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Universalism and Sexual Harassment

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UNIVERSALISM AND SEXUAL HARASSMENT

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Several courts have recently rejected a "reasonable person" standard in evaluating sexual harassment claims based on an abusive work environment.[1] These courts primarily rejected the reasonable person standard because it often resulted in a validation of a status quo work environment that was harmful to women.[2] Implicit within their rejection of a reasonable person standard is a rejection of the concept of universalism[3] in evaluating sexual harassment. Instead, these courts have adopted a reasonable victim standard, which effectively divides the world into reasonable men and reasonable women. Dividing the world into two different types of people does not advance the goals that these courts had hoped to achieve. This article argues that dividing the world into two different types of people is unnecessary and unwise, because a carefully formulated reasonable person standard will better advance justice for women and men.[4]

Developing the Theoretical Basis for a Reasonable Victim Standard

The use of a reasonable victim standard was suggested in a note published in 1984 in the *Harvard Law Review* (the Note).[5] The courts and judges

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1. *See* King v. Board of Regents of Univ. of Wisconsin, 898 F.2d 533, 537 (7th Cir. 1990); Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Radtke v. Everitt, No. 121611, slip op. at 3 (Mich. Ct. App. May 20, 1991). Not all courts have rejected the reasonable person standard. *See* Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) (a fact finder should keep "both the man's and woman's perspective in mind"); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir.), *cert. denied*, 481 U.S. 1041 (1986) (adopting a reasonable person standard).

2. *Rabidue* is an example of a poor decision using a reasonable person standard. In *Rabidue*, the court upheld the finding of the district court below that extremely vulgar, demeaning, and sexual language towards women in general and the plaintiff in particular, even when combined with the presence of posters of nude women in the workplace, did not create an abusive work environment. The cases and the literature have rightly criticized the *Rabidue* decision as insensitive to the experience of women and wrong. *See, e.g.*, Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989); Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1193-214 (1990); Pollack, *Sexual Harassment: Women's Experiences vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 62-68 (1990); Finley, *A Break in the Silence: Including Women's Issues in a Tort Course*, 3 YALE J. L. & FEMINISM 41, 58-61 (1990).

3. For purposes of this article, the term "universalism" means the legal philosophy that a court can and should apply one standard of justice in deciding cases regardless of the race, sex, or other immutable characteristic of the parties.

4. This is a limited argument. A reasonable victim standard is clearly better than a reasonable person standard as applied in *Rabidue*.

5. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449 (1984).

which have adopted a reasonable victim standard have generally followed the suggestions set forth in the Note.

The *Rabidue* dissent[6] provides the fullest explanation for adopting a reasonable victim standard to evaluate sexual harassment claims by women. A reasonable victim standard "simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant."[7]

The salient sociological difference referred to is that "many of the actions women find offensive are perceived by men to be harmless and innocent."[8] The dissent continued, "[C]oncern for the dignity of women would require courts to determine the wrongfulness of conduct from the standpoint of the victim: hence continual minor humiliations as well as flagrant assaults would become actionable."[9]

The *Rabidue* dissent and the Note argue that the appropriate standard must "account for the wide divergence between most women's views of appropriate conduct and those of men."[10] In particular, any standard must not "lock[ ] the vast majority of women into workplaces which tolerate anti-female behavior"[11] or force a woman, "simply because she is a woman, to tolerate abusive conditions in order to earn a living."[12]

The Note added another reason to adopt a reasonable victim standard. A reasonable victim standard would help bring about "a gradual internalization of the legal norm" about appropriate standards of behavior in the workplace which protect women from sexual harassment.[13]

Many courts have followed this approach. In *Yates v. Avco Corp.*,[14] the court held that "it seems only reasonable that the person standing in the shoes of the employee should be the 'reasonable woman' since plaintiff in this type of case is required to be a member of a protected class and is by definition female."[15] In a footnote, the *Yates* court, in dicta, adopted a reasonable man standard in cases involving a male subordinate.[16] In this footnote, the court relied on the *Rabidue* dissent for the proposition "that men and women are vulnerable in different ways and offended by different behavior" as apparently a fuller explanation of why it adopted a reasonable victim standard.[17]

6. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623 (6th Cir.) (Keith, J., concurring and dissenting), *cert. denied*, 481 U.S. 1041 (1986).

