rude or insensitive in some places, but is discriminatory in the workplace? What difference can be articulated by and for courts as they struggle to define the legitimate task of the law—not to police manners and social mores, but to enforce measures that prevent the kind of discrimination targeted by Congress in its enactment of Title VII?

This article attempts to provide that articulation and introduces a new concept into the consideration of the reasonableness standard in hostile environment sexual harassment cases: that of gendered space. Gendered space can help us (and the courts) understand the workplace in a new way and come to a

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11. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

12. *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1507 (M.D. Fla. 1991); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202 (1989); Katherine A. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 745-46 (1997).

13. *See Lewd Talk Can Boost Morale, Says Judge in Ruling Against Woman*, CHI. TRIB., Sept. 26, 1997, at 12.

14. In her excellent critique of *Rabidue v. Osceola Refining Co.*, Nancy Ehrenreich argues that the reasonableness standard in hostile environment sexual harassment cases ought to be abandoned entirely in that "[r]easonableness in legal ideology is simply too closely tied to the idea of objectivity—to the notion that the law can resolve legal conflicts without reflecting or reinforcing any personal perspective." Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1232 (1990). While I find her argument perceptive, I am not optimistic that courts are close to this abdication of reasonableness and prefer to press toward a better understanding of it.

better conception of how particular workplace behavior may or may not violate the sex discrimination provisions of Title VII of the Civil Rights Act of 1964. I first review the development of sexual harassment law that led to the perspective problem. I then discuss the concept of space as gendered space, and finally apply it to the most troubling cases involving perspective. In so doing, I am attempting to identify why sexual harassment in the workplace belongs under a law prohibiting discrimination, a nexus that is becoming increasingly unclear as the hostile environment cases develop with a dizzying variety of plaintiffs, defendants, and conduct.[15] By incorporating the insight that discrimination occurs because the space is gendered, I hope to avoid the "women are more sensitive" special category trap to which the perspective problem often leads.

SEXUAL HARASSMENT LAW AND THE PERSPECTIVE PROBLEM

Until the mid-1970s, people who experienced sexual harassment in the workplace had little legal recourse.[16] The behavior we have now named sexual harassment occurred,[17] of course, but the victims either "consented," tried to ignore the behavior, or quit their jobs. Whatever coping mechanism they chose, many workers experienced emotional, physical, and psychological stress, as well as "lower productivity, reduced self-confidence, and

15. During this Term, the Supreme Court has decided one sexual harassment case and has granted certiorari in three others. *See* Oncale v. Sundowner Off-Shore Servs., Inc., 118 S. Ct. 998 (1998) (holding same-sex sexual harassment actionable under Title VII); Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 876 (1998), *granting cert. to* Jansen v. Packaging Corp. of Am., 123 F.3d 490 (7th Cir. 1997) (employer's strict liability for supervisory quid pro quo harassment); Faragher v. City of Boca Raton, 118 S. Ct. 438 (1997), *granting cert. to* 111 F.3d 1530 (11th Cir.) (employer vicarious liability in a Title VII hostile environment claim); Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1206 (1997), *reviewing* Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir.) (employer vicarious liability in a Title IX claim).

16. One could have brought an action in tort, such as intentional infliction of emotional distress or assault, *see* Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 55 (1989) (providing a short list of cases in which victims of sexual harassment found relief through tort law), contract, *see* Monge v. Beebe Rubber, 316 A.2d 549, 551-52 (N.H. 1974), or employment law. Forcible rape in the workplace would, of course, come under the criminal justice system. Prior to the early 1970s, however, such cases were very rare.

17. Catharine MacKinnon's groundbreaking book on sexual harassment, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979), cites numerous studies and statistics to demonstrate how commonplace sexual harassment in the workplace has been. *See id.* at 25-55; *see also* Barbara Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 344 (1992).

a loss of motivation and commitment to their work and their employer."[18] Many workers, women in particular, failed to experience the workplace equality promised by legal developments such as the Equal Pay Act[19] and Title VII of the Civil Rights Act of 1964[20] because conditions in the workplace presented them with barriers to competing with their male coworkers on an equal basis. Thus, sexual harassment is more than mistreatment, more than boorish behavior on the part of men; it is discrimination based on sex that affects the "terms, conditions, and privileges of employment,"[21] and as such violates the law.

