

UNREASONABLE EXPECTATIONS: A PHENOMENOLOGICAL DEFENSE OF
TAKING A GROUP-RIGHTS BASED PERSPECTIVE TOWARDS THE
ADJUDICATION OF HOSTILE ENVIRONMENT
SEXUAL HARASSMENT CLAIMS

by

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There is currently a debate among legal scholars about what kind of reasonableness standard courts should adopt while adjudicating hostile environment sexual harassment claims. The alternatives generally fall into two categories: traditional individual-rights based standards and group-rights based standards. Using the former types of standards entails a commitment to several traditional liberal principles—social consensus as mediator, tolerance of diversity, assumption of risk, and interchangeability—while using the latter types of standards entails either the modification or abandonment of them. The purpose of this dissertation is to demonstrate how the explicit or implicit positing of different theories of the self ultimately underlies these disagreements.

First, I will argue that a commitment to one crucial aspect of social atomism, i.e., the view that a rational individual can choose not to be seriously psychologically affected by the views that others take towards her or him, underlies claims that courts should appeal to these traditional liberal principles and adopt some variation of a reasonable person standard. I will then argue that all previous attempts to criticize this type of theory of the self for being "excessively individualistic" have failed; these theories of the self—whether they are based on modern individualism, communitarianism, or cultural feminism—still either explicitly claim or strongly imply that a rational woman can reject and consequently be psychologically unaffected by having to work in misogynous, traditionally all male work environment.

Second, I will combine Jean-Paul Sartre's concept of "the look of the other" and with several aspects of George Herbert Mead's theory of social development in order to construct a theory of the self that will better explain why a rational individual cannot help but be psychologically affected by the disparaging attitudes that others express about her or him under certain sociological circumstances. In turn, this theory of the self will then be used to defend the claim that courts should adopt a group-rights based reasonableness standard while adjudicating hostile environment claims.

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PART I

SETTING UP THE PROBLEM: EXAMINING THE ASSUMPTIONS THAT DISTINGUISH THE REASONABLE PERSON STANDARD FROM THE REASONABLE WOMAN STANDARD

(T)he reasonable woman standard assures that male sexual and sexist behavior is not treated as the norm in the workplace. It does not favor women or provide them with special treatment. Instead, it levels the playing field; it assures them equal opportunity. Taking women's perspectives into account helps assure that workplaces are hospitable to both male and female workers.

—Caroline Forell¹

(T)he reasonable woman standard is, by definition, nonneutral. Judicial neutrality requires that courts "refuse to ground decisions on personal preferences for particular perspectives or political judgments about the importance of certain group interests." However, it is precisely these types of "personal preferences" and "political judgments" that are at the heart of the reasonable woman standard.

—Robert Unikel²

CHAPTER I

INTRODUCTION

Attempts to adjudicate hostile environment sexual harassment cases are greatly complicated by the fact that women and men often have quite different understandings of what constitutes appropriate and inappropriate sexual behavior. A sociological study conducted by Barbara Gutek strongly suggests that men and women experience what appear to be similar forms of behavior at work very differently. Women are more likely to regard sexual encounters, whether verbal or physical, as being coercive, and are less likely to be flattered by them. They are also less likely to view them as being directed at them as individuals, while being more likely to see them " . . . as signs of the voracity or prejudice of the perpetrator."³ Men, by contrast, are more likely to be flattered, and less likely to feel harassed, by such gestures. Quoting Gutek, "(m)en are also more likely to perceive such encounters as mutually desired, whereas women are more likely to feel that these encounters were desired only by the more powerful, initiating party."⁴ If these differences do indeed exist, whose view of what constitutes acceptable behavior should prevail? Whose standard should courts appeal to when they are adjudicating hostile environment sexual harassment cases?

Over the last twenty years two principle contenders for this standard have emerged: the reasonable person standard and the reasonable woman standard.

The reasonable person standard sounds intuitively appealing because it is not supposed to favor either men's or women's, or, for that matter, any group's views regarding what counts as substandard conduct. Nonetheless, some critics have argued that women's views on what constitutes appropriate behavior in the workplace should take precedence over men's views when hostile environment cases are being adjudicated.

In part, they argue that the supposedly gender neutral reasonable person standard still tends to be a reasonable man standard and thus helps the courts to "sustain ingrained notions of reasonable behavior fashioned by . . . men."⁵ They also argue that women's perspectives should be privileged because of the long history of sex discrimination in our society, for example, in Radtke v Everett the Michigan Court of Appeals reasoned as follows:

because of their historical vulnerability in the workforce, women are more likely (than men) to regard a verbal or physical encounter as a coercive or degrading reminder that the woman involved is viewed more as an object of sexual desire than as a credible coworker deserving of respect. Such treatment can prevent women from feeling, and others from perceiving them, as equal in the workplace.

We hold, therefore, that a female plaintiff states an actionable claim for sex discrimination . . . where she alleges conduct of a sexual nature that a reasonable woman would consider to be reasonably severe.⁶

The implication of arguments like these is that the reasonable person standard will not assure women equal employment opportunities because it does not adequately incorporate

their perspectives and the fact that they are in historically vulnerable positions into the judicial decisionmaking process.

Although defenders of the reasonable person standard generally acknowledge that women have been historically subordinated, and that the reasonable person standard has de facto tended to be a reasonable man standard,⁷ they nonetheless claim that the adoption of a reasonable woman standard is unjustified, unnecessary, and even counterproductive. One critic in particular, Robert Unikel, argues that this standard is unjustified because men and women would not be treated equally if it was adopted; instead, women's views would now be privileged over men's views when disagreements about what constitutes substandard conduct arise. Further, the idea that one group's perspectives should be privileged over another group's is incompatible with our liberal legal tradition because it does not "reflect the individualistic model of equality:

The standard conflicts with the basic principle of equality in two primary respects: First, because it relies exclusively on a specific group's (women's) norms for its definitions, the reasonable woman standard inappropriately adopts a group-rights, rather than an individual-rights perspective. Second, the reasonable woman standard is, by definition, nonneutral. It establishes female values and perceptions as dominant and, therefore, violates the principle of formal equality by arbitrarily differentiating between individuals.⁸

Unikel goes on to argue that this standard is also unnecessary because a truly gender neutral reasonable person standard, "a modified . . . standard that incorporates the female perspective"⁹ into the judicial decisionmaking process, would be consistent with the notion of formal equality—the idea, to quote Linda Krieger and Patricia Cooney, that "each individual has the right to be treated the same as other similarly situated

individuals, or that each has the right to equal access to a particular opportunity, resource or burden."¹⁰ Finally, Unikel argues that the reasonable woman standard is counterproductive because its focus on group affiliations helps sustain stereotypes that have disadvantaged women historically.¹¹ As we shall see, arguments in support of the reasonable person standard in particular, and the liberal legal tradition in general, usually rest upon a theory of individualism—"a theoretical construct . . . (that) dissociates the individual person from any context of family, religion, or class and invests in him (sic), as an individual, certain natural or inalienable rights,"¹² and, as a result, it promotes equality of treatment over equality of effect.

In contrast to this view, advocates of the reasonable woman standard argue that equal treatment is sometimes insufficient because of the historical subordination that women have been subject to. Catharine MacKinnon summarizes the problem in her groundbreaking work Sexual Harassment of Working Women:

To the extent that women and men are not similarly situated sexually, the reason is pervasive social inequality. It is not biological difference or personal choice. Moreover, it is questionable that people should be required to be similarly situated before they can be found to be unequally treated, since due to systematic inequality, people are often not in similar situations.¹³

Consequently, as Lucinda Finley argues,

parceling out goods such as workplace benefits according to egalitarian distributive principles may not result in people's positions actually coming out equal in the end. . . Individual needs and positions may have to be taken into account in any particular situation in order to achieve equality of outcome.¹⁴

On this view, the systematic inequality that women have been subjected to sometimes needs to be taken into account in order for women to be treated equally. This implies that it is not as easy for women in particular, or members of historically oppressed groups in general, to dissociate themselves from group contexts as defenders of individualism suggest.

I hope to show that these differing views about the extent to which individuals can dissociate themselves from their various group contexts is crucially important and that it can ultimately be traced back to different conceptions of the self. Advocates of the reasonable person standard have explicitly adopted an important aspect of what is sometimes called an atomistic conception of the self, a theory alternately referred to as social atomism, a view that exalts individual identity over group membership to the extent that the issue of historical vulnerability, the feeling that members of certain groups have of being less than equal, is largely though not completely eliminated. According to this view, individuals can simply choose not to be adversely affected by how others view her or him. Although advocates of the reasonable woman standard have criticized many aspects of the liberal legal tradition, there have not been very many explicit discussions about social atomism; rather, they have assumed that group membership shapes individual identity to the extent that members of certain groups may experience such historical vulnerability in the workplace. Quoting one male advocate of this standard,

I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. In fact, pervasive societal approval thereof and of other stereotypes stifles female potential and instills the debased sense of self-worth which accompanies

stigmatization. The 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.¹⁵

The implication of this argument is that an individual's group identity, i.e., being a woman, is going to seriously effect how one reacts to being subject to these kinds of displays and conduct at the workplace. By contrast, as we shall see, advocates of the reasonable person standard, explicitly or implicitly relying on a version of social atomism, do not necessarily agree that such stereotypes instill a debased sense of self-worth, and consequently they do not think that misogynous displays unreasonably interfere with a woman's ability to do her job.

Who is correct?

In the first two parts of this dissertation I am going to examine some of the implications that accepting an atomistic conception of the self has for the adjudication of hostile environment sexual harassment claims, as well as its related implications for the equality of treatment versus equality of effect debate. First, I will consider a specific case where admittedly extreme behavior was in large part excused by appealing to a version of the reasonable person standard. Second, I will examine the history of the legal concept of reasonableness and the evolution of rulings in hostile environment cases in order to better explain how even presumably extreme behavior might be plausibly excused if one posits an atomistic conception of the self. And third, I will argue that it will be extremely difficult to argue against many of the fundamental principles of the liberal legal tradition in general, and for the adoption of a reasonable woman standard in particular, if one does

not challenge this conception of the self. I will then attempt to develop a theory of the self in Part Three that explains why it would be reasonable to expect most women to be severely affected by working in a misogynous, traditionally all male environment and argue that courts should use a group-rights based reasonableness standard to adjudicate hostile environment sexual harassment claims.

To be more specific about the remainder of Part One, I am going to do the following: I will first examine a case that used the reasonable person standard, Rabidue v. Osceola Refining Co.,¹⁶ demonstrate how some core liberal principles—social consensus as mediator, tolerance of diversity, and assumption of risk—informed the majority opinion, and argue that these principles do not ipso fact establish whether a reasonable person (who is a woman) would be seriously affected by working in a misogynous environment. Then I will explain how these same core liberal principles are properly used to help make reasonableness determinations in ordinary negligence cases, the point being to demonstrate that the reasonable person standard is quite adequate for most types of cases. After doing that I will briefly examine the history of sexual harassment rulings in order to identify the relevant issues that separate arguments for using a reasonable woman standard to adjudicate hostile environment cases from arguments for using a reasonable person standard. Finally, I will further clarify the differences between these two perspectives by examining Robinson v. Jacksonville Shipyards, Inc.,¹⁷ a case where a court used a reasonable woman standard and explicitly rejected the arguments made by the majority in Rabidue.

I will then do the following in Part Two: First, I will outline the basic features Thomas Hobbes¹⁸ and John Locke's¹⁹ social contract theories and examine the extent to which their theories inform—and fail to inform—the use of social consensus as mediator, tolerance of diversity, and assumption of risk by the Rabidue majority. I will next examine some of the basic features of 17th century and modern individualism,²⁰ as well as some cultural feminist and communitarian criticisms of individualism,²¹ and argue that all of these theories share an explicit or implicit commitment to one crucial aspect of social atomism: that being the idea that individuals are free to reject society's values and can simply choose not to be psychologically affected by them. I will then demonstrate how this aspect of social atomism informs the use of the reasonable person standard by the Rabidue majority and Unikel's claim that courts should adopt a modified reasonable person standard. Finally, I will argue that calls for the adoption of a reasonable woman standard or any form of a group-rights based reasonableness standard should be based upon a theory of the self that rejects this aspect of social atomism and thus explains why a reasonable woman would be psychologically harmed by working in a sexist, traditionally all male environment.

In Part three I will attempt to sketch such a theory of the self. First, I will outline the phenomenological theory of the self that Jean-Paul Sartre developed in Being and Nothingness,²² especially his concept of "the look of the other." I will argue that this concept, which maintains that the attitudes that others take towards us sometimes unavoidably makes us feel self-conscious and shameful, offers the beginning of an

explanation for why a woman cannot simply refuse to be hurt by being subjected to sexist conduct and displays. I say the beginning because the problem with Sartre's theory is that it does not offer an adequate sociological account of the conditions that give rise to feeling self-conscious and shameful and he argues that the look of the other can be transcended through acts of will. I will then adapt aspects of George Herbert Mead's theory of social development²³ to Sartre's concept of the look of the other in order to develop a more comprehensive view of the sociological conditions that give rise to the look of the other. I will then use this theory of the self, which will be an amalgamation of both of their theories, to explain why a woman should reasonably be expected to suffer psychological harm while working in an anti-female environment.

Although I am going to focus on the specific issues surrounding hostile environment sexual harassment cases, my larger concern is actually with how group identity, e.g., gender or racial identity, effects individual identity. I do not think that any theory of the self that I have come across adequately explains how the various ways that we are socialized effects us psychologically. These theories of the self—be they individualist, communitarian, cultural feminist, Sartrian, Marxist, etc—fail because they all ultimately posit a dichotomous relationship between the object and the subject; they all maintain that we are shaped by the communities we are part of, on the one hand, but want to preserve the idea that we can reject aspects of our socialization by taking a critical perspective towards them, on the other. I do not think that this view is wrong, but I do

think that it is insufficiently precise. It is not wrong because we are obviously shaped by the various ways that we are socialized and we can certainly change who we are by questioning and sometimes rejecting aspects of this process. However, it is insufficiently precise because it does not adequately account for how difficult making such changes can sometimes be. To be more specific, the problem with all of these theories is that they explicitly claim or strongly suggest that our identities are, or at least can be, derived internally, by how we think and feel about ourselves, rather than externally, by how others can make us think and feel about ourselves—if we act rationally. This implies that individuals are free to facilely reject aspects of their socialization irregardless of whether the people they work, live, and interact with encourage or discourage them from doing so. It is not that all of these theories of the self claim that most people will actually succeed at doing this, but hey all claim or strongly imply that those of us who are not mentally infirm can do this—and they do not offer any theory that explains why the process of doing so is sometimes exceedingly difficult, which makes it plausible to infer that failures occur because we are behaving irrationally; there is no adequate explanation of how the views that others express about us can instill a debased sense of self worth in us even if we respond to them rationally. In sum, my main goal is to examine hostile environment rulings and arguments about which reasonableness standards courts should adopt in order to develop a theory of the self that explains why a rational individual can sometimes be stigmatized by conduct and displays directed at members of a group while demonstrating why other theories of the self do not offer an adequate explanation of why this occurs.