7. *Id.* at 626 (Keith, J., concurring and dissenting) (citation omitted).

8. *Id.* at 1451 (footnote omitted) (the *Rabidue* dissent relied on the Note for this proposition).

9. *Id.* at 1452.

10. *Id.* at 626 (Keith, J., concurring and dissenting); Note, *supra* note 5, at 1451.

11. *Rabidue*, 805 F.2d at 627.

12. Note, *supra* note 5, at 1455-56.

13. *Id.* at 1451, 1458, 1459.

14. 819 F.2d 630, 637 (6th Cir. 1987).

15. *Yates*, 819 F.2d at 637.

16. *Id.* at 637 n.2.

17. *Id.*

In *Ellison v. Brady*,[18] the court also adopted a reasonable victim standard.[19] Its rationale was that "[c]onduct that many men consider unobjectionable may offend many women." The court then proceeded to examine the case law for support of this statement.[20] It held that a reasonable victim standard was necessary "primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[21]

Some have argued that title VII requires adoption of a reasonable woman standard. The *Yates* court's reasoning stated that the reasonable woman standard should apply because "the plaintiff in this type of case is required to be a member of a protected class and is by definition female."[22] The *Ellison* court emphasized that title VII was not "fault-based."[23] A law review author has recently suggested that a reasonable person standard is weak because title VII was designed "to reform society."[24]

A Reasonable Victim Standard May Not Advance the Goals It Intends to Advance

A reasonable victim standard is intended to improve opportunities for women in the workplace and to create one standard in the workplace which does not tolerate sexual harassment. These are important goals, but it is important to examine critically whether a reasonable victim standard will actually achieve these goals. This article argues that a reasonable victim standard may actually be counterproductive.

The task of showing how a reasonable victim standard may work against the very goals it intends to achieve is complicated because the courts have interpreted the reasonable victim standard in two different ways. One interpretation adopts a reasonable woman standard for all cases. The other adopts a reasonable woman standard when the woman is the victim and a reasonable man standard when the man is the victim.

The court in *Yates* adopted the reasonable woman standard where the woman is the victim and a reasonable man standard where the man is the victim.[25] This approach is most problematical for the stated goals of increasing opportunities for women, eliminating stereotypes, and creating a new, harassment-free workplace norm.

Establishing two standards in sexual harassment cases, one for women and one for men, is very similar to protective legislation for women.

18. 924 F.2d 872 (9th Cir. 1991).
19. *Id.* at 878.
20. *Id.* at 878-79.
21. *Id.* at 879.
22. *Yates*, 819 F.2d at 637 (footnote omitted).
23. *Ellison*, 924 F.2d at 880. This reasoning shows some of the confusion in the courts because one of the purposes of adopting a reasonable victim standard is to raise the consciousness of men so that they know certain types of behavior are wrong.
24. Ehrenreich, *supra* note 2, at 1178.
25. Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987).

Protective legislation typically establishes a different standard for men and a different standard for women for the stated reason of preventing the exploitation of women.[26] For example, a law may state that employers shall not force women to work overtime, whereas the employer may force men to work overtime.[27]

The two standards in *Yates* established a sexual harassment policy which was more protective of women than of men. The *Yates* court, when it argued that "men and women are vulnerable in different ways and offended by different behavior," was suggesting a false symmetry. It was false because the *Yates* court, and the *Rabidue* dissent before it, rejected a standard for women based on the "ingrained notions of reasonable behavior fashioned by the offenders, in this case, men" as unfair.[28] Individual men, however, will have their claims judged in accordance with some of these ingrained notions.