The judicial recognition of the discriminatory harm of sexual harassment occurred in incremental stages. In 1976, a federal district court in a review of an administrative agency's refusal to consider sexual harassment under Title VII,[22] first ruled that sexual harassment in the form of overt sexual requests constituted sex discrimination. The agency had found no "causal relationship" between Diane Williams' rejection of her supervisor's advances and her ultimate termination[23] and argued that the Title VII claim was vitiated because "carnal demands" could be made of both men and women.[24] The reviewing court saw the situation differently and ruled that "the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated."[25] In 1977, the Court of Appeals for the District of Columbia Circuit reversed a lower court decision granting a summary judgment to the Environmental Protection Agency, in which a woman claimed that the Agency had violated Title VII because she had lost her job due to sexual harassment. The district court ruled that Title VII of the Civil Rights Act did not cover Paulette Barnes' complaint that her job was abolished at the Agency because she had turned down her superior's sexual advances, reasoning:

> The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the sub-

18. Gutek, *supra* note 17, at 349.
19. 29 U.S.C. § 206 (1994).
20. 42 U.S.C. §§ 2000e-2000e-17 (1994).
21. *Id.* § 2000e-2(a)(1).
22. *See* Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *vacated sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).
23. *Id.* at 656.
24. *Id.* at 657.
25. *Id.* at 657-58.

> tleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex.[26]

The appellate court disagreed and instead saw that Barnes lost her job because of her sex: that "retention of [Barnes'] job was conditioned upon submission to sexual relations—an exaction which the supervisor would not have sought from any male."[27] Paulette Barnes' complaint captured a classic quid pro quo sexual harassment situation: her sexual acquiescence for her job.

In subsequent cases, courts also recognized another kind of sexual harassment—hostile environment—in which one's job might not depend explicitly on the granting of sexual favors, but that the workplace itself was so permeated by sexual innuendo and insults that one's job performance was affected: "where an employer created or condoned a substantially discriminatory work *environment*, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination."[28]

In 1986 the Supreme Court gave its stamp of approval to these developments, recognizing both the cognizability of sexual harassment under Title VII and the two types of sexual harassment, quid pro quo and hostile environment. In *Meritor Savings Bank v. Vinson*,[29] the Court found that although Mechelle Vinson had seemingly "consented" to sexual relations with her supervisor, Sidney Taylor, "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII."[30] The Court established that "the correct inquiry is whether [Vinson] by her conduct indicated that the alleged sexual advances were *unwelcome*."[31] As encouraging as the Court's opinion was in its official recognition of the discriminatory nature (and hence illegality) of sexual harassment, its position on welcomeness was troubling. One would think that whether conduct was welcome would depend upon the perspective of the person doing the welcoming or not. Instead, the Court shifted the point of view, in large part, to the alleged harasser's perspective. The proper inquiry became not

26. Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123, 123 (D.D.C. Aug. 9, 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

27. *Costle*, 561 F.2d at 989 (footnote omitted).

28. Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981).

29. 477 U.S. 57 (1986).

30. *Id.* at 68.

31. *Id.* (emphasis added).

did Mechelle Vinson welcome Sidney Taylor's advances, but did Sidney Taylor think that Mechelle Vinson welcomed his advances. The Court came close to equating Vinson's choice of what to wear to work to whether she welcomed sexual advances, that her choice of apparel was a legally recognized signal of her receptiveness to sexual advances: "[w]hile 'voluntariness' in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome."[32]

In determining what conditions would constitute an actionable hostile environment, the Court used racial hostile environment cases as the analogue[33] and established that for sexual harassment to violate Title VII, the conduct "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[34] The Court thereby set up four additional standards: severe, pervasive, altering the conditions of employment, and creating an abusive working environment. Once more, the perspective problem arises: according to whom? If welcomeness can shift from the alleged victim to the alleged harasser, then a determination of whether conduct is severe, pervasive, transforming, and abusive can likewise shift. Additionally, since each of these elements requires some sort of measurement of emotional response, the perspective is necessarily subjective, whether the viewing subject is victim, harasser, or a judge.

The same year, 1986, the Sixth Circuit further weakened the victim's perspective as the point of view from which the new standards might be judged in *Rabidue v. Osceola Refining Co.*[35] Vivienne Rabidue, despite being the only woman in a managerial position at Osceola Refining Company,[36] was described by the court as "abrasive, rude, antagonistic, extremely willful, uncooperative, and irascible."[37] Rabidue had had an "unfortunate acrimonious working relationship"[38] with a co-worker, Douglas Henry, whom the court described as "an extremely vulgar and

32. *Id.* at 69.

33. *See id.* at 65 (citing Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971)). Also cited were *Banta v. United States*, 434 U.S. 819 (1977), *Firefighters Institute for Racial Equality v. St. Louis*, 549 F.2d 506 (8th Cir. 1977) and *Gray v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976).