CHAPTER II

USING THE REASONABLE PERSON STANDARD:

RABIDUE V. OSCEOLA REFINING

Vivienne Rabidue was the only woman holding a salaried management position at Osceola Refining. She filed a hostile environment sexual harassment claim after she was discharged, alleging that

its refusal to stop the display of pornographic posters in private offices and common work areas at the company plant, as well as the stream of anti-female obscenities directed at her and other women by a co-worker in another department constituted sex discrimination in violation of Title VII.²⁴

The abuse she was subject to was extreme:

In common work areas plaintiff and other female employees were exposed daily to displays of nude or partially clad women belonging to a number of male employees at Osceola. One poster, which remained on the wall for eight years, showed a prone woman who had a golf ball on her breasts (sic), with a man standing over her, golf club in hand, yelling "Fore." And one desk plaque declared "Even male chauvinist pigs need love."²⁵

One similarly positioned male employee, Douglas Henry, "routinely referred to women as 'whores', 'cunt', 'pussy', and 'tits.' Of plaintiff, Henry specifically remarked 'All that bitch needs is a good lay' and called her 'fat ass.'"²⁶

Although the defense did not dispute these facts, the plaintiff did not prevail.²⁷

Judge Krupansky, writing for the majority while using a version of the reasonable person standard, concluded that the aforementioned conduct did not have "the effect of unreasonably interfering with the plaintiff's work performance" and that it did not create "an intimidating, hostile, or offensive work environment."²⁸ Although Judge Krupansky described Henry as "an extremely vulgar and crude individual who customarily made obscene comments about women generally, and on occasion, directed such obscenities to the plaintiff,"²⁹ he nonetheless concluded that such conduct, "although annoying, (was) not so startling as to have affected seriously the psyche of the plaintiff or other female employees."³⁰

Judge Krupansky would appear to be contradicting himself: How can he describe Henry's behavior as extremely vulgar and crude, on the one hand, and yet claim that it is not so startling as to have seriously affected the psyches of female employees, on the other? Why would it be unreasonable to conclude that such admittedly extreme behavior would create an intimidating, hostile, and offensive work environment and thus interfere with the plaintiff's ability to do her job? Why should a reasonable person (who is a woman) merely be annoyed by such blatant displays of misogyny?

Judge Krupansky defended his ruling with three arguments: First, the plaintiff assumed a certain amount of risk when she "voluntarily" and knowingly accepted the position:

a proper assessment . . . of an employment environment that gives rise to a sexual harassment claim would invite consideration of . . . 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.³¹

Second, the majority argued that Title VII was not a mandate to transform working class cultures:

it cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar. Title VII was not meant to—or can (sic)—change this. It must never be forgotten that Title VII is the Federal Court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social norms of American workers.³²

And third, the environment at Osceola was not unreasonably offensive because it was not substantially lower than the norm that is accepted throughout most of American society:

The sexually oriented poster displays had a de minimus effect on the plaintiff's work environment 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.³³

As Nancy Ehrenreich points out, these three arguments all rest upon traditional liberal ideals: The "voluntary entry" point is based on the classical free choice argument that she cannot complain about the conditions she encountered because she implicitly agreed to tolerate them when she accepted the offer of employment. "'The working class culture' point invokes the pluralist principle of tolerance for diversity;" the idea being that courts should acknowledge and protect relativism in our society, to the extent that is possible, by allowing individuals or groups to pursue their respective interests unless their conduct harms other people. Some of us might find such expressions offensive, but we

should tolerate them because diversity should be encouraged whenever possible.³⁴

Finally, the claim that such conduct in the workplace is not unreasonably offensive because it compares favorably to the values expressed in society at large rests on the idea that the court should appeal to a societal consensus about what constitutes appropriate and inappropriate conduct when disagreements arise.³⁵ This standard recognizes that there can only be so much tolerance for diversity or pluralism:

One side's freedom can always be seen as the other side's loss of security, one side's equal treatment can seem like the other's unequal treatment, one group's pursuit of its own interest can always be called intolerance of any other group that is affected by that pursuit.³⁶

In determining what counts as freedom or loss of security, equal or unequal treatment, the legitimate pursuit of one's interests or intolerance of others, the court is said to be neutral because it relies on a societal consensus while making such determinations.³⁷ In this particular instance, the court sided with the supposed views of the so called working class because they were said to better represent the views held by the average person.

While it is easy to identify the liberal ideals that underlie Judge Krupansky's ruling, it is much harder to see how these ideals help address the previously alluded to tension, that is, what is it about them that helps transform admittedly highly offensive behavior into something merely annoying when viewed from the point of view of a woman employee, or even a hypothetical reasonable person? The fact that Rabidue voluntarily and knowingly took the position, the need to follow the pluralist principle of tolerance for diversity, and the appeal to follow societal norms when disagreements about what constitutes unreasonably offensive conduct arise do not seem to help us determine

whether she was subject to a hostile environment, one that unreasonably interfered with her ability to do her job.

First, Judge Krupansky claimed that she "voluntarily" and knowingly chose to work at Osceola Refining. While it is clear that she voluntarily chose to take the position, it is less clear that she knew what type of environment she was entering into or how such an environment might effect her psychologically. The majority's argument implies that she knowingly chose to work in what she would consider to be a hostile environment. Moreover, even if she did knowingly choose to enter into such an environment, why does it follow that such crude behavior should be excused? The majority seems to presuppose that the onus to adjust one's attitudes lies with the plaintiff, even if the conduct at issue is admittedly obscene.³⁸ This amounts to saying that such behavior is excusable because she knew what she was getting herself into. Why should the assumption of risk while working in what the dissenting judge described as an "abusive, anti-female environment"³⁹ lie with her?

Second, Judge Krupansky asserts that Title VII is not meant to be a mandate to transform working class culture. This begs the question, however. Title VII is meant to protect women from sexual discrimination at the workplace, and as such it would seem to require the transformation of any culture that is likely to create a hostile working environment for them. Given the goal of equal employment opportunity, it would seem that courts should first determine whether this so called working class culture unreasonably interfered with Rabidue's ability to do her job rather than protecting the

"rough hewn and vulgar" social norms of American workers. The third argument begs the question in a somewhat similar way: The apparent fact that the conduct at Osceola was largely in keeping with conduct condoned throughout most of the rest of society does not in itself establish whether such conduct should have seriously affected the psyches of the plaintiff or other female employees. Krupansky's argument seems to presuppose that the conduct that women are subjected to in the larger society does not generally cause them psychological harm. But perhaps "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"⁴⁰ causes systematic psychological harm to women before they ever enter the workplace? Be that as it may, why would sexually oriented poster displays be thought to have a *de minimus* effect on the plaintiff's work environment when considered in the context of the larger society which apparently condones such displays? Would such displays be thought to have a more substantial psychological effect if they occurred in the context of a larger society that generally disapproved of such displays? In sum, these ideals may help us determine which types of conduct will be protected and which will not, but they do not seem to help us distinguish hostile conduct from merely annoying conduct when viewed from the point of view of the female employee.

Although it has not been spelled out in any of the literature from law journals that I have read on hostile environment sexual harassment cases, I will argue that the justification for the use of these three liberal ideals is inextricably bound up with

individualism—though not necessarily with liberalism—especially with the social atomistic idea that a person is free to reject, and be emotionally unaffected by, society's customs and habits if one responds rationally, i.e. if one "makes the right judgment in the light of good reason."⁴¹ Given this theory of the self, the social consensus arrived at appears to be neutral rather than skewed towards certain group's perspectives because it is assumed to be the fair outcome of a debate conducted among equal individuals from a plurality of backgrounds. Wide-ranging tolerance of diversity is thought to be in everyone's interest, even someone who is being subjected to disparaging criticisms, because it allows all of us to make more informed decisions about how to live our lives. And the idea that the assumption of risk should lie with the person who disagrees with society's prevailing standards, regardless of how offensive and degrading those standards are, is based on the premise that individuals can adjust their expectations without being psychologically affected by the transition. I do not think that social atomism, the reasonable person principle, and the use of these three liberal principles is categorically unjustified. In fact, I think that their use is quite adequate for the adjudication of most negligence cases—but not for hostile environment sexual harassment cases. The problem is that adopting the individualist model of equality places an unreasonable psychological burden on women that would prevent most of them from having an equal employment opportunity at this time. This point will be clearer if one first understands why the use of this model of equality is justified for the adjudication of most negligence cases.

CHAPTER III

A BRIEF HISTORY OF THE LEGAL CONCEPT OF REASONABLENESS AND ITS APPLICATION TO SEXUAL HARASSMENT CASES

The reasonable man/person standard occupies an important place in the history of the common law because it provides us with a method by which we can resolve many of the inevitable disputes that arise among individuals as they go about pursuing their often diverse interests.

It attempts to mediate these inevitable disputes by both respecting and eliminating all differentiations among people. It respects such differences in the sense that individuals are said to be free to pursue whatever interests they wish to so long as they do not unreasonably interfere with the liberty of others. And it is an abstract standard that is supposed to eliminate all differences because it is said to be neutral in that it purportedly does not represent the values of the judge, the jury, or any other actual person. Nancy Ehrenreich explains that this mythical being is portrayed as a mediating concept by which the competing liberty interest of the individual defendant and security interest of the plaintiff are balanced.⁴² The judge or jury is told to weigh the competing interests neutrally and objectively, not through their own lens but through the community's lens. By utilizing the community's lens, the reasonable man/person standard of care "claims to

reach consensus on what conduct society considers permissible."⁴³ As one defender of this standard, Robert Unikel, asserts, it achieves "the ultimate goal of promoting individual equality while adequately preserving community harmony."⁴⁴ It supposedly accomplishes this by imposing liability on those who injure others because we can now objectively judge what society considers to be substandard conduct.

The first time that the reasonable man standard appeared in print was in the 1837 English case Vaughan vs. Menlove, which described him as "the man of ordinary prudence." According to Caroline Forell,

Vaughan specifically rejected the defendant's standard of subjective good faith in preference for the objective reasonable man standard. The justification was that there is a minimum standard that all people are required to meet whether they are actually capable of doing so or not.⁴⁵

The reasonable person standard of care utilizes a strict form of liability when judging the defendant, who is expected to measure up to certain minimal standards, even if he or she does not recognize them or is incapable of meeting them. To quote Justice Oliver Wendell Holmes famous summation of this point in The Common Law:

When men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come to their standard, and the courts which they establish decline to take his personal equation into account.⁴⁶

The point is that the defendant may still be held liable even though he had the best of intentions and/or was trying his hardest. As applied to hostile environment sexual

harassment cases, this means that the defendant would still be held accountable for creating a hostile environment for a female employee even if he genuinely thought that his conduct was innocent and harmless.⁴⁷

This view of what constitutes reasonableness assumes that we are all more or less capable of acting rationally, and indeed, as we shall see in more detail later, this is the argument made by both Thomas Hobbes⁴⁸ and John Locke.⁴⁹ Hobbes argues that all men have equal bodily and mental capacities, not in the sense that all possess the same amount of physical strength or mental acumen, but in the senses that all hope to attain their desired ends and have the ability to accept the idea that the desired ends that others are pursuing must be respected to some degree. Similarly, Locke argues that being all equal and independent, no one ought to harm another in his life, health, liberty, or possession (property). The concept of reasonableness is an attempt to balance these sometimes competing interests, and it assumes that we are all by and large capable of understanding what the prevailing standards are and that we all have the ability to behave accordingly. This explains why the person who lacks physical coordination will still be held accountable for any mishap that he might cause. He may not have intended to topple the rare ceramic vase he was examining at the department store, but he is quite capable of knowing what consequences will follow if he should happen to topple the vase, and he is expected to calculate the additional risks that are entailed by his clumsiness. Similarly, a man may not have intended to offend a woman when he made sexual advances towards her at work, but he is quite capable of knowing what consequences will follow if he

should happen to offend her, and he is expected to calculate the additional that are entailed by his womanizing. In both instances, mental genius is not required in order to be able to identify what the prevailing standards of reasonableness are; only a minimal amount of mental acumen is required, enough to know, for example, that one's unusual clumsiness or attitudes towards women sometimes entail unacceptable risks to the security of others. Thus, the legal concept of reasonableness is founded upon the theory of formal equality, which maintains that we are all equal to the extent that we all have certain rights, have an obligation to respect the idea that others are entitled to the same rights, and have the ability to recognize and abide by the standards that constitute such respect.

Unfortunately, the reasonable man/person concept has never truly been gender neutral. During the last century formal equality was said to be inappropriate because women were not thought to be "similarly situated"; they were not considered to be the equals of men and they were often legally regarded as chattel or property.⁵⁰ Even though in theory this is no longer the case, descriptions of the apparently neutral ideal reasonable person actually still end up reflecting middle class male values: In our country the ideal reasonable person is supposed to be "the man who mows the lawn in his shirt sleeves and who takes the magazines at home."⁵¹ This standard also tends to be conservative because its neutrality is derived from existing community norms, and if these norms reflect a disparaging view of women then that will factor into how the courts will measure what counts as substandard conduct. As Nancy Ehrenreich alleges,

(t)hus, it is not so much that the reasonableness test is itself a neutral standard, but rather that it serves as a vehicle for importing an already arrived at political solution into the law.⁵²

This puts women in the position of having to change society's, or more specifically, men's, views about how they are viewed before the courts will recognize the harm that is being caused to them. Finally, our legal institutions are still largely dominated by males, and it seems intuitively obvious that masculine values will predominate in our courts so long as this gender imbalance continues.

Despite its troubled history and these ongoing problems, the reasonable person standard is still adequate for the adjudication of most cases. Caroline Forell summarizes the point nicely:

when it comes to most injuries, for example, auto accidents or simple slip and fall cases, the reasonable person standard remains appropriate . . . (T)he adoption of the reasonable person standard helps us see and acknowledge the commonalities among men and women that do exist in so many areas. When it comes to driving too fast, drunk driving or failure to remove a hazard that causes someone to slip or fall, what is considered reasonable for men should be the same as what is considered reasonable for women.⁵³

Problems arise, however, when members of different groups tend to have different understandings about what constitutes reasonable behavior, as is often, but not always, the case with hostile environment sexual harassment claims. How should the law account for such differences on those occasions when they do arise?

Hostile or abusive environment sexual harassment claims are a manifestation of Title VII of the Civil Rights Act of 1964, which states that it is "an unlawful employment

practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."⁵⁴ Over the course of the next two decades the courts very gradually came to recognize two types of sexual harassment claims, of the quid pro quo and hostile environment variety. Quid pro quo claims involve "economic" or "tangible" discrimination.⁵⁵ As Catherine MacKinnon describes it,

This category is defined by the more or less explicit exchange: The woman must comply sexually or forfeit an employment benefit . . . : "If I wasn't going to sleep with him, I wasn't going to get my promotion"; "I think he meant that I had a job if I played along"; . . . "I was fired because I refused to give at the office."⁵⁶

The legitimacy of these suits rests upon the idea that women's sexuality should not be a condition of employment.

In 1986, the Supreme Court rejected the claim that Title VII should be limited to "economic" or "tangible" discrimination. In Meritor Savings Bank V Vinson, the Court held that "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."⁵⁷

Michelle Vinson worked at Meritor Savings Bank under the supervision of vice president Sidney Taylor for four years. During that time she was promoted to teller, head teller, and branch manager. The employer and the employee both agree that these promotions were based upon merit. After being discharged for taking excessive sick leave Michelle Taylor filed a sexual harassment claim against Meritor Savings. She alleged that she had "constantly been subject to sexual harassment."⁵⁸ According to

Vinson, shortly after she was employed Taylor took her out to dinner and made sexual advances towards her. She at first refused but then relented because she feared that she would lose her job. Taylor then proceeded to make repeated demands upon her for sexual favors, usually at the branch office both during and after office hours. She had sexual intercourse with him forty or fifty more times and he also "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and forcibly raped her on several occasions."⁵⁹ She also claimed that Taylor fondled and touched other women at the bank. Taylor denied all of these allegations, "testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so."⁶⁰

The District Court denied relief for Vinson, but it did so without considering whether her allegations were true or false: It instead held that,

(i)f respondent and Taylor did engage in an intimate or sexual relationship during the time of (respondent's employment with the bank), that relationship was a voluntary one having nothing to do with her continued employment at (the bank) or her advancement or promotion at that institution.⁶¹

Questions about Taylor's conduct were simply irrelevant because Vinson had not suffered any economic or tangible discrimination, and on this basis the District Court concluded that Vinson had not been sexually harassed or discriminated against, the implication being that the psychological affects on a female employee are only relevant to the extent that they cause "tangible loss" of "an economic character."⁶² The Court of Appeals for the District of Columbia Circuit reversed the ruling and concluded that remand was necessary. The Court of Appeals argued that Title VII could be predicated on two types of

sexual harassment: "harassment that involves the conditioning of concrete employment benefits on sexual favors (quid pro quo harassment), and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment."⁶³ The Supreme Court agreed with the Court of Appeals that remand was appropriate. Justice Rehnquist, delivering the opinion of the Court, argued that there was no evidence of congressional intent to limit Title VII of the Civil Rights Act to economic or tangible discrimination, as it was intended "to strike at the entire spectrum of disparate treatment of men and women in employment."⁶⁴ The Court then proceeded to draw on the Equal Employment Opportunity Commission (EEOC) guidelines issued in 1980. These guidelines state that

'unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of an unwelcome nature' . . . constitutes 'prohibited sexual harassment,' whether or not it is directly linked to the grant or denial of an economic quid pro quo, where '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.'⁶⁵

The Court concluded "that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."⁶⁶ By way of explaining its rationale, the Court then drew upon Rogers v EEOC.⁶⁷ In this case, the Court of Appeals for the Fifth Circuit held that the giving of discriminatory service to Hispanic clientele created an offensive working environment for Hispanic employees, in that

(o)ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . .⁶⁸

The Supreme Court then held that a hostile sexual environment should be likewise prohibited. The Court elaborated on this by quoting Henson v Dundee⁶⁹ approvingly:

Sexual harassment which creates a hostile or offensive working environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.

Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.⁷⁰

The Court then went on to caution that not all conduct that can be described as harassment unreasonably affects the "terms, conditions, or privilege(s)" of employment; actionable sexual harassment "must be sufficiently severe or pervasive 'to alter the conditions of (the victim's) employment and create an abusive working environment', e.g., to quote Rogers v EEOC, 'mere utterances of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to a sufficiently significant degree to violate Title VII."⁷¹

The holding in Downes v Federal Aviation Administration is an example of such a case.⁷² An employee of the F.A.A., referred to as Ms. Jones, alleged hostile environment sexual harassment against her supervisor, Finley Downes, on the basis of four undisputed incidents:

1. Referring Ms. Jones as "the Dolly Parton of the office" in a conversation with two visitors to the facility which a female employee overheard.
2. Speculating on the frequency of Ms. Jones sexual relationships after her divorce, in a telephone conversation with her in January, 1982.
3. Describing a woman (non-employee) who wore tight shorts and repeating a joke attributed to Bob Hope about such attire to staff members.
4. Touching Ms. Jones hair on two occasions.⁷³

Circuit Judge Nies, writing for a unanimous court, reversed the previous ruling that these incidents were sufficiently severe to constitute a hostile environment. These five incidents (number four refers to two separate incidents) occurred over the course of more than three years and thus did not establish a pattern of behavior, and thus were not proven to be "representative of his conduct. . . They do not show that conduct has been repeated to a point where it is 'routine' or of 'generalized nature', i.e., has become a condition of anyone's employment."⁷⁴ Downes made no more offensive remarks "after she called him 'gross' and hung up on him during the January, 1982 telephone conversation."⁷⁵ Finally, the context in which these incidents occurred was not established. In sum, Judge Nies concluded that "(t)he record is wholly devoid of evidence that Downes' remarks interfered with anyone's work or psychological well-being."⁷⁶

The allegations that Vinson made, conversely, were clearly thought to be sufficiently severe "to state a claim for hostile environment sexual harassment."⁷⁷ In remanding the case, the Supreme Court instructed the District Court to focus on the "unwelcomeness" of Taylor's conduct rather than upon the "voluntariness" of Vinson's, even if "it presents difficult problems of proof."⁷⁸ To my mind, neither the Supreme Court or the Court of Appeals offered an adequate explicit explanation of the rationale underlying this distinction, but I assume it refers back to Vinson's claim that she only had intercourse because she feared she would lose her job if she did not.⁷⁹ Presumably, the point is that one's supposedly "voluntary" consent is a very problematic if it is given under such "unwelcome" circumstances. And finally it instructed the District Court to

follow the EEOC guideline which urge the trier of fact to consider "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."⁸⁰

Although hostile environment claims were now recognized by the Supreme Court, the especially egregious nature of the conduct alleged in Meritor presented a problem for subsequent rulings, like Rabidue. Behavior such as that directed towards Rabidue was seen as having a "de minimus" psychological effect in part because it was compared to the extreme examples considered in Meritor. Such behavior might be "extremely vulgar and crude,"⁸¹ but, when compared to Meritor, it was seen as being "not so startling as to have affected seriously the psyche of the plaintiff or other female employees."⁸² The implication is that only the most extreme kinds of behavior create a hostile environment for women, whereas merely "annoying" behavior like that directed at Rabidue does not create "an intimidating, hostile, or offensive work environment," and thus does not have "the effect of unreasonably interfering with the plaintiff's work performance."⁸³

The Supreme Court addressed this specific issue and rejected the requirement that an "actionable 'abusive environment' harassment . . . must 'seriously affect (an employee's) psychological well-being' or lead the plaintiff to 'suffer injury'" in Harris v Forklift Systems Inc.⁸⁴

Teresa Harris worked as the only female manager at Forklift Systems Inc. for a little longer than two years. Throughout that time the president, Charles Hardy, "insulted

her because of her gender and often made her the target of unwanted sexual innuendoes."⁸⁵ To be more specific,

Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "we need a man as the rental manager"; at least once, he told her that she was "a dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate (Harris') raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women and asked them to pick the objects up. He made sexual innuendoes about Harris' and other women's clothing.⁸⁶

Harris eventually complained to Hardy and he promised to stop, but shortly thereafter he asked her, again, in front of others, if she had promised a client sex in order to secure a deal? She quit shortly thereafter.

The District Court for the Middle District of Tennessee ruled in favor of Forklift and Hardy, though they did concede that this was a "close case."⁸⁷ They followed the precedent set in Rabidue and found that Hardy's offensive comments were not

so severe as to be expected to seriously affect (Harris') psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance. . . I do not believe that he created a working environment so poisoned as to be intimidating or abusive.⁸⁸

Justice O'Connor, writing for the majority, remanded this "close case" back to District Court with instructions that courts should take

a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. . . Title VII comes into play before the conduct leads to a nervous breakdown.⁸⁹

psychological injury, they also assume that only the most extreme conduct can cause enough psychological harm to unreasonably interfere with a woman's job performance or employment opportunities. By contrast, the Supreme Court ruling in Harris presupposes that conduct that falls somewhere between being merely offensive and truly appalling can reasonably be expected to cause such interference. The issue before the courts in hostile environment cases now looks more like the following: we need to examine the totality of the circumstances, "such as the nature of the sexual advances and the context in which the . . . incidents occurred,"⁹³ in order to determine whether conduct like that which Harris or Rabidue was subject to was so abusive and intimidating that it created a sexually discriminatory hostile environment. To be more specific, we need to consider whether the frequency and the severity of the "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature,"⁹⁴ given the context in which they occurred in, should be expected to have adversely affected a woman's psychological well-being to the point where it unreasonably interfered with her job performance, discouraged her from remaining on the job, or kept her from advancing in her career.

I am using the phrase "adversely affected a woman's psychological well-being" in a different sense than the Supreme Court used the phrase "seriously affect a reasonable person's psychological well-being."⁹⁵ The Supreme Court associates psychological effects with the idea of "tangible psychological injury," e.g., "conduct (that) leads to a nervous breakdown,"⁹⁶ but I think that it is important to explicitly acknowledge the term

usually has a broader meaning, a meaning well captured by Judge Keith's claim "that the presence of pin-ups and misogynous language in the workplace . . . stifles female potential and instills the debased sense of self-worth which accompanies stigmatization" in them.⁹⁷ The point is that such work environment will have a deleterious psychological effect on most women to a point where it would be reasonably expected to interfere with their job performance even it does not cause most of them to suffer tangible psychological injuries. Semantics aside, I do not think that questions about whether these types of work environments will stigmatize a reasonable person or woman are inconsistent with the Supreme Court's holding in Harris. The factors that Judge O'Connor alludes to that are supposed to distinguish "mere offensive utterance" from abusive behavior suggest the importance of considering psychological issues in the broader sense that I am using the term; as she explains, besides tangible psychological injury, other factors "may include the frequency of the discriminatory conduct; the severity; whether it is physically threatening or humiliating . . . and whether it unreasonably interferes with an employees work performance."⁹⁸ The idea expressed by her is that conduct of a sufficiently severe and frequent nature will threaten and humiliate most female workers to a point where it will unreasonably interfere with their work performances; in other words, the psychological experience of feeling threatened and humiliated by such conduct might not cause tangible psychological injuries, but having to suffer it still cannot be reconciled with the idea that women should have an equal employment opportunity. Given the importance of these kinds of effects, i.e., feeling threatened and humiliated, from now on

I am going to use the term "psychological" in the broader sense that just outlined.

CHAPTER IV

CAN THE REASONABLE PERSON STANDARD BE SALVAGED?

The question now before us is this: should we use a reasonable person or a reasonable woman standard to determine whether sexually harassing conduct is merely offensive or severe and pervasive?

It is not hard to see why many feminist scholars have argued for the adoption of a reasonable woman standard when one considers the pronounced masculine bias that has permeated and still prejudices our legal system, as well as society at large. The adoption of such a standard would help eliminate the structural inequalities that have been built into our legal system because the courts would then be required to explicitly consider female perspectives when adjudicating these type of cases; specifically, it "assures that male sexual and sexist behavior is not treated as the norm in the workplace."⁹⁹ Critics of the reasonable person standard, like Judge Keith, argue that female perspectives will remain largely ignored so long as the courts continue to use this standard:

In my view the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men. . . I would have the courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employees from the neurotic complainant. Moreover, unless 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.¹⁰⁰

Given the wide divergence between women's and men's perspectives and the fact that the former's views have been systematically marginalized, the argument is that the reasonable person perspective, however well intentioned it might be and however fair it might seem in theory because it is supposed to be neutral, is not at this time capable of yielding equitable results for women in these types of cases in practice.

Although defenders of the use of the reasonable person perspective readily acknowledge that it has been and continues to be biased towards male perspectives,¹⁰¹ they argue that the reasonable woman standard unjustifiably undermines some of the most valuable aspects of the liberal legal tradition and that the reasonable person standard should be perfected rather than abandoned.. One critic, Shirley Robin Letwin, even argues that the possibility of adopting the reasonable woman standard is "one of the most insidious threats to our liberties since World War II."¹⁰² And Unikel alleges that it undermines the fundamental principle of formal equality because it privileges women's perspectives over men's—which would be no better than privileging men's views over women's—in certain types of cases, and, as a consequence, the courts will still fail to realize the desired goal of gender equality because one group's views, in this instance women's, would now be decisive. Unikel argues that we need to preserve the principle of formal equality because it "underlies the legal system as a whole and the reasonableness principle in particular,"¹⁰³ while at the same time eliminating the gender biases that the reasonable man/person has been compromised by. Consequently, Unikel

proposes that courts should utilize a modified reasonable person standard that incorporates female decisions into judicial decisionmaking . . . Such a standard would be legally appropriate and consistent with the dominant model of formal equality. Moreover, this standard might have the concomitant effect of transforming gender stereotypes over time.¹⁰⁴

This modified standard would require the courts to abandon a single ideal for what counts as a reasonable person, e.g., the man who mows his lawn in his shirt sleeves and who takes the magazines at home, in favor of a more contextual understanding of what counts as reasonable;

the hypothetical trier of fact may not simply construct a hypothetical reasonable person and imagine how that individual would have acted" or reacted in the isolated incident or event at issue. Rather, the factfinder must evaluate the reasonableness of an individual's conduct and/or perceptions in light of that individual's vital beliefs, ideals, and physical attributes.¹⁰⁵

The courts, for example, would be required to make certain that "jury instructions . . . acknowledge and reflect the female perspective."¹⁰⁶ Thus, women's ideals and norms, their general views about what constitutes appropriate or inappropriate conduct, would be factored into "reasonableness" determinations when a woman's actions and understandings are at issue, such as in hostile environment sexual harassment cases. This would insure the inclusion of the female perspectives while still being "a formally neutral standard of general applicability."¹⁰⁷ In sum, Unikel is arguing that we can adequately integrate female's perspectives into our judicial decision making process without having to abandon "the individualistic model of equality that underlies the American legal system."¹⁰⁸

After examining Rabidue v. Osceola Refining Co., Unikel concluded that this case provides us with an "excellent" example of the proper use of the reasonable person standard.¹⁰⁹ He maintained that Judge Krupansky, the writer of the majority opinion, had properly attempted "to balance individual freedom and collective security" by establishing "'reasonableness' as an objective boundary between protected and excessive exercises of freedom."¹¹⁰ In Unikel's view, Judge Krupansky had considered both of the individual male's and female's perspectives without privileging either. If the court had used the traditionally biased reasonable man standard or the reasonable woman standard, it would, in Unikel's opinion, have preordained the outcome by privileging one group's perspective over the other's; but,

(b)y refusing to establish one group's ideals as dominant and, instead, relying on prevailing social norms for its definition, the reasonable person standard approximates the objectivity and neutrality that are ideally required by the concept of "reasonableness."¹¹¹

This, however, from a different point of view, is exactly the type of case, in fact, it is the case, that Nancy Ehrenreich used to illustrate her argument that this so called neutral standard is not really so because "it serves as a vehicle for importing an already arrived at political solution into the law."¹¹² By relying on prevailing social norms for its definition and on the principle of formal equality for its conception of equality, the reasonable person standard actually ended up approximating the view of the dominant group in society, men's.

This case does not appear to even come close to approximating the "modified" reasonable person standard that Unikel proposed. First of all, as Judge Krupansky's

comments make clear, there is no evidence that the majority abandoned, or intended to abandon, a single ideal for what counts as a reasonable person in favor of a more contextualized understanding:

(T)he trier of fact . . . must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances. Thus, in the absence of conduct which would interfere with the hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail on asserted charges of sexual harassment anchored in an alleged hostile . . . environment regardless of whether the plaintiff was actually offended by the defendant's conduct.¹¹³

The evidence suggests that judge Krupansky hardly attempted to acknowledge, let alone attempted to factor in, women's ideals and norms or their general views about what constitutes appropriate or inappropriate conduct into his reasonableness standard. Even Unikel later argues that "the more simplistic reasonable person standard utilized in Rabidue failed to recognize or highlight women's viewpoints in any meaningful sense."¹¹⁴

In addition, the majority opinion and the dissenting opinion weighed the evidence very differently. The majority opinion offered a far less detailed account of the evidence against Douglas Henry and the other workers at Osceola Refining,¹¹⁵ problematically focused attention on Rabidue's personality,¹¹⁶ and uncharitably dismissed the quid pro quo aspects of the plaintiff's complaint.¹¹⁷ Thus, the majority, supposedly employing a truly gender neutral reasonable person standard, outlined the case in a manner that strongly, if not entirely, favored men's perspectives. Krupansky's use of the reasonable person standard, and, worse still, Unikel's argument that this is an "excellent" example of a case that approximates objectivity and neutrality by refusing to establish one group's

ideals as dominant, would seem to support Judge Keith's claim that the failure to adopt a reasonable woman standard will result in the inability of courts to account for the wide divergence between men's and women's views about what constitutes appropriate conduct, as well as permit the courts to sustain ingrained notions of behavior fashioned by men.

The contrast between the two different reasonableness standards can be further clarified by considering a case where a reasonable women standard was employed, Robinson v Jacksonville Shipyards, Inc.¹¹⁸

Lois Robinson was a woman welder at Jacksonville Shipyards, Inc. ("JSI") working among six other female and 846 male craftworkers.¹¹⁹ She and the other women were continuously exposed to numerous sexual comments and pornographic displays, ranging in severity from the relatively mild (e.g., Playboy Magazine centerfolds) to the truly obscene (e.g., a picture of a spatula pressed against a woman's pubic area).¹²⁰ Such displays were sometimes directed directly at her (e.g., a picture of a naked woman with her legs spread apart was left on her tool box).¹²¹ Such pictures were even displayed in management offices.¹²² And the abuse she was subject to increased after she began lodging formal complaints.¹²³

The District Court for the Middle District of Florida held that the question before it in these type of cases is the following:

The objective standard asks whether a reasonable person of Robinson's sex, that is, a reasonable woman, would perceive that an abusive working environment has been created.¹²⁴

The Court explicitly rejected the social context argument made by the majority in Rabidue and concluded that a reasonable woman would find such conduct abusive.