Protective legislation has certain well-known negative effects which should be carefully weighed before protective legislation is adopted. First, the creation of two separate standards makes it more expensive to employ women than men and discourages integration. An employer who manages a segregated workplace[29] in an environment of sexually-oriented posters and vulgar language will weigh the cost of employing a woman, including the cost of eliminating the sexual posters and vulgar language from the workplace, against the cost of a sexual harassment judgment. The cost of hiring a man would not include these costs. Equal opportunity laws force an employer not only to eliminate sexual posters and vulgar language, but also to employ women; however, an employer may employ fewer women or only women the employer believes will not be offended by the prevailing workplace norm.[30]

Two standards may also promote the very stereotypes which underlie and support sexual harassment. Two standards suggest that women are the "weaker sex" who need protection on the shop floor. Two standards suggest that men are "animals" who cannot be expected to control their aggressive and sexual urges in the workplace.[31]

26. Protective legislation for women was held constitutional in Muller v. Oregon, 208 U.S 412 (1908). It has been more carefully scrutinized recently. *See* Orr v. Orr, 440 U.S. 268 (1979).

27. This law discriminates against women because an employer who wants its employees to work overtime in order to avoid paying fringe benefits will hire men. In order to hire women the employer must hire extra workers and pay them fringe benefits.

28. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 625 (6th Cir.) (Keith, J., concurring and dissenting), *cert. denied*, 481 U.S. 1041 (1986).

29. It is illegal for an employer to intentionally maintain a segregated workplace, but segregated workplaces exist which are not necessarily illegal. Moreover, the question is the practical effect of having two standards on the willingness of employers to employ women in traditionally segregated workplaces.

30. For example, it can be argued that the Osceola Refining Company, in *Rabidue*, hired and promoted Vivienne Rabidue because it believed her personality would allow her to survive in its hostile workplace.

31. Rhode, *Feminist Critical Theories*, 42 STANFORD L. REV. 617, 625 (1990) (where the

The *Ellison* court adopted the universal reasonable woman standard. The court, without discussion, held that the "reasonable woman standard does not establish a higher level of protection for women than men."[32]

The universal reasonable woman standard avoids some of the dangers of explicitly establishing two different standards. Both men and women have the right to work in a nonabusive workplace. An employer has no statutory economic incentive to employ a woman or a man because the employer must maintain the same nonabusive workplace whether the employer hires women or men.[33]

However, the universal reasonable woman standard still does not eliminate the danger of stereotyping. Jurors will be called on to decide what a reasonable woman thinks. Some jurors may well rely on stereotypes in deciding what a reasonable woman thinks. There is the danger that jurors will draw the inference that a reasonable person is different from a reasonable woman.

Criticism of the Theoretical Basis for a Reasonable Woman Standard

Another fundamental issue raised by adopting a reasonable woman standard for allegations involving sexual harassment against women[34] is its legitimacy in the traditional Anglo-American legal system. If a reasonable man or person truly differs from a reasonable woman, then why should the courts favor the viewpoint of a reasonable woman over a reasonable man? Moreover, if the courts want to improve opportunities for women, why choose the viewpoint of a reasonable woman over the subjective viewpoint of the actual woman?[35] The cases and the literature have not adequately addressed these issues.[36]

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author criticizes some feminist "frameworks [which] also reinforce dichotomous-stereotypes—such as males' association with abstract rationality and females' with empathetic nurturance—that have restricted opportunities for both sexes."); Aiken, *The Male Irresistible Impulse*, 12 N.Y.U. REV. L. & SOC. CHANGE 357 (1983-1984).

32. *Ellison*, 924 F.2d at 879.

33. As a practical matter, an employer may illegally choose to hire men if it believes the cost of hiring women will exceed the cost of complying with the equal opportunity laws.

34. Under both the *Yates* and *Ellison* reasonable victim standards, a woman alleging sexual harassment will have her claims judged according to the reasonable woman standard.

35. *See* Ehrenreich, *supra* note 2, at 1231-32 (where she argues that the idea of reasonableness should not be retained); Pollack, *supra* note 2, at 82 ("We can no longer accept men's versions of the conduct complained of. Women have been told far too long that their feelings of degradation in the face of what has been passed off as normal behavior are ridiculous. Certainly, when there is behavior so offensive that a woman is compelled to complain about it, her perspective must be primary.").

36. This article will only discuss those cases where the court adopted a reasonable victim standard, but the text is equally true about the other cases. For example, the *Lipsett* court discussed the issue of the appropriate standard in one paragraph and never made its standard explicit. Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988). The *Rabidue* majority merely stated that the reasonable person standard was necessary "[t]o accord appropriate protection to both plaintiffs and defendants." Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir.), *cert. denied*, 481 U.S. 1041 (1986).