34. *Meritor*, 477 U.S. at 57 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

35. 805 F.2d 611 (6th Cir. 1986).

36. *See id.* at 623.

37. *Id.* at 615.

38. *Id.*

crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff."[39] When Rabidue was discharged from her job, she filed a complaint charging hostile environment sex discrimination and sexual harassment.

The court, using in part the guidelines issued by the Equal Employment Opportunity Commission (EEOC), required that "the sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psycho logical [*sic*] well-being of the plaintiff."[40] And the court went on to address the perspective problem:

> To accord appropriate protection to both plaintiffs and defendants in a hostile and/or abusive work environment sexual harassment case, the trier of fact, when judging the totality of the circumstances impacting upon the asserted abusive and hostile environment placed in issue by the plaintiff's charges, must adopt the perspective of a *reasonable person's* reaction to a similar environment under essentially like or similar circumstances.[41]

The court included among the factors to be considered in judging the totality of the circumstances in such a case "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."[42] Thus, the context in which Henry's obscenities, as well as the "displayed pictures of nude or scantily clad women"[43] to which the female workers were exposed, were to be judged was the typical, male-dominated refinery work environment *and* "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."[44] Let the female worker beware. If she chooses to work in a refinery (or the like), she better be thick-skinned or "rough hewn and vulgar"[45] enough to withstand the Douglas Henrys of the world. That was the "reasonable" perspective in the eyes of the Sixth Circuit. So,

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39. *Id.*
40. *Id.* at 619.
41. *Id.* at 620. (emphasis added).
42. *Id.* (emphasis added).
43. *Id.* at 615.
44. *Id.* at 622.
45. *Id.* at 620.

although Henry's obscenities were "annoying,"[46] his "vulgar language, coupled with the sexually oriented posters, did not result in a working environment that could be considered intimidating, hostile, or offensive."[47] The court essentially ignored, or collapsed, the concept of space: the workplace was of a piece with the larger world and conditions in the workplace would be measured according to the standards in that world.[48]

Five years later, the Ninth Circuit took a decidedly different tack in *Ellison v. Brady*.[49] Kerry Ellison and Sterling Gray were coworkers at the Internal Revenue Service office in San Mateo, California. Gray apparently became infatuated with Ellison and began leaving her notes which said things like "I cried over you last night and I'm totally drained today" and "I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away."[50] Ellison complained to her superiors and eventually Gray was transferred to the San Francisco office. After three weeks, Gray filed a union grievance that resulted in his return to San Mateo, and in his writing another strange letter to Ellison. Ellison filed a complaint in federal district court alleging hostile environment sexual harassment; the court granted the defendant's motion for summary judgment on the ground that Ellison failed to state a prima facie case.

The Ninth Circuit reversed and departed from the standards set forth in *Rabidue*. The court acknowledged that Ellison and Gray had different perspectives, that while Gray might describe his behavior as courtship and that while an outside observer might describe the incidents as trivial, the appropriate inquiry for a court was Ellison's perspective:

> We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. . . .
>
> . . . .
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> We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable per-

46. *Id.* at 622.

47. *Id.*

48. Everyone does not agree with the Sixth Circuit that pornography is so widely accepted and condoned in the larger world. *See* Abrams, *supra* note 12, at 1199-1202; CATHARINE A. MACKINNON, ONLY WORDS *passim* (1993).

49. 924 F.2d 872 (9th Cir. 1991).

50. *Id.* at 874.

> son standard tends to be male-based and tends to systematically ignore the experiences of women.[51]

However enlightened the Ninth Circuit's words may appear, the reasonable woman standard raises considerable problems. It comes close to reifying a single standard called Woman that has been long used to prevent women from entering the working world,[52] and it suggests that all women are more sensitive, especially when it comes to sex-related matters, than all men. An atypical woman, such as Vivienne Rabidue, might not fit into the court's conception of a "reasonable woman," and her claim might fail.