Rather than focussing on the reasonable expectations that a person should have when entering into and working in a vulgar environment that exists within "the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica,"¹²⁵ it instead focussed on "the salient conditions of the work environment, such as the rarity of women in relevant work areas."¹²⁶ Given this set of considerations, the court concluded that sexual remarks and jokes, sexually oriented pictures of women, and "the non-sexual rejection of women by co-workers" will corrosively affect the psychological well-being of a reasonable woman placed in these circumstances.¹²⁷ Thus, they rejected the claim that such conduct only has a "de minimus" psychological effect and argued that allowing it cannot be squared with Title VII's promise to open the workplace to women:

When the pre-existing state of the work environment receives weight in evaluating its hostility to women, only those women who are willing to and can accept the level of abuse inherent in a given workplace—a place that may have historically been all male or historically excluded women intentionally—will apply to and continue to work there. It is absurd to believe that Title VII opened the doors to such places in form and closed them in substance.¹²⁸

In large part, these conclusions about the psychological effects of sexually charged conduct in the workplace were drawn from the expert testimony of two witnesses, psychologist Susan Fiske and K.C. Wagner, "a consultant in the area of issues regarding women and the work environment."¹²⁹

Fiske studied stereotyping, which she defined as "category based responses in the human thought and perceptual processes,"¹³⁰ and its effect on people in employment settings. When categorizing people along group lines, "a person tends to maximize the differences among groups, exaggerating those differences, and minimize the differences within groups."¹³¹ Given these prejudices, workplace discrimination sometimes occurs because members of one group are inclined to view members of another group less favorably, often evaluating these individuals in terms of the characteristics associated with the group rather than on the basis of job performance. In this instance,

(categorizing) a female employee along the lines of sex produces an evaluation of her suitability as a "woman" who might be expected to be sexy, affectionate, and attractive; this female employee would be evaluated less favorably if she is seen as not conforming to that model without regard to her job performance.¹³²

There are four preconditions that enhance the effects of stereotyping in the workplace: rarity, priming for category sensibility, work environment structure, and the ambience of that environment. Rarity exists when an individual's group comprises a small percentage of the workforce in a given environment, and members of such a group "typically elicit extreme responses from members of the majority group," e.g., substandard female employees receive evaluations that are worse than they actually deserve.¹³³ Priming or "category accessibility" occurs when "specific stimuli in the work environment prime certain categories for the application of stereotypical thinking."¹³⁴ In this case, pornographic displays encouraged a significant percentage of the male workforce to treat women as sex objects. The frequency of stereotyping increases if the hierarchy of the work environment structure is dominated by members of certain groups. The impact of

women's concerns is diminished because the men in power "perceive those complaints less favorably and take them less seriously," e.g., male supervisors trivialized the complaints made by Robinson and other female craftworkers and raised doubts about their sexual preferences.¹³⁵ Finally, an unprofessional ambience at the workplace promotes stereotyping, i.e., women are much more likely to be treated as sex objects when profanity or sexual joking commonly occur.¹³⁶

Not surprisingly, a nonprofessional ambience has much more adverse effects upon women than it does upon men:

when sex comes into the workplace, women are profoundly affected . . . in their job performance and in their ability to do their jobs without being bothered by it. The effects encompass emotional upset, reduced job satisfaction, the deterrence of women from seeking jobs or promotions, and an increase of women quitting jobs, getting transferred, or being fired because of the sexualization of the workplace. By contrast, the effect of the sexualization of the workplace is "vanishingly small" for men.¹³⁷

As a result, women must "constantly monitor" their behavior and "conform" it to the existing stereotypes, "either by becoming sexy and responsive to the men who flirt with them or by becoming rigid, standoffish, and distant so as to make it clear that they are not interested in the status of sex object."¹³⁸

Wagner's studies focus on "common patterns and responses to sexual harassment."¹³⁹ She argued that the women who work at JSI are particularly likely to be subject to a sexualized environment because they are a small minority employed in a nontraditional field. Under these circumstances, sexually charged conduct causes women to suffer "stress effects" while adopting "common coping patterns." There are five typical

coping strategies that women select depending on "her personal style, the type of incident, and her expectation that the situation is susceptible to resolution:

(1) denying the impact of the event, blocking it out; (2) avoiding the workplace or the harasser, for instance, by taking sick leave or otherwise being absent; (3) telling the harasser to stop; (4) engaging in joking or other banter in the language of the workplace in order to defuse the situation; and (5) threatening to make or actually making an informal or formal complaint.¹⁴⁰

Formal complaints are the most rare because women fear that the problem will not be addressed, that it will escalate, and they experience "embarrassment in the process of reporting."¹⁴¹

The stress effects of sexual harassment, which are officially recognized by the American Psychiatric Association, can take several forms and affect a high percentage of women:

'work performance stress' . . . includes distraction from tasks, dread of work, and inability to work . . . '(E)motional stress' . . . covers a range of responses, including anger, fear of physical safety, anxiety, depression, guilt, humiliation, and embarrassment. Physical stress . . . may manifest itself as sleeping problems, headaches, weight changes, and other physical ailments. A study by the Working Women's Institute found that ninety-six percent of sexual harassment victims experienced emotional stress, forty-five percent suffered work performance stress, and thirty-five percent were inflicted with physical stress problems.¹⁴²

Finally, stress related problems increase greatly when women feel that their complaints are not going to be acted upon and when they have to maintain vigilance against further incidents.¹⁴³

In essence, the Court in Robinson offered the following rationale for its conclusion: Considering the totality of the circumstances at JSI which enhance the effects

of stereotypes at the workplace—the rarity of craftswomen, the pornographic priming that leads women to be categorized as sex objects, the male dominated power structure, and the unprofessional ambience—the cumulative, corrosive impact of the conduct that Robinson was subject to—the sexual remarks and jokes, the sexually-oriented pictures, and the nonsexual rejection of women by coworkers—was severe and pervasive enough to affect the psychological well-being of a reasonable woman placed in these conditions. Such conduct would reasonably be expected to cause her enough physical, emotional, and "work performance" stress while forcing her to adopt coping strategies—to the point where her ability to do her job would be interfered with. Considering all of this, it would be normal for someone in her position to suffer reduced job satisfaction, decline seeking a job or a promotion, quit, transfer, or be fired.

The District Court explicitly rejected the rationale proffered by the majority in Rabidue, which the defense in Robinson used to claim that "sexually-oriented pictures and sexual remarks standing alone cannot form the basis for Title VII liability."¹⁴⁴ The District Court held that Rabidue's "social context" argument could not be squared with holdings in race based cases or with those in some other sexual harassment cases. For example, in Walker v Ford Motor Co. the Eleventh Circuit Court held that "the social milieu of . . . the workplace does not diminish the harassing impact of racial slurs," and analogously, since the analysis for sexual and racial harassment cases are no different, a sexualized social milieu does not diminish the impact of sexual slurs when they occur in the workplace either.¹⁴⁵ Thus, behavior which "may be permissible in some settings . . .

can be abusive in the workplace."¹⁴⁶ The District Court also argued that this social context argument lacked a sound analytical basis because sexualized conduct directed at women in the workplace was more likely to cause them harm. The District Court sighted work done by Kathryn Abrams, who argued that there are several reasons for this: it is easier to avoid or protest against pornography outside of the workplace; pornographic displays within the workplace clearly represent the views of coworkers, sometimes even of supervisors, whereas such displays outside of the workplace are not so easily attributed to individuals, especially to those who have power over her or whom she must relate with regularly; and such displays communicate the message that a woman is viewed more as a sexual object than as a coworker.¹⁴⁷ For all of these reasons, the District Court concluded that the social context argument in Rabidue had not adequately factored in the "totality of circumstances" that female workers like Rabidue and Robinson face when they work in a sexually charged, predominantly male environment.

The rulings in Rabidue and Robinson illustrate that the adoption of a reasonable person and a reasonable woman standard entail a whole range of differing commitments regarding how hostile environment cases will be adjudicated. Even if the Rabidue majority had abandoned the criterion that conduct must cause a woman serious psychological harm in order to constitute harassment, in keeping with the Supreme Court's holding in Harris, their ruling still might have favored Osceola Refining. The majority still might have concluded that the displays and conduct that Rabidue was subject to did not cause her enough psychological harm to interfere with her ability to

work there because of the reasonable expectations that she should have had when she accepted the position, and because the behavior directed towards her and other women should be evaluated in the context of a society that condones such behavior. The point is that this type of reasonableness test would still be based upon the traditional liberal ideals that Unikel supports and Ehrenreich identified and criticized when she analyzed Rabidue: responsibility for the free choices one makes, tolerance of diversity, and an appeal to societal consensus regarding what counts as acceptable or unacceptable behavior.¹⁴⁸

The ruling in Robinson amounted to a de facto rejection of these traditional liberal ideals. The District Court focused on the rarity of women in the work area rather than on Robinson's voluntary acceptance of the position, examined the effects that a predominantly male work environment would normally have on female employees instead of arguing that we need to tolerate and protect the working class culture that exists at JSI, and dismissed the social context argument made by the majority in Rabidue on the grounds that very few women would have equal employment opportunities under such circumstances. If Unikel examined this ruling, he would almost undoubtedly argue that this approach to hostile environment cases undermines the fundamental principle of formal equality because it privileges the views held by most women over the views held by most men. In Unikel's view we do not need to do this in order to assure women equal employment opportunities, as a truly neutral and properly utilized "modified" reasonable person standard can achieve this end for women.

At bottom, Unikel's criticisms of the reasonable woman standard and his defense of formal equality and the other traditional liberal ideals rests upon his commitment to individualism. In his view, the reasonable woman standard is fundamentally flawed because it adopts a pluralistic group rights perspective, a perspective that "treats each woman primarily as a member of a particular gender group and establishes that group's norms as the measure of appropriate conduct."¹⁴⁹ He goes on to argue that individuals are affected by their various group memberships, but not to the extent that advocates of the reasonable woman standard maintain, and, as we shall see in Part Two, not to the extent that they are not similarly situated because of the history of discrimination that women have suffered. As he puts it,

(i)ndividualism recognizes that group membership influences the individual; but individualism permeates the individual, not the group, identity.¹⁵⁰

What does this mean? The idea that one's identity can be separated from one's various group memberships reflects a commitment to one crucially important aspect of social atomism, especially as that theory has been developed and incorporated into the law from the work done by Hobbes and Locke. I will now examine their respective social contract and social atomistic theories, as well as more contemporary versions of individualism and some theories of the self that criticize liberal individualism, in greater detail in order to answer this question. In turn, answers to this question will help us better understand why Unikel concludes that the adoption of a modified reasonable person standard would provide an adequate solution for the hostile environment problems women have faced at the workplace.

PART II

A PLAUSIBLE DEFENSE OF THE RABIDUE RULING: EXAMINING THE IMPLICATIONS THAT FOLLOW FROM POSITING AN INDIVIDUALIST THEORY OF THE SELF

What Clarence Thomas allegedly did to Anita Hill boils down to pestering her for dates and talking dirty. Even if she's telling the whole truth—which I doubt—I'm not sure we want people being hauled into court for that sort of crass behavior.

—Stuart Taylor Jr., of the American Lawyer¹⁵¹

How can the law say one person's lewd and another's nice? There are so many different taste levels. . . . We condone sexual jokes and innuendoes in the media—a movie might get a PG rating—and yet an employee can be called on the carpet because the same thing bothers someone in an office.

—Susan Hartzoge Gray, a labor lawyer¹⁵²

CHAPTER V

INTRODUCTION

As I outlined in Part I, the arguments made by Judge Krupansky in Rabidue V. Osceola Refining¹⁵³ appear to be quite paradoxical. How can he describe Douglas Henry's behavior as being extremely vulgar and crude, on the one hand, and yet claim that it is not so startling as to have seriously affected the psyches of female employees, on the other? Why would it be unreasonable to conclude that a proliferation of such admittedly extreme behavior would create an intimidating, hostile, and offensive work environment and thus interfere with the plaintiff's ability to do her job? Why would a reasonable person (who is a woman) merely be annoyed by such blatant displays of misogyny?¹⁵⁴

Robert Unikel's claim that the majority opinion in Rabidue represents an "excellent" example of the proper use of a "reasonable person standard also appears to be paradoxical.¹⁵⁵ By Unikel's own admission, Judge Krupansky scarcely acknowledged or factored in women's perspectives about what constitutes substandard conduct into his ruling.¹⁵⁶ Further, even though the majority obviously appeared to favor male's perspectives over female's, Unikel still claims that they refused to establish "one groups' ideals as dominant."¹⁵⁷ Finally, Unikel argued that this standard is objective and neutral because it relies "on prevailing social norms for its definition,"¹⁵⁸ but, even if this is true,

given the misogynous quality of these prevailing norms, it is difficult to see how this standard would then achieve his stated goal of eliminating the gender biases that the traditional reasonable man/person standard has been compromised by.¹⁵⁹

A commitment to liberal individualism explicitly underlies Robert Unikel's argument that the courts should adopt a "modified" reasonable person standard instead of a reasonable woman standard.¹⁶⁰ He argues that a gendered reasonableness standard is inconsistent with the individualistic model of equality that underlies American jurisprudence because it adopts a group-rights based perspective, a perspective that "treats each woman primarily as a member of a particular gender group;"¹⁶¹ individualism, by contrast, recognizes that group membership influences but does not permeate the individual. This idea is based upon a theory of the self which maintains that human beings are free to accept or reject society's customs and habits because of our ability to subject them to critical scrutiny. Because we have the ability not to assent to any ideas until we conclude that it is true, we can simply choose not to be psychologically affected by the views that others express about us. On this view, a reasonable woman should merely be annoyed and consequently not be seriously affected by blatant displays of misogyny or by working in an anti-female work environment like the one at Osceola Refining. Moreover, if she is seriously affected by working in such an environment, it is because she is being irrational; she is allowing the views expressed by others to have a deleterious effect upon her because she is not making the right judgment on the basis of sound reason. Considering the importance of these ideas, the purpose of this part of my

dissertation is to examine the implications that positing liberal individualism has for the adjudication of hostile environment sexual harassment claims.

First, I will examine the basic frameworks of Hobbes' and Locke's social contract theories in order to show how their respective theories furnish the foundation for the three principles used by the majority in the Rabidue ruling: social consensus as mediator, tolerance of diversity, and assumption of risk. I will then argue that liberal individualism has important implications for how these traditional liberal principles are applied in hostile environment cases. I think that the positing of this theory of the self implicitly promotes the primacy of civil liberties over civil rights and the value of freedom of expression over concerns about the conditions that give rise to such expressions or the harm that such expressions will cause others. To be more specific, the social consensus arrived at appears to be neutral rather than skewed towards certain group's perspectives because it is assumed to be the outcome of a fair debate conducted among equal individuals from a plurality of backgrounds. Wide-ranging tolerance of diversity is thought to be in everyone's best interest, even someone who is being subjected to disparaging criticisms, because it provides all of us with more ideas and information about different lifestyles, which in turn supposedly allows everyone to make better decisions about how to live their own lives. And the idea that the assumption of risk should lie with the person who fails to acclimate one's self to society's standards, regardless of how offensive and degrading those standards are, is based upon the premise

that individuals can adjust their expectations to conform to society's norms, at least to the point where they will not be greatly effected by how others view them.

I will then briefly examine Descartes', Hobbes', and Locke's social atomistic theories of the self, as well as three types of contemporary theories of the self, individualism, communitarianism, and cultural feminism, in order to explain what Unikel meant when he claimed that we are first and foremost individuals and only secondarily members of a group. Although modern individualism, communitarianism, and cultural feminism criticize social atomism for being excessively individualistic, I will argue that all of these theories are themselves excessively individualistic because they either explicitly claim or strongly imply that individuals are capable of being psychologically unaffected by how others view them if they act rationally. If this is correct, these theories cannot explain why courts should adopt a group-rights based perspective instead of an individual-rights based perspective.