Ellison, Yates, and the Note subtlely avoid the most difficult theoretical issue concerning which standard should apply if a reasonable woman and a reasonable man disagree about the offensiveness of the behavior.[37] The two courts and the Note author relied on a study which showed that some men perceived as harmless and innocent many of the actions that some or most women found offensive. The reasonable woman standard was necessary to "protect women from the offensive behavior that results from the divergence of male and female perceptions of appropriate conduct."[38]

This argument comes perilously close to turning the definition of what a reasonable man would think from a moral judgment into an opinion poll. The study undoubtedly included the opinions of some men who were ill-informed or prejudiced. The fact that sexual harassment is tolerated in some workplaces does not make it an acceptable industry standard.[39] Moreover, there is no presumption that external forces, like the market, are successfully exercising any regulating force on sexual harassment.[40]

The Note did not explicitly consider a reasonable person standard, but the *Rabidue* dissent, the *Yates* court, and the *Ellison* court rejected the reasonable person standard because it would fall somewhere in between a reasonable woman and the reasonable man standard. This relied on the same weak reasoning that because some men may perceive as harmless and innocent many of the actions that some or most women find offensive, a reasonable man or person standard must incorporate inappropriate offensive behavior.

The assumption that reasonable men and reasonable women may disagree about some conduct may itself be a stereotypical assumption. "Most empirical work on moral reasoning and public values discloses less substantial gender differences than [certain critical feminist] relational frameworks generally suggest."[41]

The difficulty of addressing the fundamental issue of what standard should control when a reasonable woman and a reasonable man disagree has also caused the cases and the literature to rely on intuitive balances. The *Ellison* court adopted the objective standard of a reasonable woman standard in order to shield employers from "hypersensitive employees" with no discussion about what constitutes a hypersensitive employee.[42] The Note found

37. If such a situation exists.

38. Note, *supra* note 5, at 1459.

39. A reasonable person standard is not as tied to the status quo as Ehrenreich suggests. Ehrenreich, *supra* note 2, at 1178. *But see id.* at 1234 (where Ehrenreich suggests that a reasonable person standard is not inevitably tied to the status quo). Courts have invalidated industry standards as unreasonable in the past. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

40. The argument that employers will stop sexual harassment because women will not work where they are sexually harassed is weak. Donohue, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, U. CHI. L. REV. 1337, 1355 (1989).

41. Rhode, *supra* note 31, at 625.

42. *Id.* at 1353. The *Radtke* reasoning was similar. Radtke v. Everitt, No. 121611, slip op. at 3 (Mich. Ct. App. May 20, 1991).

that "a compromise between" the various possible standards was necessary due to the "equities on the sides of both employee and employer."[43] The court therefore adopted the objective standard of the reasonable victim instead of the subjective standard of what the individual woman thought.[44]

This is a serious lapse because the views of women are often not considered reasonable by the very men who are harassing them. Explicit consideration of the factors used to reach the balance will hopefully help the offending men to learn and to accept any new standard.

Intuitive balancing based on results presents a further problem for everyone. It relies on what may be a temporary majority for deciding the difficult questions of what is offensive and what are the appropriate tradeoffs. It therefore invites the use of prejudice or inaccurate stereotypes about women or men.

The argument that title VII requires or supports the adoption of a reasonable woman standard has serious difficulties. Title VII did not establish a reasonable woman standard for determining whether behavior is offensive. It did not even explicitly discuss sexual harassment.[45] The argument that a reasonable woman standard is necessary because one of the purposes of title VII is to increase opportunities for women is possible, but it is subject to severe criticism.[46] In particular, the argument cannot explain why a court should choose a reasonable woman standard over a subjective woman standard if the latter standard most improves opportunities for women.

Developing a Method for Evaluating the Various Standards

The cases and the literature have struggled to articulate a basis for a reasonable victim standard because the theory of sexual harassment has often been advanced by its proponents as contrary to traditional Anglo-American jurisprudence. This approach forces judges to argue that a reasonable victim standard is necessary because of results or because of a statute. The theory of sexual harassment can be, however, easily accommodated in the traditional, albeit liberal, Anglo-American theory of justice proposed by John Rawls.[47] Incorporating the theory of sexual harassment

43. Note, *supra* note 5, at 1458.

44. *Id.* at 1459.