In a case with a work environment similar to that described in *Rabidue*, a district court took a less sympathetic view of the status quo of a male-dominated workplace. In *Robinson v. Jacksonville Shipyards, Inc.*,[53] Lois Robinson centered her claim of hostile environment sexual harassment on pictures of nude and scantily clad women, some in sexually provocative poses, and sexually suggestive and demeaning remarks in the workplace. In its Findings of Fact, the court described the Jacksonville Shipyards (JSI) working environment in the following way:

> JSI is, in the words of its employees, "a boys club," and "more or less a man's world." Women craftworkers are an extreme rarity. The company's EEO-1 reports from 1980 to 1987 typically show that women form less than 5 percent of the skilled crafts. For example, JSI reported employing 2 women and 958 men as skilled craftworkers in 1980, 7 women and 1,010 men as skilled craftworkers in 1983, and 6 women and 846 men as skilled craftworkers in 1986. . . . JSI has never employed a woman as a leaderman, quarterman, assistant foreman, foreman, superintendent, or coordinator. Nor has any woman ever held a position of Vice-President or President of JSI.[54]

At trial, each of three women testified that when she was sexually harassed, she was the only woman in a group of men.[55] The court's findings continue for pages (items a through t) describing in detail the "visual assault on the sensibilities of female work-

51. *Id.* at 878-79 (citations omitted).

52. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a statute prohibiting women from engaging in the trade of bartending); Muller v. Oregon, 208 U.S. 412 (1908) (upholding a statute prescribing maximum hours of labor for women); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding a statute refusing to grant women the right to practice law).

53. 760 F. Supp. 1486 (M.D. Fla. 1991).

54. *Id.* at 1493 (citations omitted).

55. *See id.*

ers at JSI that did not relent during working hours."[56] The remarks directed at Robinson and others were both sexual ("The more you lick it the harder it gets"[57]) and insulting to women ("there's nothing worse than having to work around women"[58]). When Robinson challenged one of the men, she was told that he was not harassing her because he had not propositioned her. When her complaints became widely known, a "Men Only" sign was attached to the door of the shipfitters' trailer, the general harassment escalated, and when Robinson formally complained, her superior responded that the shipyards were a "man's world."[59]

In finding that the work environment was hostile, the court evaluated the extensive expert testimony regarding reasonable responses to the JSI workplace offered by both sides. The court favorably quoted the testimony of Dr. Susan Fiske, an expert on stereotyping, who testified for the plaintiff that sexual stereotyping such as that found at JSI results in the evaluation of the suitability of women as a group:

> In practice, this translates into a perception that women are more similar to other women and more different from men (and vice versa) than they actually may be. This perceptual process produces the in-group/out-group phenomenon: members of the other group or groups are viewed less favorably. This categorizing process can produce discriminatory results in employment settings if it leads a person in that job setting to judge another person based on some quality unrelated to job performance into which the other person falls.[60]

Dr. Fiske also maintained that one of the major preconditions for stereotyping is rarity: stereotyping of women is much more likely to occur if there are relatively few women in a workplace. Sexually suggestive pictures of women lead to a mindset that stereotypes women as sex objects, which in turn leads to behavior that judges and treats women as unfit for a particular workplace.

Fiske's testimony on the negative impact of sex stereotyping in the workplace was buttressed by the testimony of K.C. Wagner, an expert on women in nontraditional employment settings, which the court also cited with approval. Wagner testified that "women in nontraditional employment who form a small minor-

56. *Id.* at 1495.
57. *Id.* at 1498.
58. *Id.*
59. *Id.* at 1515.
60. *Id.* at 1502.

ity of the workforce are at particular risk of suffering male worker behaviors such as sexual teasing, sexual joking, and the display of materials of a sexual nature."[61]

The court was not favorably inclined toward the defendant's experts who testified that sexually explicit materials did not bother most women because the experts' studies dealt with exposure to these materials in contexts other than the work environment at JSI: "The important element of context is missing; the sexually harassing impact of the materials must be measured in the circumstances of the JSI work environment."[62] The court also, unlike the Sixth Circuit in *Rabidue*, was unimpressed with JSI's evidence concerning conditions in other shipyards, in part because the percentage of women was much higher in their workforces. The court determined that the severity and pervasiveness of sexually harassing behavior must be judged using a "holistic perspective," including "the salient conditions of the work environment, such as the rarity of women in the relevant work areas."[63] The court found that "[a] reasonable woman would find that the working environment at JSI was abusive," and "that the cumulative, corrosive effect of this work environment over time affects the psychological well-being of a reasonable woman placed in these conditions."[64] The court saw the JSI workplace as separate and different from the world at large.