I will then draw out some of the implications that positing the idea that we are first and foremost individuals and only secondarily members of a group has for the adjudication of hostile environment cases. I will argue for three related conclusions. One, the majority ruling in Rabidue and Unikel's claim that courts should adopt a modified reasonable person standard actually have a great deal of force if one accepts the arguments made by Hobbes and Locke and other proponents of liberal individualism. Two, arguments for the adoption of a reasonable woman standard do appear to be discriminatory and unnecessary if we are primarily individuals and only secondarily

members of groups. If we are all equally capable of critically reflecting on and rejecting our inherited group associations, a woman should not be severely affected by sexually charged conduct and displays at the workplace, certainly not to the point where such an environment would stifle their potential and instill in them "the debased sense of self-worth which accompanies stigmatization."¹⁶² Consequently, if the above is true, women's generally held views do not need to be privileged over those held by men in order to assure them equal employment opportunities. And three, arguments that courts should adopt a reasonable woman standard, or any group-rights based standard, would have more force if they were based upon a theory of the self that demonstrated why group identity is of primary importance. Such a theory would explain why a reasonable woman would be profoundly affected by being subjected to misogynous displays while working in a traditionally all male environment.

Thus far I have argued that what Nancy Ehrenreich described as "the traditional mediating constructs used in liberal legal thought"¹⁶³—social consensus as mediator, tolerance of diversity, and assumption of risk—cannot be justified without positing individualism, i.e., the majority holding in Rabidue ultimately rests on the idea that a rational female employee can simply refuse to be hurt by being subjected to an anti-female work environment like the one that existed at Osceola Refining. I will use the conclusion to go one step farther and argue that taking a group-rights based perspective is not necessarily incompatible with the basic ideals that underlie liberalism. First, I am going to briefly identify the common features that Hobbes' and Locke's social contract

theories share. Second, I will use a distinction between Individualist and altruistic models of jurisprudence drawn by legal scholar Duncan Kennedy¹⁶⁴ in order to demonstrate that the moral content of individualism is separable from the basic features of Hobbes' and Locke's social contract theories, even if both of them were committed to social atomism. And third, I will argue that the distinction between individualist and altruistic models that Kennedy argues for should be replaced by a distinction between individual-rights and group-rights based models; I think that Kennedy's contrast is ill advised because it strongly implies that adopting a group-rights based reasonableness standard amounts to asking a man like Douglas Henry to sacrifice his legitimate self-interests to help a woman like Vivienne Rabidue because she is not capable of being self-reliant. Instead, I will argue that adopting a group-rights based reasonableness standard is quite compatible with the individualist ideal of self-reliance.

Finally, a few words of caution to the reader. The purpose of this part my dissertation is not to defend liberal individualism and the majority opinion in Rabidue—quite the opposite—but rather to offer a plausible defense of them. The difference between the two is the difference between a sound argument and a valid argument. My purpose is to demonstrate that the arguments made by the majority in Rabidue and Unikel's proposal that courts adopt a modified reasonable person standard are valid, meaning that they logically follow from positing the idea that we are first and foremost individuals and only secondarily members of a group. I do not think that these arguments

are sound because this idea cannot withstand critical scrutiny. My point is that arguments for the adoption of a group-rights based reasonableness standard need to be based upon a new theory of the self, one that largely rejects the radical autonomy that 17th century and modern individualism, as well as communitarianism and cultural feminism, posit and explains why it would be reasonable to expect a woman like Vivienne Rabidue to suffer psychological harm while working in an environment like the one at Osceola Refining.

CHAPTER VI

AN EXAMINATION OF HOBBS' AND LOCKE'S CONTRIBUTIONS TO THE REASONABLENESS STANDARD

The purpose of this chapter is to outline the basic frameworks of Hobbes' and Locke's social contract theories in order to show the extent to which they inform—and fail to inform—the legal concept of reasonableness, in general, and the use of the reasonable person standard by the Rabidue majority, in particular. I will argue that the basic commitments that underlie liberalism are different from those that underlie individualism. Although social consensus as mediator, tolerance of diversity, and assumption of risk are traditionally identified as liberal principles, I do not think that the Rabidue majority could have appealed to them without also tacitly positing individualism, i.e., a commitment to these three liberal principles by itself does not adequately explain why the psychological impact of extremely crude and offensive behavior is diminished because of the social context within which these behaviors occurred. In the subsequent three chapters I will argue that the way these traditional liberal principles were applied by the Rabidue majority presupposes a commitment to the idea that individuals can simply choose not to be psychologically affected by how others view them, and this explains why

someone like Vivienne Rabidue would not be reasonably expected to suffer psychological harm while working in an anti-female environment.

Hobbes' social contract theory begins with the most basic conclusions about the similarities and differences between human beings and animals. Hobbes argued that human beings are animals who, like other animals, have two kinds of motions: vital motions, like digestion, which take place without any effort; and voluntary motions, like speaking, that only occur after they are "first fancied in our minds."¹⁶⁵ The origin of voluntary motion can ultimately be traced back to our imaginations which lead us to have appetites, which manifest themselves as either desires or aversions, which are absent (e.g., a desire to fall in love in the future), or love and hate, which are present (e.g., being in love). Some appetites (e.g., the one we have for food) are innate while others are products of our experience (e.g., a desire to be a carpenter). What counts as good is relative to what one desires or loves and what counts as evil is relative to what one is averse to or hates. Hope and despair result from our ability or inability to secure our desires or to avoid being subject to our aversions. Deliberation is always related to our passions: How do I secure this desire or avoid that aversion. All animals deliberate in this sense, but humans also have intellectual virtues, and these are either natural or acquired. The amount of natural ability one has is inversely proportional to the baseness of one's passions. Acquired wit, on the other hand, involves other causal factors such as education. The more power we desire—which is either for riches, knowledge or honor—the more we work at acquiring wit.¹⁶⁶

Hobbes' social contract is founded on this theory of human nature. Although we do not all possess equal mental or physical capacities, Hobbes nonetheless argues that we are all fundamentally equal because an individual's deficiencies in one respect can be compensated for by other factors:

Nature hath made men so equal, in the faculties of the body and the mind; as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together, the difference between man and man is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend as well as he.¹⁶⁷

Physical weakness can be compensated for by mental shrewdness or by allying one's self with others; mental deficiencies can be compensated for through experience gained over time. Thus, we all have a more or less equal chance of attaining our ends, and we all act as though we can do so and have a right to do so. Unfortunately, such rough equality among us only leads to greater competition and more distrust:

From this equality of ability, ariseth equality of hope in the attaining of our ends. And therefore if two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and endeavour to destroy, or subdue one an other.¹⁶⁸

Further, we seek approval from others, what Hobbes calls glory, and we become angry at every slight and all signs of contempt. Thus, unless we are living under a common power, we are in a state of war with one another, even if we are not presently engaged in a war; for the state of war also consists in the disposition to war, manifested in the deleterious effects that come with fear of such conflict. Civilization and its benefits are absent when we are in a state of war because it is not prudent for individuals to make the necessary investments for a culture or a community to flourish:

In such conditions there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, or removing, such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society.¹⁶⁹

Worst of all, since there is no security, the life of man is "solitary, poor, nasty, brutish, and [presumably for the worse] short."¹⁷⁰

Given these conditions, our ability to reason allows us to realize that our appetites are best served when we emerge from the state of war. The pursuit of our respective appetites leads to the state of war, but, as Hobbes commentator Frederick Coplestone explains,

at the same time fear of death, desire of such things as are necessary to commodious living, and hope of attaining these things by industry . . . incline men to seek . . . peace.¹⁷¹

Peace, civilization, and individual security can only be attained when the commonwealth is established and society is organized. This desire to form a civil government is thus a law of nature for Hobbes, in that it follows from what Hobbes calls the dictates of right reason. These dictates are general rules, found out by reason, which demonstrate that society and stable government best secure our self-preservation and security. To be more specific, there are three laws of nature or dictates of right reason: The first and fundamental law of nature states that "every man ought to endeavor peace, as far as he has hope of attaining it; and when he cannot obtain it, that he may seek, and use, all helps and advantages of war."¹⁷² The second law states that it is in an individual's best interest to renounce one's right to all things if everyone else is also willing to do so. And the third

law is that we ought to abide by the agreement so made in order to avoid returning to the state of war. We are no longer as free as we were in the state of war, but justice is secured because we are all now in a better position to attain our respective desires while not being so subject to our respective aversions.¹⁷³

Like Hobbes, Locke argues that prudence is the motivating appetite that drives our conduct. However, unlike Hobbes, Locke does not offer an elaborate theory to support this view. Rather, he simply posits the claim that we are innately inclined to desire happiness while simultaneously being averse to misery.¹⁷⁴ Locke also thinks that the quest for the esteem of others is one of our greatest appetites: In his personal journal he commented,

(t)he principal spring from which the actions of men take their rise, the rule they conduct them by, and the end to which they direct them, seems to be credit and reputation, and that which at any rate they avoid is in the greatest part shame and disgrace.¹⁷⁵

Locke also argues that what counts as good or evil is relative to our respective desires and aversions:

That we call good which is apt to cause or increase pleasure, or diminish pain in us, or else to procure or preserve us the possession of any other good or the absence of any evil. And, on the contrary, we name that evil which is apt to produce or increase any pain, or diminish any pleasure in us, or else to procure us any evil, or deprive us of any good.¹⁷⁶

Unlike Hobbes, Locke argues that the state of nature is not synonymous with the state of war. The difference is that Locke claims that we are naturally inclined to be moral as well as prudent. While there are no innate moral laws, there are moral laws, which come

from God, that individuals can come to know from experience through reflection to varying degrees:

There is a great deal of difference between an innate moral law and a law of nature, between something imprinted upon our minds in this very original, and something that we being ignorant of, may attain to the knowledge of by the use and due application of our natural faculties.¹⁷⁷

These moral laws take the following basic form: "being all equal and independent, no one ought to harm another in his life, liberty, or possession."¹⁷⁸ All people are naturally free and equal in the state of nature, and as such are not only obligated to respect one another but are also required to love one another.

According to Locke, even though we generally recognize and acknowledge such views in the state of nature, a government with positive laws and the ability to coerce compliance because of the threat of punishment is more likely to secure the desired behavior. Three specific problems that arise in the state of nature drive people into civil society. First, people do not always conform to the laws of nature because they do not always study them enough. They also tend to act prudentially and are often biased. The solution to these problems is a written version of the moral laws. These objective standards will facilitate a better common understanding of the law and provide a mechanism for the adjudication of controversies. Second, people tend to be overzealous when they have been, or feel that they have been, treated unjustly. And third, some people are not capable of punishing others for crimes that are committed against them. The last two problems can be remedied by a law enforcement system capable of exacting punishment. Thus, it is in our respective best interests to consent to form a government

in order to preserve our lives, liberties, and property. We give up our individual executive and legislative powers but come to enjoy our liberty more securely.¹⁷⁹

Much of what was just outlined may seem overly obvious or, in some cases, obviously wrong, but the basic frameworks of Hobbes' and Locke's respective social contracts do indeed supply the foundation that underlies the legal concept of reasonableness. Both Hobbes and Locke see human beings primarily as rational, independent utility maximizers, who, as diverse individuals, go about trying to secure what they consider good while avoiding what they consider evil. While Locke and Hobbes disagree about whether there are natural moral laws, they both do agree that what counts as good or evil is relative rather than absolute. Further, given that we are all more or less equal, we must respect the liberty of others to pursue what they think will best secure their own happiness unless it unreasonably interferes with the ability of another or of others to do the same. These views serve as an important justification, perhaps the most important justification, for the idea that the law needs to respect and mediate between our often different and conflicting interests. Although they disagree about the extent to which a government should be answerable to its constituents, and even about who should establish the laws,¹⁸⁰ they both agree that the reason we enter into a social contract is because we can better secure our individual liberties; they may view the quality of life in the state of nature very differently, but they both agree that it is worth foregoing when compared to the benefits that come with living in civil society. In sum, both theorists see all of us as distinct and independent individuals who are in need of

political authority to mediate the inevitable disputes that arise as we go about pursuing personal, rather than collective, goals.

I am now going to demonstrate how their ideas inform the legal concept of reasonableness, in general, and the use of the reasonable person standard to Rabidue, in particular.

First, the overall desirability of establishing and abiding by a community wide reasonableness standard is an extension of Hobbes' dictates of right reason and Locke's moral laws in that adhering to it helps move us out of the state of nature and into civil society. The pursuit of our respective appetites leads us to a state of war, but our ability to reason allows us to realize that our appetites are best served when we establish a civil government with a written version of the laws and a viable law enforcement system. Similarly, the concept of reasonableness provides us a means by which we can distinguish a protected expression from an excessive infringement on the rights of another. We can no longer do whatever we want to, as we could if there were no objective standards, and we may strongly disagree with many of the particular standards that are established, but it is still prudent for us to respect the constraints placed upon our behavior so long as the same constraints are being placed upon everyone else. To paraphrase Hobbes' second dictate of right reason, it is in an individual's best interest to renounce her or his right to all things if the rest of the members of the community are also willing to do so. Similarly, it is in our respective best interests to abide by the prevailing standards of reasonableness, which entails that we must sometimes renounce our right to all things, in

order to help preserve our lives, liberty, and property. We give up our respective executive and legislative powers, but justice is more secure because we are all now in a better position to attain our respective desires while not being so subject to our respective aversions.

Second, their arguments that we are all more or less equal, or at least that we all deserve to be treated equally, furnish the motivation for the adoption of a reasonableness standard. Conflicts inevitably arise because people act prudentially and are often biased, but the reasonableness standard provides a mechanism for the adjudication of these controversies. It is a means by which our often competing concerns can be fairly balanced without favoring particular individuals or groups. In a hostile environment case like Rabidue v. Osceola Refining, where the two different ways that Rabidue and Douglas Henry are pursuing their respective interests are clearly in conflict, the rights of both the plaintiff and the defendant must be respected equally. Further, in keeping with claims that what counts as good or evil is relative, there is no a priori notion of what constitutes inappropriate behavior that can be appealed to. Consequently, courts are not supposed to legislate from the bench by favoring one group's norms over another's, no matter how disagreeable one group's views might appear to be. Instead, they are supposed to appeal to the prevailing social consensus to mediate the dispute between them by asking what a reasonable person would think. This is exemplified by the Rabidue majority's claim that

Sexually oriented poster displays had a de minimus effect on the plaintiff's work environment 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.¹⁸¹

Perhaps the majority used the wrong standards of measurement, but they concluded that the prevailing standards at newsstands, on prime-time television, at the cinema, and in other public places accurately measured the prevailing social consensus. They then proceeded to use this supposed consensus to decide whether the conduct directed towards Rabidue and other female employees at Osceola Refining was substandard.

Third, the idea that what counts as good or evil is relative to our often differing respective desires and aversions entails that the courts should tolerate the expression of the widest variety of differing views possible.. There are two interrelated ideas at work here: Individuals often have different and sometimes conflicting views about what will bring them happiness and, as I just mentioned, there is no absolute standard that can be used to judge the worth of an individual's views or conduct. Consequently, courts should make as few judgments as possible about what constitutes appropriate or inappropriate behavior in order to allow individuals as much latitude as possible to pursue what they think will bring them happiness. And when they must make such judgements, courts should not "legislate from the bench" by imposing a particular groups' views about what constitutes substandard conduct on the larger society. This rationale is also well illustrated by the majority's ruling in Rabidue:

It cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar . . . (I)t can never be forgotten that Title VII is the Federal Court's mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was meant to bring about a magical transformation in the social norms of American workers.¹⁸²

Thus, the court depicted the so called working class culture that Rabidue was subject to disparagingly, describing it as "rough hewn and vulgar," but nonetheless concluded that such behavior should be tolerated by a reasonable person in a pluralistic society. It also concluded that tolerating such expressions is not inconsistent with Title VII's goal of affording female workers equal employment opportunities, the assumption being that giving the Douglas Henry's of the world the latitude to pursue what they think will bring them happiness will not unreasonably interfere with the ability of someone like Vivienne Rabidue to pursue what will bring her happiness.