45. *See* 42 U.S.C. § 2000e-2(a)(1) (1988).

46. *See* Cox, *The Supreme Court, Title VII and "Voluntary" Affirmative Action — A Critique*, 21 IND. L. REV. 767 (1988) (criticizing the use of the fact that one of the purposes of title VII is to increase opportunities for African-Americans, to support race-based remedies).

47. J. RAWLS, A THEORY OF JUSTICE (1971). Ronald Dworkin provides a brief, informative, description of this theory:

> It imagines a group of men and women who come together to form a social contract. Thus far it resembles the imaginary congresses of the classical social theories. The original position [in which all the men and women are in at this congress] differs, however, from these theories in its description of the parties. They are men and women with ordinary tastes, talents, ambitions, and convictions, but each is temporarily ignorant of these features of his personality, and

into the Rawls theory allows the courts to develop a method for evaluating the various standards which is not based solely on intuitive judgments about fairness.

The Rawls theory has several advantages as a method of choosing between the various possible standards to determine offensiveness in sexual harassment cases. It is a moral theory based on a theory of individual rights.[48] It can be viewed as just by both women and men because it relies on unanimous consent to a social contract in the original position where no one will be identified according to gender.[49]

The Rawls theory also clearly supports outlawing sexual harassment as sexual discrimination. "[S]exual discrimination presupposes that some hold a favored position in the social system which they are willing to exploit to their advantage."[50] Sexual harassment falls easily under this definition. Men who sexually harrass women are exploiting their favored positions in the workplace as supervisors, as more numerous, or as otherwise more powerful than the women they are harassing.[51] No individual in the original position would agree to a contract permitting such behavior because the individual may be a woman.

Finally, the Rawls theory does not assume that either women or men are correct about whether the disputed behavior is offensive. Preconceptions and stereotypes about the way women and men think and behave should be eliminated.

Some feminists who advocate a reasonable victim standard would reject using the Rawls theory to evaluate various standards in sexual harassment cases because his theory retains the universalism of traditional Anglo-American jurisprudence.[52] The theory creates a single theoretical individual

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must agree upon a contract before his self-awareness returns.

R. DWORKIN, TAKING RIGHTS SERIOUSLY 150 (1977).

48. *See* J. RAWLS, *supra* note 47, at 586 ("to respect persons is to recognize that they possess an inviolability founded on justice that even the welfare of society as a whole cannot override"); R. DWORKIN, *supra* note 47, at 150-83.

49. *See* J. RAWLS, *supra* note 47, at 136-37.

> Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. . . . It is assumed, then, that the parties do not know certain kinds of facts. First of all, no one knows his place in society, his class position or social status. . . .

Id.

50. J. RAWLS, *supra* note 47, at 149.

51. Sexual harassment is "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN; A CASE OF SEX DISCRIMINATION 1 (1979). "Sexual harassment is the exploitation of a powerful position to impose sexual demands or pressures." Note, *supra* note 5, at 1451. "It is the recognition that the sexual harassment is an assertion of power by men to control and subordinate women which is crucial." Pollack, *supra* note 2, at 83.

52. *See* Pollack *supra* note 2, at 53 (general rejection of the traditional Anglo-American legal concepts of autonomy, privacy, and neutrality).

by seeking to eliminate all preconceptions, stereotypes, and self-interest from the individuals in the original position and assuming that the individuals are rational.[53]

The claim that women and men view some gender-related behavior differently may be, however, part of a claim that history or biology does not allow the meaningful use of a single theoretical individual in determining justice. In particular, some feminist philosophers and writers deny that there is one theoretical individual because of gender.[54] The Rawls theory can adapt to the lesser claim that some people will interpret behavior differently based on gender outside the original position,[55] but it cannot adapt to the claim that there is no single theoretical individual type in the original position because the parties may not agree to a contract.[56]