As part of its remedy, the court rejected JSI's First Amendment arguments and issued an injunction that prohibited both the displaying and the reading of sexually suggestive or discriminatory material in the JSI workplace. The court also ordered educational programs and monitoring of the JSI workplace to change the behavior of the male workers.[65]

Each of these latter three cases has met with intense criticism. *Rabidue* has been roundly repudiated by both courts and scholars for several reasons: first, because its reasonableness standard is tied to and reinforces a status quo that is largely anti-woman and "privileges one narrow, elite viewpoint and silences others;"[66] second, because "by applying the prevailing workplace factor, [the] court locks the vast majority of working women into

61. *Id.* at 1506.
62. *Id.* at 1509.
63. *Id.* at 1524.
64. *Id.* at 1524-25.
65. *See id.* at 1545-46.
66. Ehrenreich, *supra* note 14, at 1207; *see also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1485-86 (3d Cir. 1990) ("Obscene language and pornography quite possibly could be regarded as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional

workplaces which tolerate anti-female behavior;"[67] and third, because it can be used to support "a merely juvenile behavior defense."[68] The *Ellison* court's reasonable woman standard has been criticized by both feminists and conservatives. Feminists are wary because the reasonable woman standard replaces one stereotypic notion of reasonableness (a man's) with another (a woman's) and thus "replace[s] one caricature with another."[69] It is also felt that the reasonable woman standard subverts the purpose of the Civil Rights Act of 1964 by perpetuating rather than eliminating sexual stereotypes.[70] A more conservative view holds that any departures from the reasonable man standard should be legislatively mandated, given the long tradition in which "Anglo-American jurisprudence has utilized the reasonable person standard and its predecessor, the reasonable man standard."[71] *Robinson* has been criticized because the scope of the injunction, which prohibits not only pictures in public places at the shipyard but also the private reading of some magazines on the workers' lunchtimes and breaks,[72] infringes on the workers' First Amendment rights. The isolated workplace slur or innuendo, which would not be actionable under current hostile environment law, will be suppressed by employers fearful of liability: "employers . . . cannot restrict speech that creates a hostile work environment without suppressing other speech as well."[73] This virtual shutdown of workplace opinion, many feel, is too high a price to pay, and some go so far as to argue that any regulation of speech in the workplace violates the First Amendment.[74]

Each opinion, too, has its positive aspects. The dueling majority opinion and dissent in *Rabidue*, as Nancy Ehrenreich has

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dignity and without the barrier of sexual differentiation and abuse.") (internal citation and quotation marks omitted).

67. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 627 (6th Cir. 1986) (Keith, J., dissenting).

68. Atwood v. Biondi Mitsubishi, 61 Fair Empl. Prac. Cas. (BNA) 1857, 1858 (W.D. Pa. May 12, 1993).

69. Finley, *supra* note 16, at 63.

70. *See* Claire Saady, Editorial, NAT'L L.J., Sept. 13, 1993, at 13.

71. Radtke v. Everett, 501 N.W.2d 155, 165 (Mich. 1993).

72. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1542 (M.D. Fla. 1991).

73. Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA. L. REV. 1791, 1859 (1992).

74. *See, e.g.*, Kingsley R. Browne, *Workplace Censorship: A Response to Professor Sangree*, 47 RUTGERS L. REV. 579 (1995). First Amendment concerns were briefed in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), but were not dealt with in the Court's opinion. *See* Cynthia L. Estlund, *The Architecture of the First Amendment and the Case of Workplace Harassment*, 72 NOTRE DAME L. REV. 1364, 1366 (1997).

so clearly articulated, lay bare the myth of pluralism that holds that we can support all groups, no matter how competing their claims: "the notion that pluralism is an unproblematic goal is logically incoherent and disconsonant with the reality of irresolvable conflicts between groups."[75] In this way, *Rabidue* makes us face the unsettling fact that we have to choose between Douglas Henry's workplace and Vivienne Rabidue's; the possibility of compromise, of a solution that makes everyone if not happy, satisfied, is an illusion. The *Ellison* court displays uncommon sensitivity to the day-to-day realities of women's lives, in which the threat of sexual violence is omnipresent. And the *Robinson* court, with its nearly tedious delineation of the remarks, conduct, and pornography present at Jacksonville Shipyards, presents us with a workplace reality that few of us will ever experience.

Nonetheless, all this reality does not seem to have moved us closer to an acceptable point of view; it has not answered "according to whom?" Each court is faced with choosing one perspective and rejecting another, and the champions of the rejected perspective have cogent arguments. Moreover, the nexus between sex discrimination and sexual harassment is becoming increasingly blurred, especially concerning the diffuse and undefined conduct that becomes the focus of many hostile environment claims. Why this conduct amounts to sex discrimination is, as Katherine Franke argues, undertheorized.[76] Courts, including the Supreme Court, have asserted rather than analyzed that sexual harassment is sex discrimination and is thus prohibited by Title VII. This failure to set up an adequate analytical framework has led us to an impasse in which almost anything or nothing might qualify as sexual harassment.