Fourth, the idea that people can choose to enter into a social contract presupposes that most of us are capable of understanding what the prevailing norms are and that we have the ability to behave accordingly. This implicit assumption underlies Hobbes' dictates of right reason: if most people could not recognize and abide by the laws established by the state, it would not be prudent for someone to forego the advantages of the state of nature by renouncing one's right to all things because that person should not be confident that others could follow the laws. The chances of living peacefully and commodiously would be too remote under such circumstances, and thus it would be prudent for an individual to seek and use "all helps and advantages of war."¹⁸³ Similarly, the concept of reasonableness could not be used to mediate between and among our sometimes competing interests unless most of us have the ability to recognize and abide by these standards. This point may seem rather obvious, but it has important implications for the legal concepts of assumption of risk and strict liability.

As I outlined in Part One, the fact that a person who lacks physical coordination will still be held accountable for any mishap that he might cause rests on the idea that he can recognize and accept certain community standards. He might not intend to topple a rare ceramic vase in a department store, but he is quite capable of knowing what consequences will follow if he breaks the vase, and he is expected to calculate the additional risks that are entailed by his clumsiness. Similarly, a man who unintentionally offends a woman by making sexual advances towards her at work is quite capable of knowing what consequences will follow if he offends her by behaving in a manner that society at large deems substandard, and he is expected to calculate the additional risks that are entailed by his womanizing. Mental genius is not required to recognize the prevailing reasonableness standard in either instance; only a minimal amount of ability is required, enough to know that one's unusual clumsiness or attitudes towards women sometimes entail unacceptable risks to someone else's security. Thus the legal concept of reasonableness is based upon the idea that we are all equal to the extent that we all have certain rights, have an obligation to respect the idea that others are entitled to the same rights, and have the mental ability to recognize and accept the standards that constitute such respect.

Ironically, I think that the majority applied a somewhat similar logic in Rabidue, not to Henry but to Rabidue. The court assumes that the plaintiff is able to recognize that Henry's behavior largely falls within societal norms for what counts as acceptable conduct and she is then expected to adjust her expectations accordingly, even if it is at her own

peril. This plausibly explains what Judge Krupansky meant when he argued that courts should consider "the lexicon of obscenity" that pervaded "the workplace both before and after the plaintiff's introduction" and "the reasonable expectations of the plaintiff upon voluntarily entering" into such an environment.¹⁸⁴ She is expected to be able to identify what the existing workplace norms are, and consequently should have known what she was getting herself into when she voluntarily took the position. While it is true that the man who unintentionally offends a woman by behaving in what society deems a substandard fashion can be held liable for his conduct, it is also true that the man who intentionally offends a woman by behaving in a permissible fashion will not be held liable. In fact, in the latter instance, a woman is expected to assume the risks to herself that are entailed by her overly sensitive attitudes, just as the person who lacks coordination is supposed to assume the risks to himself that his excessive clumsiness entails. Thus strict liability and assumption of risk are interrelated: we are all equal to the extent that we all possess certain rights, which we are free to exercise within the boundaries established by society's prevailing norms; and we all have an obligation to respect the idea that others are entitled to the same rights, knowing full well that one can be held strictly liable for failing to respect them and that one assumes the risk of adjusting one's expectations to accord with them.

The problem with using these traditional liberal ideals to adjudicate hostile environment cases is that they appear to place an unreasonable burden on the plaintiff. Judge Krupansky claims that "Title VII is the Federal Court's mainstay in the struggle for

equal employment opportunity for the female workers of America,"¹⁸⁵ but it is difficult to see how most female workers would have an equal opportunity to compete with males in such an anti-female environment.

How could Krupansky conclude that being exposed to displays of nude or partially clad women belonging to a number of employees on a daily basis and having to work with "an extremely vulgar and crude individual who customarily made obscene comments about women generally, and on occasion, directed such obscenities to the plaintiff"¹⁸⁶ should not have had "the effect of unreasonably interfering with the plaintiff's work performance?"¹⁸⁷ Rabidue should be able to recognize what society's prevailing norms are and perhaps she should have expected the environment at Osceola Refining to be anti-female, but it does not ipso facto follow that such conduct and displays should only have a de minimus psychological effect upon her. Yet this is exactly what judge Krupansky argued, claiming that such conduct, "although annoying, (was) not so startling as to have affected seriously the psyche of the plaintiff or other female employees."¹⁸⁸ Even if Rabidue should not have been startled by the misogynous work environment at Osceola, why does it follow that she should only be annoyed when a co-worker in another department says of her, "All that bitch needs is a good lay," calls her "fat ass" or routinely refers to women as "whores," "cunt," "pussy," or "tits"?¹⁸⁹

As I outlined at the end of Chapter Four, the Robinson trial court explicitly rejected the social context arguments made by the majority in Rabidue, claiming that a sexualized social milieu does not diminish the impact of sexual slurs when they occur at

the workplace.¹⁹⁰ Further, it focussed on the rarity of women in the workplace rather than on Lois Robinson's voluntary acceptance of the position, and examined the effects that a predominantly male work environment would normally have on female employees instead of arguing that the working class culture that exists needs to be protected. Given these considerations, it then concluded that sexual remarks and jokes, sexually oriented pictures of women, and "the non-sexual rejection of women by co-workers" will "corrosively effect the psychological well-being of a reasonable woman placed in such circumstances."¹⁹¹ In sum, the trial court in Robinson explicitly rejected the idea of basing its ruling on the three traditional liberal principles used by the majority in Rabidue, arguing that using them cannot be squared with Title VII's promise to open the workplace to women.¹⁹²

Questions about whether the use of these principles can be squared with the goal of equal employment opportunity for women ultimately rest on whether such displays and conduct will have a de minimus or corrosive psychological effect on female employees under such circumstances. Should these kinds of displays and conduct under such circumstances be expected to merely annoy a woman or should they, if I may borrow Judge Keith's words again, instill in her the debased sense of self-worth that accompanies stigmatization?¹⁹³

The argument to be made throughout the rest of this part of my dissertation is that the Rabidue majority's and Robinson Court's different answers to this question can ultimately be derived from the different theories of the self they implicitly posited.

Although neither ruling explicitly acknowledges that such a theory is being used, I will show that their respective arguments necessarily entail different understandings about how individuals are affected by their various group associations, e.g., being a woman, and by their interactions with members of other groups, e.g., how women react to the way they are viewed and treated by men. The crucial difference between the two is that the Rabidue majority assumes that individuals, at least in one important sense, are largely unaffected by their group associations and by how others view them and fellow members of their various groups: in this instance, Judge Krupansky assumes that being a woman is only of secondary importance to Vivienne Rabidue, at least in the crucially important sense that she can choose to be unaffected by even the most crude and vulgar displays and conduct directed at her and other female employees given the prevailing social consensus and the pre-existing workplace norms at Osceola Refining.

CHAPTER VII

INDIVIDUALISM, COMMUNITARIANISM, AND CULTURAL FEMINISM:

IN AN IMPORTANT SENSE, THREE SIDES OF THE SAME COIN

I am now going to briefly examine the history of liberal individualism in order to more fully explain the meaning of the idea that group identity, e.g., being a woman, is only of secondary importance. I will begin by outlining Thomas Hobbes' and John Locke's social atomistic theories of the self, both of which maintain that individuals are free to accept or reject, and be emotionally unaffected by, society's customs and habits, in order to explain what it means to claim that individual identity takes precedence over group identity. I will then consider some criticisms of 17th century individualism from the points of view of modern individualism, communitarianism, and cultural feminism. Although all of these critics allege that 17th century individualism is guilty of excessive individualism, meaning that it does not adequately account for the fact that we are embedded in various social roles, I will argue that these critics still accept the crucially important social atomistic claim that individuals are capable of being psychologically unaffected by how others view them if they act rationally, which implies that someone like Vivienne Ravidue or Lois Robinson is behaving irrationally if she is corrosively psychologically affected by these type of displays and conduct. If this is correct, none of

these theories can better explain why courts should adopt a group-rights rather than an individual-rights based perspective when adjudicating hostile environment claims.

In its modern manifestation liberal individualism can actually be traced back to Rene Descartes' claim that all people have an equal capacity to reason:

good sense of all things in the world is the most equally distributed . . .
(and) the power of forming a good judgment and distinguishing the true
from the false . . . is naturally equal in all men.¹⁹⁴

If we would all just use the proper methods of investigation, a method equally well suited for theology, mathematics, physiology, morals, and every other subject, we could all then draw verifiable conclusions about whether given propositions are true or false. To top matters off, Descartes argued that these deductive demonstrations do not require specialized knowledge from others; "all that can be known of God may be manifest by means which are not derived from anywhere but from ourselves."¹⁹⁵ In sum, according to Descartes, our respective rational capacities provide us with an Archimedean point through which we can make accurate judgments about the nature of all aspects of reality.

Hobbes subsequently borrowed Descartes' theories about autonomous individuality and used them to develop his theory of human nature. Elizabeth Wolgast summarizes how Hobbes managed to do this:

In Hobbes' picture of equal, autonomous agents, people can be likened to molecules of gas bouncing around inside a container. Each molecule proceeds independently, is free to go its own way, although it occasionally bumps into others in its path. As molecules have their energy, people are driven by their passions, and their relations with one another reflect both their love (of) liberty and (love of) dominion over others. No atom helps or moves aside for another; that wouldn't make sense. They are a collection of unrelated units.¹⁹⁶

We are a collection of unrelated units in the sense that the passions that we are driven by can be consciously weighed and therefore ordered through reflection. To be more specific, as mentioned before, Hobbes argues that we have appetites: We desire some things and are averse to some others. Our ability to exercise free will, the liberty of a person to follow her or his will, operates within this already established appetitive context. Various emotions lead us to action, and sometimes we act on the basis of these emotions without thinking; but, at other times, we stop and think about the various passions that motivate us. As one Hobbes' commentator, George Shelton, describes it, we exercise free will on those occasions when "(t)he inclination which is found to have the most weight after the comparison takes place in deliberation tip(s) the scale and decide(s) the nature of the action which is initiated."¹⁹⁷ According to Hobbes, "all passions may be expressed indicatively; as I love, I fear . . ." etc, whereas deliberation "is expressed subjunctively; which is a speech proper to signify suppositions, with their consequences; as if this be done, then this will follow."¹⁹⁸ In other words, we are only slaves to our passions when we do not mediate their influence upon us through acts of reflection; we exercise free will precisely at those times when we consciously decide which passions will guide our behavior. As Shelton explains, "(a) freeman, thus, is one who is not hindered from doing those actions of which he is mentally and physically capable."¹⁹⁹

Similarly, Locke argued that it is our ability to deliberate, to exercise "freedom of understanding," that makes us rational creatures. This ability can keep us from imposing upon ourselves anything which we don't perceive to be true:

In these two things, viz., an equal indifferency for all truth; I mean the receiving of it, the love of it, as truth, but not loving it for any other reason, before we know it to be true; and in the examination of any principles, not receiving any for such, nor building on them, till we are fully convinced, as rational creatures, of their solidity, truth, and certainty.²⁰⁰

Peter Schouls offers the following explanation of what Locke meant:

To be critical means not accepting anything as true or good merely on the grounds that many others accept it and may have done so for a long time, and in accepting as true or good only that which one has personally proved to be true or good.²⁰¹

This means nothing less than that human beings are capable of being indifferent to society's customs and habits;

they can withdraw their commitment to any tenet once they recognize that they have accepted it on some authority other than that of their own reason.²⁰²

We are born into a society with a given set of customs and habits, and we inherit emotional relationships to these before we are capable of reflecting upon their worth, but, once we engage our reflective capacities, we are capable of reevaluating the worth of these—and then we can amend or even overhaul our emotional relationships to them.

Locke is not so naive as to think that most of us will succeed at becoming truly rational, since most of us do not transcend our "feeble passionate Nature(s)(sic),"²⁰³ but he does think that the vast majority of us are capable of such mastery over our passions. The problem we face is that humans are creatures of passion, beings who strongly desire pleasure and are quite averse to misery, and almost all of these passions lead us to hold prejudices that frustrate the attainment of rationality.

These prejudices arise for many reasons, some of which are, at least initially, beyond our control, and they take many forms, including "fashion," "common opinion," "custom," "education," and "universal consent."²⁰⁴ We are not born prejudiced but four factors tend to lead us in that direction: (1) some of us do not have an sufficient opportunity to examine our beliefs; on rare occasions this is due to a lack of natural mental ability, but more often this occurs because we do not have enough time since the necessities of life take the best part of our time and energy;²⁰⁵ (2) there are those people who have enough ability and time to undertake rational examinations but fail to do so because they don't want to uproot those opinions "which best suit their Prejudices, Lives, and Designs (sic),"²⁰⁶ and this group includes both those who were not reared properly and the "'Learned Professor' who is in the grip of a 'received Hypothesis (sic)';"²⁰⁷ (3) there are also people who are incapable of reasoning because they are consumed by their strong passions, for example, the person in love who refuses to face or submit to an obvious argument;²⁰⁸ (4) and finally there are those who submit to the authority of one's own culture and traditions, which amounts to the "giving up of our Assent to the common received Opinions, either of our Friends, or Party; Neighborhood, or Country (sic)."²⁰⁹

Locke does not think that any of these obstacles to being rational are insurmountable. In fact, prejudice, no matter how deeply rooted, can never completely subdue the possibility of becoming rational; whereas rationality can completely extinguish prejudice. We are always employing our "Understanding," or analytical skills, whether we are acting rationally or prejudicially. It is the inevitability of such analysis

that leaves open the possibility that we might use it to "consider thoroughly, and examine fairly," that is, to act rationally instead of prejudicially when we are examining a problem.²¹⁰ The point, to quote Schouls, is that

(p)rejudiced or irrational action results in part from inadequate use of the understanding . . . (But) because the understanding is also necessarily involved in actions informed by insufficiently examined beliefs, there is . . . always the chance for reason to break through.²¹¹

Reason breaks through when understanding is no longer fettered by prejudice, as, to quote Schouls yet again, "well-considered judgment results from intentional adequate use of the understanding."²¹² There are only two conditions that must be met before we can make such quality judgments: we must be committed to searching for truth because of the love of truth, what Locke refers to as "perfect indifference," and we must not assent to anything until we, as rational creatures, are convinced of its truthfulness.²¹³ Once we have what Locke calls the "master passion" for truth, instead of being ruled by "natural" passions, we are in control of our own destiny for we are then ruled by the desires that our reason has authorized.²¹⁴

The important point for our concerns is that all of these theories of the self imply that we can decide for ourselves whether society's definitions of who we are accurate, and we can establish new identities if we find that the ones that we have inherited are not. Therefore, Vivienne Rabidue is free to reject what Douglas Henry and other men say about her even if what he says is accepted by society as true. In Descartes' language, she can always distinguish truths from falsehoods about who she is so long as she uses the proper deductive methods. In Hobbesian terms, she can stop and think about the passions

that motivate her and reconsider their worth when she is confronted with unfavorable views about who she is from others. And according to Locke, she can reject anything that others might believe is true about her if she come to the thoroughly thought through conclusion that they are wrong. To do otherwise would be to act prejudicially rather than rationally. This explains how a group might experience historical subordination without an individual member of that group experiencing subordination when she is being subjected to problematic behavior: The simple answer, reflected in the theories of Descartes, Hobbes, and Locke, is that most women will be psychologically effected because they respond irrationally to the views expressed by their male colleagues and by society at large, but any individual can refuse to accept or be deleteriously effected by anti-female conduct and displays. The reason is that an individual's identity can be constituted internally rather than externally, through what he or she concludes about who he or she is rather than through how others may look upon him or her. Others may say that members of a given group possess this quality or that quality, but, because we are all autonomous, every individual has the ability, even if many do not manage to exercise it, to question and revise these definitions. In sum, classical individualist theory maintains that we are free to reject, revise, and transcend the definitions that others are foisting upon us and that we can choose not to be hurt by the views expressed by others.