The philosophical validity of the basic challenge to the Rawls theory is beyond the scope of this article, but there are several good reasons for using the Rawls theory without resolving the challenge. First, the Rawls theory is more consistent with traditional Anglo-American legal ideals and theories. Some may argue that this is a bad reason, but experience has shown that traditional Anglo-American legal ideals and theories have formed the basis for greater freedom for everyone. The freedom has come too slowly and more may be needed, but traditional Anglo-American legal theory has worked as well or better than any other tradition in the world. Those who would radically change that tradition should have the burden of showing that their legal philosophy would be better at achieving a workplace free of sexual harassment than suitably modified traditional Anglo-American jurisprudence would be.[57]

Second, dividing the world into two groups of people based on an immutable characteristic is highly suspect.[58] It is also highly controversial even among feminists.[59]

53. *Id.* at 142. Rawls also assumes other characteristics about the individuals in the original position. *See id.* at 146-50.

54. *See* H. EISENSTEIN, CONTEMPORARY FEMINIST THOUGHT 45-101 (1983) (tracing the development of a "woman-centered" analysis by some feminists).

55. *See id.* at 137 ("Nor . . . does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology").

56. *See id.* at 140-42 (unanimous agreement necessary in the original position).

57. *See* R. PIPES, THE RUSSIAN REVOLUTION xxiii (1990) (asking the fundamental question of when should people destroy old institutions created by trial and error in order to replace them with institutions created in accordance with theories about an ideal state).

58. The danger of presupposing that there are two fundamentally different viewpoints because of gender is obvious when one considers that male chauvinists might argue that the people in the original position could agree to a social contract limiting the right of women to work because women are suited to stay home and would not mind the limitations on their freedom. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 120 (1873) (upholding a law denying women the right to practice law on the grounds of their different personality and different role as ordained by God).

59. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 830 (1989) (arguing that *EEOC v. Sears* shows "how traditionalist judges can use women's culture against women"); *see* EEOC v. Sears, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

Third, dividing the world into two types of people also has another well-known danger. There is no theoretical stopping point in dividing the world, because there is no agreement about who is a reasonable woman.[60]

There is no convincing theoretical argument, therefore, for choosing a more radical theory than the Rawls theory.

Using the Rawls Theory to Evaluate the Possible Standards

The next step is to evaluate the various possible standards using the Rawls theory. The Rawls theory suggests that a specific and sensitive reasonable person standard better advances justice than a reasonable woman standard and better meets the goals of those who advocate a reasonable woman standard.

Individuals in the original position would reject any standard which depended upon the sex of the person alleging sexual harassment. An individual in the original position would not agree to a reasonable woman standard because the individual would know that a reasonable woman and a reasonable man might differ about what is sexual harassment, but the individual would not know which one was right.[61] Either the reasonable woman or the reasonable man standard might be incorrect and harmful.

An individual in the original position would also not agree to a standard based upon past status as a victim. The individual in the original position would not agree to a contract granting favored status in society to people solely on the basis of their being past victims because there is no historical or *a priori* principle that past victims are always right.[62]

60. *See* Rhode, *supra* note 31, at 624 (author discusses the difficulties of achieving an "authentic female voice" because of the diversity of views held by women); Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 589-90 (criticizing Catherine MacKinnon's works for "the ways in which the voices of black women . . . are suppressed in the name of commonality"); Dalton, *Commentary: Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1, 7 (1987-1988) ("no single feminist narrative or theory should imagine it can speak univocally for *all* women").

61. If the individual in the original position knew which standard were correct, then the individual would agree to it. Many of the articles on sexual harassment assume that the victim, a woman, is always correct. See, for example, Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, 17 N.M.L. REV. 91, 99-100 (1987) ("The previous discussion demonstrates that men's views as to what constitutes sexual harassment differs [*sic*] from women's view and limits their acceptance of what it is, how much of it there is, and who is responsible for its occurrence. Until the problem is seen from the victim's perspective, institutional reform is not possible."). This article is skeptical of the claim that, *a priori*, women are always correct and that men are always incorrect. Individual variation deeply affects the moral views of everyone. *See id.* at 100 (Bratton admits that "[i]t is simplistic and misleading to infer from the foregoing that only women managers can proscribe sexual harassment or that only women judges can fairly hear sex discrimination claims. The forces which shape one's beliefs are too complex to be ascribed soley to gender . . . . ," but fails to consider the implication of this statement on her general statements about the views of women and men).