When an issue is as emotionally charged as sexual harassment, any ruling will be controversial, of course. Still, it is helpful to explore ways of understanding the workplace experience so that the link between harassment and discrimination remains clear and so that the anti-discrimination provisions of Title VII are not perceived to be utilized as a device unnecessarily to silence people or to police social mores. The *Robinson* court takes into account the nature of the space in which the conduct occurs and demonstrates an increasing awareness that perspective and space are interrelated. This promising development

75. Ehrenreich, *supra* note 14, at 1221.

76. *See* Franke, *supra* note 12, at 691-92. Franke argues that "the Supreme Court has provided lower courts with ample description of the *what* of sexual harassment, without ever providing a sufficient account of *why* sexual harassment is actionable under laws prohibiting discrimination because of sex." *Id.* at 692.

may be furthered by an understanding of the gendering of space and how gendered space and discrimination go hand in hand. The concept of gendered space, I believe, offers a new lens through which to view the workplace and thereby to determine what behavior is merely boorish and what is discriminatory. It also provides a way of understanding the nature of the workplace so that a court's choices do not appear to be so one-sided.

GENDERED SPACES

"Gendered spaces" is a concept put forth by Daphne Spain in her 1992 book.[77] Drawing on anthropology, architecture, sociology, and geography, Spain studied the relationship between space and status in various cultures, places, and social structures, such as the family, education, and the workplace. After discovering that woman's status is lowest in societies in which housing is sexually segregated, she formulated the concept of "spatial institutions" and matched "the social institutions of the family, education, and the labor force with their respective spatial corollaries of the dwelling, the school, and the workplace."[78]

Spain demonstrates that much space has been and is gendered: that is, it is purposely made and kept specifically for women or for men. Dwelling places, for example, from the Mongolian *ger* and the Turkish *yurt* in nonindustrial societies[79] to the lady's drawing room and the men's smoking room in nineteenth century English country houses,[80] reflect rigid gender segregation that reinforces social and status differences both inside and outside the home.

As these status differences began to break down in the twentieth century when more and more women entered the labor force, contemporary house floor plans likewise changed. Drawing rooms and smoking rooms gave way to great rooms in which the entire family gathered; closed female-gendered kitchens lost their confining walls and often opened on to the great room.[81]

Like houses, educational institutions were long characterized by the spatial segregation of women and men. "Just as ceremonial huts were places in which men shared knowledge and excluded women in nonindustrial societies, American schools historically were masculine places of learning that excluded

77. DAPHNE SPAIN, GENDERED SPACES (1992).
78. *Id.* at xiv.
79. *See id.* at 37-52.
80. *See id.* at 112-15.
81. *See id.* at 129-34.

women."[82] Space, Spain postulates, is related to acquisition of knowledge, and that women have traditionally been kept out of spaces in which they could acquire enough knowledge and hence power to change their status in society: "'spatial institutions' form barriers to women's acquisition of knowledge by assigning women and men to different gendered spaces. Masculine spaces (such as nineteenth-century American colleges) contained socially valued knowledge of theology, law, and medicine, while feminine spaces (such as the home) contain devalued knowledge of child care, cooking, and cleaning."[83]

It was not until the second half of the twentieth century that homes and schools began to eliminate gender segregation, and "[t]he demise of separate spheres for women and men was hastened by the gender integration of education, which in turn contributed to gender integration of the labor force."[84] This gender integration in the workplace, however, has been more difficult to achieve. There was and remains much at stake in the gender integration of the workplace. Men's jobs pay more money and women working with men can make more money, and become more economically independent, than can women mired in women's jobs. Women can also acquire knowledge and skills that make them competitive in male workplaces. They can, in short, take jobs that pay well and that provide them with skills for advancement, jobs that hitherto were guaranteed for men.

The effort to keep women out of the male workplace occurs in two ways: first, law can be enlisted so that women are not allowed into male jobs. Historically, courts buttressed the separate sphere structure of society and women were legally relegated to the private domestic sphere, where they had little access to money or knowledge. Women's entry into the public sphere was fought every step of the way, often with the complicity of the courts: women were too "timid and delicate" for a profession such as law;[85] women were too physically frail to compete on an equal footing with men for jobs;[86] women were too morally vulnerable to work as barmaids without special protection;[87] women with small children should not hold jobs;[88] women are too inher-

82. *Id.* at 143.

83. *Id.* at 10-11.

84. *Id.* at 168.

85. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

86. *See* Johnson v. Transportation Agency, 480 U.S. 616 (1987); Muller v. Oregon, 208 U.S. 130 (1908).