Contemporary liberal social theorists have abandoned the idea that we can come to know the world from an Archimedean vantage point, as Descartes, Hobbes, and Locke

maintained. Nevertheless, they still argue that we are free to accept or reject society's customs and habits even if we are not acultural and ahistorical beings.²¹⁵ I will now examine articles by two contemporary authors, Will Kymlicka²¹⁶ and Donna Greschner,²¹⁷ in order to explain what contemporary theorists mean when they maintain that we are primarily individuals and only secondarily members of groups.²¹⁸ I then will show that contemporary versions of individualism, though different from early modern versions in important ways, nonetheless reject the claim that a reasonable person who is a woman would be severely psychologically affected by the type of displays that Rabidue and Robinson were subjected to if she considers them rationally. Although all of these theories start from the premise that we are socially embedded beings, beings who derive our world views from the various communities we are raised in, they still all imply that a woman chooses to be hurt when she is affected by an anti-female work environment.

Both Kymlicka's and Greschner's articles are critiques of communitarianism, a social theory now identified with Alasdair MacIntyre and Michael Sandel, which maintains that who we are is largely shaped by the communities that we are raised in and find ourselves part of.²¹⁹ A thorough exegesis of communitarianism is unnecessary for our present purposes since the forthcoming analyses of Kymlicka and Greschner will explicate its basic commitments quite adequately. However, one point is worth noting before we proceed: in large part communitarians see themselves responding to liberalism's alleged overemphasis of individualism; as we shall see, they allege that individualism undervalues the importance of the group associations that we find

ourselves part of. Considering this stated concern, the question worth keeping in the back of your mind is the following: is the theory of the self posited by communitarianism substantially different from the theory of the self posited by liberal individualism? Does it still imply that by acting reasonably someone like Vivienne Rabinovitch can choose not to be hurt by someone acting like Douglas Henry?

In his article "Liberalism and Communitarianism" Kymlicka attempts to defend contemporary liberalism—by which he explicitly means "liberals from J.S. Mill to Rawls and Dworkin . . . (and) not seventeenth-century liberalism"²²⁰—against communitarianism's charge that it is given to "excessive individualism," meaning that it ignores

the manifest ways in which we are "embedded" or "situated" in various social roles or communal relationships. The effect of these theoretical flaws is that liberalism, in a misguided attempt to protect and promote the dignity and autonomy of the individual, has undermined the associations and communities which alone can nurture human flourishing.²²¹

According to MacIntyre, at bottom, it is the theory of the self that individualism posits that undermines these associations and communities, as it maintains that

I am what I myself choose to be. I can always, if I wish, put in question what are taken to be the merely contingent social features of my existence.²²²

Given this theory of the self, the problem with liberal individualism is that it cannot account for the fact that individuals have to find their respective moral identities in communal traditions, practices, and roles.

Kymlicka, by contrast, argues that individualism is not incompatible with the idea that moral identities must be found within communal traditions, practices, and roles. He

starts with the premises that our essential interest is in living the "good life," and that what counts as the good life may change for any individual over time. Thus, individuals should not only think about how to realize their goals but also about what goals to try to realize. It also follows that we may be mistaken about our beliefs or about what we should value, but it does not follow that a person's best interest can be secured if someone else or a community imposes the proper values upon him or her:

On the contrary, no life goes better by being led from the outside according to the values the person doesn't endorse. My life only goes better if I'm leading it from the inside, according to my beliefs about value.²²³

We need "whatever information and examples and arguments our culture can provide"²²⁴ in order to allow individuals to make the best life choices. Hence, we need to tolerate unorthodox and unpopular views, and protect personal and civil liberties, so that individuals can draw upon enough collective cultural resources to critically evaluate the worth of their respective beliefs. Kymlicka argues that the above account allows all people an equal opportunity to pursue their interests:

According to liberalism, since our most essential interest is in getting these beliefs right, and acting on them, government treats people as equals, with equal concern and respect, by providing for each individual the liberties and resources needed to examine and act on these beliefs.²²⁵

Or to put it slightly differently, individuals are thought to be equally able or free to examine and act upon their respective beliefs about what constitutes the good life if each one is granted a sufficient amount of liberty and if there are enough collective cultural resources to draw upon, e.g., if one is exposed to a plurality of different lifestyles and points of view.

It is these collective cultural resources that form the background which makes it possible for individuals to make meaningful decisions. In fact, according to Kymlicka, we cannot act rationally unless we are embedded in a social context:

Of course in making that judgment we must take something as given—someone who is nothing but a free rational being or a freely creative being would have no reason to choose one way of life over another.²²⁶

The social context we inherit constitutes what Kymlicka calls the "given" and it does not make it more difficult for us to make sense of the world, as Descartes, Hobbes, and Locke argued; rather, it is the precondition for any understandings that we might come to possess. While the self is not prior to its ends in that we are always embedded in a particular social context, we can nevertheless reexamine particular ends, that is, we can reexamine any part of the social context that we are embedded in;

(t)here must always be some ends given with the self when we engage in such reasoning, but it does not follow that my particular ends must always be taken as given with the self.²²⁷

Thus, what counts as the given differs among individual members of different groups and can potentially change for an individual over time, and the views one comes to possess may eventually amount to a rejection of the ideals held by most members of the given group of which that person is a member:

The purposes which are presupposed in the liberal account of value of freedom could come from an acceptance of communal ends as authoritative horizons, but they could also come from freely made personal judgments about the cultural structure, the matrix of understandings passed down to us by previous generations, which offers us possibilities that we can either affirm or reject. Nothing is 'set for us', nothing is authoritative before our judgment of its value.²²⁸

Kymlicka's point is that deriving our respective moral identities from communal traditions, practices, and roles does not preclude taking a critical perspective towards aspects of those same communal values.

If having the ability to take this kind of critical perspective constitutes excessive individualism, then communitarianism is also guilty of this charge. Recall MacIntyre's charge that individualism maintains

I am what I myself choose to be. I can always, if I wish, put in question what are taken to be the merely contingent social features of my existence.²²⁹

According to MacIntyre, although I cannot question the merely contingent social features of my existence, I do not have "to accept the moral *limitations* of the particularity of those forms of community (italics MacIntyre's)."²³⁰ What is the difference between "the merely contingent social features of my existence," on the one hand. and "the particularity of those forms of community," on the other? As Kymlicka asks,

If we can . . . put in question the 'rightful expectations and obligations' of the roles and statuses we inhabit; if we can reject the value of the goods internal to a given practice, then it's not clear how MacIntyre's view is any different from the liberal individualist one he claims to reject. . . . When MacIntyre allows such questioning, his argument against the liberal view collapses.²³¹

In sum, Kymlicka argues that modern liberal individualism and communitarianism share the same conception of the self: Since we can question the value of the social roles we currently occupy, the self is partially but not wholly constituted by the various communities we find ourselves part of, e.g., Rabidue does not have to accept the moral limitations of the views expressed by her colleagues or by the public at large.

For our present purposes, the point is that the view of the self posited by both Kymlicka and the communitarians implies that an individual who is a member of a group embedded in a social context that views members of that group disparagingly, or a person who is a member of a group that views another group in such a way, should be able to transcend such views through a process of reflective examination. Group identity is not primary because it does not ultimately constitute who an individual is; we may be born into and raised to accept various group identities and values, but it is the individual who has the final say about whether he or she accepts or rejects them. Rabidue may have been raised to accept the idea that a woman's place is in the home and that she should not be working at a refining company, and her co-workers' conduct may serve to reinforce such anachronistic values, but as a reasonable person she has the final say about whether she accept or rejects them and whether she allows herself to be hurt by them.

To be charitable to Kymlicka, he explicitly concedes that psychological and sociological factors no doubt deter some people from flourishing to the extent that they otherwise might. However, he approvingly cites Bernard Williams's comment

that it is a social or psychological, not philosophical, question which sorts of conditions, upbringing and public discourse help foster confidence in one's moral judgments.²³²

Further, from the first person perspective, such confidence in our moral judgements "is . . . essentially a by-product . . . of making the right judgment in the light of good reason."²³³

The ability to make such quality judgments rests on the liberal ideal that society can be "transparently intelligible"—a place "where nothing works behind the backs of its members."²³⁴ The idea that society can be transparently intelligible de facto privileges the

philosophical, the ability to make the right judgment in the light of good reason, over psychological and sociological concerns about which sets of conditions foster confidence in one's moral judgments. Thus Kymlicka's theory of the self privileges individual identity over group identity for two reasons: First, because he maintains that individuals can transcend the psychological and sociological factors that have shaped them by subjecting them to rational scrutiny, which strongly implies that Vivienne Rabidue would not have been hurt if she had made the right judgment in the light of good reason; and two, although he concedes that psychological and sociological factors might deter someone from flourishing to the extent that they otherwise might, he does not have a theory of the self that explains why such failures occur.

As the title indicates, Donna Greschner's article, "Feminist Concerns with the New Communitarians: We Don't Need Another Hero", is also a response to communitarianism. While her general concerns are with the communitarians' inattentiveness to gender issues and their gendered assumptions, I want to focus on her specific concerns with the conception of the self they posit.²³⁵

Although Greschner, in keeping with the cultural feminism she wants to further develop, sees and approves of some obvious intersections between cultural feminism and communitarianism, especially their emphasis on "connections between persons and the promotion of a more subjective process of moral reasoning,"²³⁶ she, like Kymlicka, is

very leery of what she sees as their overstating of "the notion of a self that is formed completely by the groups within which it finds itself."²³⁷

Like communitarians, she explicitly criticizes social atomism for two reasons: First, this model, which ignores the type of "epistemological" understandings that women develop because they have and raise children, does not account for the differences between women and men;

it is absurd to think of a mother and child as two molecules who have bumped into each other and will then go their own ways again unaffected by the encounter.²³⁸

Second, as was shown in Carol Gilligan's groundbreaking work In a Different Voice,²³⁹ the defining of women's identity more in terms of attachment than separation "begins in childhood and encompasses not just the mother-child bond but the general way in which women perceive themselves."²⁴⁰ While the "intersubjective" theory of the self, a "self defined by its attachments within communities such as families,"²⁴¹ that communitarianism posits, initially seems to be more compatible with women's experiences, further exploration forces Greschner to conclude that it is "insufficiently precise" since it possibly posits "a self that is constituted solely by communities."²⁴² She cites the following passage from MacIntyre's After Virtue in order to illustrate her point:

I can only answer the question 'What am I to do' if I can answer the prior question 'Of what story or stories do I find myself a part?' . . . we all approach our own circumstances as bearers of a particular social identity. I am someone's son or daughter, someone else's cousin or uncle, I am a citizen of this or that city, a member of this or that guild or profession; I belong to this class, that tribe, this nation. Hence what is good for me has to be the good for someone who inhabits these roles.²⁴³

Given that the dominant traditions have been patriarchal, Greschner quite justifiably concludes that the notion of a self that is formed completely by group identities is "unacceptable from the feminist perspective because it fails to explain (women's) experience of becoming feminists."²⁴⁴ How can women and others escape the traditions into which they are born if the self is completely constituted by these group identities? It follows that an adequate conception of the self must also explain how women can come to reject given attachments and create new ones.²⁴⁵

She then goes on to suggest that original "feminist stirring(s)" might result from one of several forms of injustice that they perceive: the privileged status of their brothers, empathizing with the lack of power that their mothers have, the asymmetry between the equality that they had at home and the inequality that they were subject to outside of it, or because of involvement with other social justice movements which led them to see similarities between the oppression of others and their own. Whatever form it takes, the point is that a woman becomes a feminist because she perceives that injustices for women exist, because a basic notion of equality is absent in her community.

A self completely constituted by its various group identities cannot explain how a woman acquire new identities, how she becomes a feminist:

The communitarians are correct in one sense—it is indeed relationships that shape who we are, but they shape us not just by how we reflect them but also by our resistance to them. Feminists, by our existence, are contradictions to MacIntyre's proposition: what is good for me is not the good of one who inhabits roles but the good of one who rejects roles.²⁴⁶

Thus, leaving aside the problems that it does have, the atomistic conception of the self does have two strengths: first, the idea that we are separate selves does partially explain

how we can come to separate ourselves from our various group connections; and second, the idea that we are all equal, when not restricted to exalting formal equality, was actually a "revolutionary" idea for its time.²⁴⁷

The type of equality that Greschner does want to defend is one that pays attention to the economic and social inequalities of life. Achieving this requires that we reject certain strands of liberalism, but not the fundamental commitment to equality that underlies it:

Our experience of becoming feminists shows that equality is the impulse of feminist consciousness. . . . (T)aking women's experiences and interests seriously is grounded in the proposition that women and men are equal in the basic sense, their experiences and interests deserving of equal attention and concern. Our disagreements as feminists revolve around the identification of "the root of inequality," the specific requirements of equality, and the set of political arrangements which foster and maintain the equality of women and men.²⁴⁸

For Greschner, the fundamental problem with the communitarian description of the self is that it does not recognize that we are all basically equal. If someone is completely constituted by his or her various group identities, then that person is not free to choose her or his ends and hence her or his identity. The ability to make these choices is especially important in communities that have hierarchies:

The notion of separate, equal selves with the capacity of choice and change gives us a critical space, it gives us a lever to help move the accumulated weight of centuries of patriarchy. Without it, we have no ground upon which to criticize the conservative hierarchies protected by tradition, less hope of moving beyond the traditions of patriarchy.²⁴⁹

In sum, Greschner concludes that the achievement of economic and social equality requires a theory of the self that acknowledges that we are only partially constituted by

our various group identities. This theory ought to combine communitarianism with liberal individualism. To be more specific, the communitarian theory of a situated self makes for a good beginning, but it needs to be supplemented with a liberal theory of the self that explains how we can renegotiate our identities. This avoids the worst problems with both theories:

liberalism is inaccurate insofar as it only sees selves as being separate, equal atoms not constituted in part by connections with others; communitarianism is inaccurate insofar as it sees selves constituted solely by communities.²⁵⁰

Greschner then goes on to argue that this description of the self is most compatible with Gilligan's work, as her theory accounts for both women's "attachment to others" as well as "an increasing awareness of self."²⁵¹ Finally, she concedes that a feminist account of the self "may not entail a complete re-working of either liberalism or communitarianism," as some versions of both theories posit a self that is only partially constituted by his or her group connections:

Liberalism's defenders have argued that their conception of the self can encompass the notion of a self partially constituted by connection. And maybe the communitarian conception of the self is not complete constitution, but partial.²⁵²

Given that this is the case, she concludes by pointing out that "liberalism and communitarianism have reached the same point from different directions."²⁵³

Unfortunately, so too has Greschner.

As I noted at the end of Part One, Robert Unikel argues that the reasonable woman standard is fundamentally flawed because it "treats each woman primarily as a member of a particular gender group."²⁵⁴ Not surprisingly, Unikel approvingly cites

Kymlicka by way of supporting his claim that individuals are not as affected by their various group memberships as advocates of adopting a gendered reasonableness standard maintain.²⁵⁵ Unikel also cites Greschner, but, unlike Kymlicka, she is cited as being an example of someone who argues that "a group-rights . . . perspective is preferable to an individual-rights perspective because it recognizes the group associations that influence and define each person."²⁵⁶ This is really not very surprising. After all, Greschner explicitly criticizes and opposes any theory of the self that exalts formal equality. She also states the desirability of developing an intersubjective theory of the self, and is clearly very concerned with the economic and social inequalities of life, with 'the set of political arrangements which foster and maintain the equality of women and men.'²⁵⁷ I have next to no doubt that she would side with Judge Keith's arguments against the majority in Rabidue. But, regardless of what her intentions might be, I do not think that the incipient theory of the self she has developed in her article, which she concedes is not fundamentally different from the theories developed by Kymlicka or the communitarians, adequately accounts for why a reasonable woman would be psychologically harmed by working in an anti-female environment.