62. Usually victims have a greater claim to being morally correct than the victimizers because they have not usually victimized anyone. In the United States today, most women can make this claim because there is no evidence that they want to oppress some or all men

A reasonable person standard would not give anyone a favored status in determining whether there was an abusive work environment. The claims would be evaluated on the merits alone.

Individuals in the original position would also know that a reasonable person standard might be misinterpreted to incorporate the invalid opinions of those who commit sexual harassment or who sympathize with the sexual harassers. Most importantly, they would know that the perception that reasonable women and reasonable men might disagree about what is sexual harassment would increase the tendency of judges and juries to use stereotypes and simplistic reasoning to decide cases. The individuals in the original position would, therefore, not accept a vague definition of a reasonable person as in *Rabidue*. Any reasonable person standard must explicitly and thoroughly incorporate and consider the important facts about the woman or man[63] claiming sexual harassment and the work environment in which he or she worked.[64] This would include recognition that "women are disproportionately victims of rape and sexual assault,"[65] and other important experiences of women. A sex-neutral rule does not require ignoring gender differences.[66]

Will a Specific and Sensitive Reasonable Person Standard Work?

The last objection to using a specific and sensitive reasonable person standard is that it is not workable. If true, then theoretical arguments about its superiority to a reasonable woman standard must be set aside. This article argues that a specific and sensitive reasonable person standard will work.[67]

A reasonable person standard would have worked in the highly criticized *Rabidue* case if the court of appeals had defined a reasonable person to

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because of the injustices they have suffered. But victims are as affected by the injustice they suffer as the victimizers. Victims and victimizers may both be wrong on any specific issue. Victims may even victimize once they attain power. T. SOWELL, PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE 152-53 (1990) (listing numerous groups which have been victims that have also victimized).

63. The importance of men claiming sexual harassment is often overstated. Women are overwhelmingly the victims of sexual harassment. Bratton, *supra* note 61, at 93-94 ("However, it is specious to discuss a world in which women as a group hold such social and economic power that they are in a position to exploit subordinates who are, as a group, largely male."). In any event, a reasonable person standard can evaluate whether a workplace is abusive to a man based on whether the workplace is segregated, whether the man or other men have any power, whether the sexual conduct was threatening or offensive to people of the same or different sex, whether it involved a supervisor or peers, and other similar, neutral factors.

64. This responds to the valid criticism that ignoring gender differences by using an abstract reasonable person standard is unsatisfactory. Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1193 (1989).

65. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

66. "What is needed is not a gender-neutral rule but one that avoids the traditional shorthand of addressing gender by reference to sex." Williams, *supra* note 59, at 839.

67. Pollack found the result acceptable in *Lipsett* which used a reasonable person standard. Pollack, *supra* note 2, at 84.

include the specific facts of Vivienne Rabidue's situation. She may have been the first person of her sex to enter a previously segregated workplace.[68] Her job required her to exercise authority over members of the opposite sex. When she attempted to exercise her authority, a person of the favored sex challenged her and used extremely vulgar and demeaning language about her personally. In addition, management tolerated extremely vulgar and demeaning language about females and posters of nude females.[69]

Reasonable persons of either sex would have great difficulty performing their job under such circumstances. They would feel frustrated. They would feel angry at the unfairness. They would feel threatened because they could not perform their job. They would be hurt. In short, the abusive working environment would seriously affect their psychological well-being.

Conclusion

The reasonable victim standard is an advance over the mechanical application of a reasonable person standard in sexual harassment cases involving an abusive work environment, but it too may result in the use of stereotypes about women and men. A reasonable person standard which explicitly and thoroughly addresses the reality of sexual harassment will best open opportunities for women and create a new, single workplace norm. A reasonable person standard also allows the courts to stay closer to the Anglo-American tradition of universalism.

68. The Rabidue dissent claimed she was the only salaried woman management employee. *Id.* at 623 (Keith, J., concurring in part and dissenting in part). The district court and majority did not agree or disagree with this statement, but they did not mention any other salaried women management employees. The failure to make a finding on this issue should be a reversible error.

69. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 615 (6th Cir.), *cert. denied*, 481 U.S. 1041 (1986).