87. *See* Goesaert v. Cleary, 335 U.S. 464 (1948).

88. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

ently objects of male predatory behavior to be prison guards;[89] women, as potential childbearers, should not work around possibly dangerous substances.[90] Finally, many of these legal obstacles to women becoming unencumbered members of the workforce fell, and Congress reinforced the change by passing the Title VII of the Civil Rights Act that prohibited sex discrimination in employment.[91]

The second method, which gathers strength if the laws change and women are legally permitted into male work spaces, is a patriarchal version of moral suasion: women must be persuaded that they do not belong in the male workplace. Male control over knowledge and money is, thereby, maintained. If women can be made to feel morally vulnerable or unfit for male workplaces, then all of the legal guarantees of equal pay and equal access become fruitless. Before major legal changes such as Title VII, as women slowly began to enter the workforce in the late nineteenth and early twentieth centuries, one of the primary non-legal objections raised to women in men's jobs was the threat to morality. "As long as women were engaged in household production, teaching or domestic service, they were perceived as morally protected,"[92] in that, they were in contact with relatives and children. Women in the male workplace were vulnerable.

Spain suggests, however, that the threat to morals may be seen as a red herring, that the fear of women entering the workforce had its roots more in economics than morals. Even in the nineteenth century, when women and men working together was described as "detrimental to morality,"[93] economic loss may well have been the real threat to men. Spain writes:

> When women entered the public (i.e., male) sphere, they ran the risk of being stigmatized as morally suspect—whether in the factory or in the office. Such informal mechanisms of control served to discourage women from pushing into a predominantly male labor force. Expressing fears of loose morals may have been more socially

89. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977).

90. *See* United Auto Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991).

91. Of course, discrimination on the basis of sex was not taken very seriously at first, both by lawmakers and the courts. As the now famous story relates, the word "sex" became part of Title VII because of Representative Howard Smith's misfired effort to scuttle the entire bill. *See* 110 CONG. REC. 2577-84 (1964).

92. SPAIN, *supra* note 77, at 196.

93. *Id.* at 195.

> acceptable than expressing fears of economic competition. The sexual integration of the workplace was clearly perceived as a threat when it first occurred, but the threat was defined on moral grounds rather than economic grounds which seem, in retrospect, to be the more realistic fear.[94]

Preserving spatial segregation is crucial to the maintenance of power, in that the dominant group can control access to knowledge if it controls the places in which others might get this power. But this second method, informal mechanisms of control that lack the force of law, requires the complicity of women. "The powerful cannot maintain their positions without the cooperation of the less powerful. If a given stratification is to persist, then, both powerful and less-powerful groups must be engaged in its constant renegotiation and re-creation."[95] In other words, if men can convince women that they do not belong in male workplaces and women "voluntarily" stay out of these workplaces, the economic threat inherent in the gender integration of the workplace dissipates.

The dominant group must, therefore, control constructions of reality so that subordinate groups accept the status quo and their place in it, even if that place is rigidly circumscribed. Such a "renegotiation and re-creation" occurs in places like the Osceola Refining Company and Jacksonville Shipyards, and a sexually-charged atmosphere that women find uncomfortable is a means by which the men who work there can control the construction of reality. Women are uncomfortable in such places and feel that they don't belong there, that these workplaces are "boys' clubs." As long as it is "unreasonable" to experience discomfort in such a place, the law offers no redress and the status quo, the male workplace, is maintained. On the other hand, if courts support the reasonableness of some workers' response by putting women in a special category that may include traits such as hypersensitivity, delicacy, and vulnerability, then we risk perpetuating damaging (and untrue) stereotypes. This is the current construction of reality, that we are forced into a Hobson's choice between not protecting women in the workplace or accepting sexual stereotypes. And it is just this fallacy that the concept of gendered space can deconstruct.

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94. *Id.* at 196.
95. *Id.* at 17.

GENDERED SPACE AND THE REASONABLE PERSON

Let us return now to the problem of perspective and imagine courts taking into account the gendered nature of a workplace. In a workplace that is gendered female—a nursing station in a hospital, for example—a male nurse will experience himself as hyper-gendered. While the female nurses in this space are largely oblivious to the fact that they are *female* nurses, he is constantly aware that he is a *male* nurse. He will thus experience derogatory comments about men, comments about male sexuality, and comments about his own sexuality in a more sensitive way than he would in a space that is male gendered or neutral. In the nursing space, these comments are not merely annoying or even insulting, but they also remind him that he is male, that he is an outsider, and that he is not suited for this work. For these remarks to hinder his doing well on the job is a reasonable response, *even though* it might not be a reasonable response in a male gendered workspace where his hypersensitivity is not to be expected.

Imagine, too, that the nurses, on some level, fear the entry of men into the nursing profession because it will result in more applicants for a finite number of jobs, reduce job availability, and perhaps even drive down wages. As they come to realize that their behavior makes their male coworker uncomfortable, their behavior becomes the means by which they can guarantee that few men thrive in the nursing profession.[96]

Likewise, and obviously more to my point, if we utilize the lens of gendered space, we need not rely on the politically-charged reasonable woman or man standard. My male nurse is a reasonable male worker in work space that is gendered female. Remarks and behavior that in any way emphasize his maleness are inevitably linked to suggestions that he does not belong in this space.[97] What he is like in male gendered space is irrelevant just as Vivienne Rabidue's personal qualities become irrelevant if the gendered space of Osceola Refining Company is taken into account. The concept of gendered space can cut through the myth of neutrality that so clouded the court's judgment in

96. Ever since the development of hostile environment as a claim, commentators have remarked upon its relationship to power in the workplace and its use as a tool to keep women economically suppressed. *See* MACKINNON, *supra* note 17, at 174-77; Franke, *supra* note 12, at 693-95; Abrams, *supra* note 12, at 1202.

97. *See* Abrams, *supra* note 12, at 1208. She writes: "Sexual inquiries, jokes, remarks, or innuendoes sometimes can raise the spectre of coercion, but they more predictably have the effect of reminding a woman that she is viewed as an object of sexual derision rather than a credible coworker." *Id.*

Rabidue. It also avoids the dilemma central to the court's position in *Ellison* that women and men are somehow essentially different in their responses to sexually-loaded remarks and behavior.[98] In fact, women and men may be remarkably similar. The problem, of course, is that female-gendered workplaces with few or sole male workers are rare, whereas the reverse is quite common. On mere numbers, then, there seem to be more sensitive women, or women seem to be more sensitive. Yet through the lens of gendered space, it becomes clearer that anyone, regardless of gender, struggling to fit into a workplace that is gendered other may well respond with heightened sensitivity to subtle reminders, in the form of sex-laden remarks and conduct, that one is an outsider. I finally disagree, then, that sexual harassment is a "distinctly different experience for women than it is for men."[99] It just seems that way because of the ubiquitous maleness of most workplaces. In other words, sensitivity has to do with the nature of the workplace, not the nature of the person.

Sexual harassment in gendered space, then, is sex discrimination because it operates to maintain the sexual stratification of the workplace and to keep women from knowledge and money. Franke puts this connection between harassment and discrimination powerfully and graphically: "sexual harassment is sexually discriminatory wrong because of the gender norms it reflects and perpetuates. . . . Sexual harassment is a technology of sexism."[100] As the incidence of offensive conduct in a hostile environment increases, the workplace finally becomes intolerable to the minority gender and the gendered nature of the workplace remains unchanged. Increased access to male gendered workplaces, then, cannot alone eliminate gender stratification in employment. Sexual harassment is a technology, I would maintain, that takes its force from the gendered nature of the workplace. In other words, it *works* not because of its overt content, but because of its subtext, its "hidden" message that the female worker does not belong in the male workplace. The message may be "dumb ass woman" or "come sit on my face," but its content is secondary to its effect. In a neutral workplace, these remarks have less power, are less likely to force a worker out of

98. I do not want to throw out the baby with the bathwater here and underplay the welcome insightfulness of the court in recognizing that women, in a culture rampant with both real and imaged violence against women, interpret sexual advances as more threatening than do men. Women's response, however, is not more sensitive, but more realistic.

99. Abrams, *supra* note 12, at 1202.

100. Franke, *supra* note 12, at 693.

the workplace, and thus may not be discrimination. Therefore, whether it is legally redressable should depend on the gendered nature of the place in which it occurs. And the extent of the law's involvement and the legal remedies, from sweeping injunctions to less draconian measures, depends on the gendered nature of the workplace.

The idea of a static reasonable person—man or woman—is unnecessary and finally untrue to the employment experience. Perspective—reasonableness—*depends*. When weighing the totality of the workplace to determine whether conduct reaches an impermissible level, courts must take into account the gendered nature of the workplace itself. As more and more women are initially protected by the law (in decisions such as *Robinson*) and are able not only to enter but also to survive and reach their full potential in places such as shipyards and refining plants, the necessity of legal protection lessens. Sexual stratification of the workplace diminishes, sexual harassment will have failed as a technology to maintain the stratification, and the promise of equality will have moved closer to realization.