Earlier, Greschner pointed out that we need a theory of the self that explains how women can reject existing attachments and create new ones. This is certainly the case, but, on the flip side, we also need a theory that explains how a reasonable woman can sometimes fail to reject existing attachments and create new ones or why the process of doing so would cause her psychological harm, even when she has enough collective

cultural resources to draw upon and it would clearly be in their best interests to do so. Greschner is quite clearly opposed to any theory of the self that exalts formal equality, but the theory of the self she posits, and the most charitable readings of contemporary individualism and communitarianism, all of which maintain that we are partially but not wholly constituted by the various group we are members of, are nonetheless compatible with the ideal. The reason is that none of them adequately explains why a woman sometimes fails to reject her existing group attachments and they all claim or strongly imply that she can do so if she subjects them to critical scrutiny. Consequently, they all suggest that someone like Rabidue can simply choose not to be psychologically harmed while working in an anti-female environment. If this is the case, the conduct that Douglas Henry and other male co-workers directed at her would not unreasonably interfere with her ability to do her job and it could plausibly be argued that Judge Krupansky's use of a reasonable person standard assured her an equal employment opportunity.

The claims made by all three types of theorists are almost identical. They all agree that we are shaped by our various group associations in an important sense: MacIntyre claims "that we all approach our own circumstances as bearers of a particular social identity,"²⁵⁸ Kymlicka claims that we are always embedded in a particular social context,²⁵⁹ and Greschner claims that "it is indeed relationships that shape who we are."²⁶⁰

And they all agree that we can reject the values that we were socialized to hold:

MacIntyre acknowledges that the fact that the moral identity of the self must be found in communal traditions, practices, and roles "does not entail that the self has to accept the

moral limitations of the particularity of those forms of community."²⁶¹ Kymlicka argues that "nothing is authoritative before our judgment of its value;"²⁶² and Greschner supports the possibility of "renegotiating our identities through separation of the self from the connections within which it finds itself."²⁶³ She might suggest that renegotiating one's identity is not a painless process, but she, like these other theorists, does not offer us a theory of the self that explains why it would be painful. It is indeed the case that all three of these theories "have reached the same point from different directions."²⁶⁴ At least for our purposes, however, this is a problem.

The notion of a self partially but not wholly constituted by one's various group identities is all too obviously correct, but it is, to use Greschner's own turn of phrase, insufficiently precise. I say insufficiently precise rather than wrong because such a theory of the self is quite adequate for the adjudication of most negligence cases. The idea that most of us have enough mental acumen to recognize and adjust our expectations to accord with the prevailing community standards, even if an individual or most members of a particular group strongly disagree with some of them, rests on the idea that the law does not need to differentiate between interchangeable individuals. The reasonable person standard remains appropriate "when it comes to most injuries, for example auto accidents and simple slip and fall cases"²⁶⁵ because individuals can be reasonably expected to adjust their expectations to accord with prevailing norms without being psychologically affected by the process of having to do so. By contrast, although such a theory of the self adequately explains how women can come to recognize what the

prevailing standards for gender relations are, it is not precise enough to explain why a reasonable woman would be psychologically hurt by working in an anti-female environment. So long as we accept a theory that merely maintains that we are free to reject society's customs and habits, and revise our identities through a process of reflective examination given sufficient evidence or cultural resources to draw upon, we will not be able to explain why people sometimes fail to reject society's prejudices or why they are sometimes adversely psychologically effected by the process of having to do so. We need to integrate the psychological and sociological factors that Kymlicka concedes sometimes matter into a theory of the self in order to avoid the implication that failures occur because these people have failed to act rationally, to avoid the implication that Vivienne Rabidue chose to be hurt when Douglas Henry directed such extremely crude and vulgar remarks towards her.

These contemporary theories of the self, be they variations of liberal individualism, communitarianism, or cultural feminism, can no better explain these type of failures than can the theories developed by their 17th century predecessors. The problem is that all of the theories examined in this chapter ultimately rest upon the idea that there is a universal human nature. As Elizabeth Wolgast argues, it is

a theory that represents human as alike. People's distinguishing characteristics, the superior talents and skills of some, differences of personality, age, sex, and ability to contribute to the community—all these elements must drop out if the analysis is to work.²⁶⁶

The only thing left after everything else drops out of the analysis is reason, our ability to think and behave rationally. Even if people are socialized into different and sometimes

conflicting social roles, the point is that we are all alike—which entails that we are equal—in the fundamental sense that we are capable of rationally reflecting on the worth of society's norms and values and the various group identities we inherit.²⁶⁷

While the view that there is a universal human nature is common to both 17th century individualism and the contemporary theories we have examined, there is still one important difference between them. The 17th century theorists argued that we can best acquire knowledge about all aspects of reality from an Archimedean vantage point, through the use of reason alone, unfettered by society's prejudices. According to Descartes, for example, the ability to use the proper deductive methods of investigation does not require specialized knowledge from others since we can derive it entirely from our own minds.²⁶⁸ Contemporary theorists, by contrast, argue that being rational cannot be so easily separated from being a socially embedded subject, as we cannot act rationally without being part of a given social context. The social context an individual inherits provides him or her with a given set of received categories and understandings which allow that person to make sense of the world. Thus, 17th century theorists thought that the categories of understanding exist a priori in our minds while the contemporary theorists argue that categories presuppose the existence of given social contexts.

Regardless of who is correct about these issues, the important point is that all of these theories of the self maintain that we are all largely capable of questioning and rejecting society's customs and habits. There is no important difference between Locke's claim that we cannot be forced to accept any views "till we are fully convinced, as

rational creatures, of its solidity, truth, and certainty"²⁶⁹ regardless of whether many others accept it and have done so for a long time and Kymlicka's claim that we can either affirm or reject "the matrix of understandings and alternatives passed down to us by previous generations."²⁷⁰ Both views ultimately rest upon faith in our ability to reflectively examine the worth of particular aspects of the various social contexts that we are all embedded in. Further, both traditions imply that failure to exercise proper judgment from failures on the part of the individual. According to Hobbes, for example, we are only slaves to our passions when we do not mediate their influence upon us through acts of reflection. Similarly, Greschner argues that we are free to reject and separate ourselves from group attachments and create new ones. These views so expressed imply that such failures occur because an individual is acting irrationally; as applied to Vivienne Rabidue, they imply that she has uncritically accepted communal values as authoritative horizons when she could have subordinated them to her rational judgment, or, at the minimum, there is no explanation of why rejecting these values would have a deleterious psychological effect upon her.

Although the critics of 17th century individualism explicitly try to defend themselves against the charge of "excessive individualism" that their early modern predecessors were subject to, their theories nonetheless end up being compatible with one crucially important aspect of social atomism. Kymlicka, for example, argues that we are socially embedded beings who are partially but not wholly shaped by the communities we are part of. This supposedly addresses charges of excessive individualism because it

amounts to a rejection of Descartes' and Locke's claim that we can derive knowledge solely from our own minds. While this is certainly an improvement, as it indicates how important it is to provide individuals with a sufficient amount of resources so that they can make informed decisions, the idea, so simply put, that no communal ends are authoritative before our judgment of their worth preserves the foundation of social atomism: People can still be likened to a collection of unrelated molecules of gas bouncing around inside a container, proceeding independently, and occasionally bumping into others, while being driven by their respective passions. It might be argued that people can no longer be likened to unrelated molecules of gas because we sometimes share similar social contexts and group identities, but these shared values are only of secondary importance when compared to everyone's ability to question and reject them. Liberal individualism, old and new, as well as the communitarian and cultural feminist theories examined here, represent people as being alike in the important sense that people's distinguishing characteristics, e.g., race and gender, are subordinate to the idea that we are all equally capable of acting rationally and rejecting the values and habits associated with the various groups that we are members of.

In fact, the idea that we are all thought to be equally capable of acting rationally if provided with a sufficient amount of cultural resources underlies the legal assumption of "interchangeability." This principle posits that

individual members of different groups are inherently no different from one another by virtue of their group identity. Given the necessary training and experience, a constituent of one racial, ethnic, or sexual group could take the place of another. It would thus be a violation of an individual's

right to equality to treat him or her differently from members of another group, even if the two groups manifest normative differences.²⁷¹

Even if members of two groups tend to have major normative differences, individual members of those groups are inherently no different from one another because they are both equally able to reexamine the worth of the different social contexts they are indebted to. This explains what Unikel meant when he claimed that individual identity takes primacy over group membership. On this view, the self is partially constituted by the various group connections that we are socialized into, but "individualism permeates the individual, not the group, identity"²⁷² because we, as members of various groups, are still said to be free to reject or accept a given group's norms.

CHAPTER VIII

A PLAUSIBLE DEFENSE OF ADOPTING UNIKEL'S MODIFIED REASONABLE PERSON STANDARD

The purpose of this chapter is to demonstrate how the idea that we are first and foremost individuals and only secondarily members of various groups informs the core liberal legal principles employed by the Rabidue majority. I will argue that using Unikel's version of the modified reasonable person standard instead of the reasonable person standard employed in Rabidue will not substantially change the outcome of hostile environment adjudications. Demonstrating this will, in turn, help us better understand why Unikel concludes that his modified reasonableness standard provides an adequate solution for the hostile environment sexual harassment problems that women have faced in the workplace, as well as why he rejects the use of a reasonable woman standard as being both unnecessary and discriminatory.

It is important to remember that Unikel's primary concern is to preserve the principle of formal equality, which "underlies the legal system as a whole and the reasonableness principle in particular,"²⁷³ while at the same time eliminating the gender biases that the reasonable man/person standard has been compromised by.²⁷⁴ To achieve this end, Unikel proposes that courts abandon the idea that there can be a single ideal for

what counts as reasonable in these type of cases; instead, courts should introduce contextual understandings that "acknowledge and reflect the female perspective."²⁷⁵ To be more specific, courts should make certain that jury instructions acknowledge and reflect women's ideals and norms, as well as their general views about what constitutes inappropriate conduct at the workplace, into these kinds of reasonableness determinations. By doing this courts could "combat the biases and male perspectives inherent in the legal system"²⁷⁶ while still using "a formally neutral standard of general applicability."²⁷⁷

In fact, Unikel argues that the reasonable woman standard is discriminatory because it is not a formally neutral standard of general applicability. It adopts a pluralistic group-rights perspective, a perspective "that treats each woman primarily as a member of a particular gender group and establishes that group's norms as the measure of appropriate conduct."²⁷⁸ In his view, advocates of the reasonable woman standard have overstated the extent to which individuals are affected by their various group memberships. "Individualism," by contrast,

recognizes that group membership influences the individual; but individualism permeates the individual, not the group, identity.²⁷⁹

As we have seen in the previous chapter, the idea that group identity influences but does not permeate an individual ultimately means that individuals are free to reject particular aspects of their inherited social contexts through acts of reflection without being unduly psychologically effected by the process of doing so.

The idea that a reasonable woman standard is unnecessary because the adoption of a modified reasonable person standard can adequately integrate female's perspectives into our judicial decision making process is also based upon this theory of the self. In Judge Keith's dissent to the majority opinion in the Rabidue, he argued that the failure of the courts to adopt a reasonable woman standard will permit the courts to sustain ingrained notions of reasonable behavior fashioned by the offenders, . . . men,"²⁸⁰ the implication being that the reasonable person standard will de facto still amount to a reasonable man standard, privileging the views held by men over those held by women. Unikel acknowledges that women's views have not been adequately integrated into reasonableness considerations, but given the aforementioned reflective capacities that liberal individualism argues that we all possess, Unikel concludes that adopting a reasonable woman standard is not needed in order for the courts to avoid sustaining notions of reasonable behavior fashioned by men: A fair minded and sufficiently well informed man is assumed to be rational enough to give women's point of view due consideration if so instructed. In sum, this modified reasonable person standard operates from the traditional liberal premise that we all have sufficient mental ability to identify and reflectively examine the worth of a society's customs and habits, and from the premise that we are capable of giving both men's and women's respective views fair and equal consideration if we are properly informed about their different perspectives.

These commitments help explain how he can conclude the majority ruling in Rabidue is an excellent example of the proper use of the reasonable person standard. As I

argued in Part One, it certainly does not appear to be an excellent example. Even Unikel acknowledges that "the more simplistic reasonable person standard utilized in Rabidue . . . fails to recognize highlight women's viewpoints in any meaningful sense."²⁸¹ Krupansky does say that the reasonableness standard is supposed to "accord appropriate protection to both plaintiffs and defendants," presumably meaning that he is attempting to accord appropriate protection to both Rabidue and her male co-workers.²⁸² And he does acknowledge that she was offended by the defendant's conduct, albeit in the context of pointing out that this does not necessarily mean that she has established her claim.²⁸³ Nevertheless, despite the fact that the Rabidue holding did not adequately highlight women's viewpoints, Unikel argued that it still represented the proper use of a formally gender-neutral reasonable person standard:

the court applied the (reasonableness) principle through a reasonable person standard—incorporating both female and male norms into its definition. Hence, the court considered both the supervisor's and the woman's rights in determining whether the supervisor's conduct was protected.

By refusing to establish one group's ideals as dominant and, instead, relying on prevailing social norms for its definition, the reasonable person standard approximates the objectivity and neutrality that are ideally required for the concept of "reasonableness."²⁸⁴

How can he claim that the reasonable person standard utilized in Rabidue failed to recognize or highlight women's viewpoints in any meaningful sense, on the one hand, and still claim that it refused to establish one group's ideals as dominant, on the other?

I think that this question can most plausibly be answered by drawing out the implications that follow from assuming that we are first and foremost individuals and

only secondarily members of a group. In the Rabidue case, if none of the views expressed about Vivienne Rabidue or other women by Douglas Henry and other male co-workers must be accepted as true until "we are fully convinced as rational creatures of their solidity, truth, and certainty,"²⁸⁵ which implies that she can simply choose not to be hurt by them, then Judge Keith is wrong to claim that such conduct "stifles female potential and instills (in her) the debased sense of self worth which accompanies stigmatization."²⁸⁶ Given her rational ability not to impose upon herself anything which she doesn't perceive to be true, why would "(t)he presence of pin-ups and misogynous language . . . evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy"?²⁸⁷ The presence of pin-ups and misogynous language almost certainly confirms the existence of norms by which women are primarily and contemptuously valued as objects of male sexual fantasy, but it does not ipso facto follow that such conduct and displays will have a debilitating effect on them. In sum, if this theory of the self is accurate, there is little or no reason to think that the conduct directed at Rabidue should have more than a de minimus psychological effect upon her.

It might be objected that it is much harder for a woman to maintain a positive view of herself when society and the law concur with the Douglas Henry's of the world in saying that she is worthless. It appears that Henry has it much easier because his view is in keeping with society's view. Given this, the additional difficulties that Rabidue et al face are likely to cause them psychological distress; even if she succeeds in rejecting

Henry's, society's, and the law's anti-female view of her, the process of succeeding is quite likely to be very psychologically taxing—it might plausibly make it harder for her to do her job.²⁸⁸

To reply, even using this theory of the self, the Douglas Henrys of the world certainly have it easier than the Vivienne Rabidues. There is no doubt that the additional burdens placed on the person who has to reject society's prevailing norms is greater than it is on the person who does not have to do so, but can these burdens be called psychological burdens? The idea that Rabidue can choose to reject and be not be more than de minimusly effected by these views strongly suggests that such views need not instill a debased sense of self-worth in her. This effectively makes hostile environment cases no different from ordinary negligence cases. Consider the example of drunk driving standards. Someone who wants to drink beyond the legal driving limit might really be bothered by the prevailing standard and might have to make unwelcome major adjustments in his lifestyle, but the burden of assuming the risk of failing to conform to these standards nonetheless properly falls on him. Similarly, Rabidue might really be bothered, Krupansky might say "annoyed," by the prevailing anti-female norms and she might have to make major unwelcome adjustments in her lifestyle, but, if she is reasonably able to be psychologically unaffected by the Douglas Henry's of the world, it does not seem unreasonable to suggest that the burden of assuming the risk of conforming to these prevailing standards should fall on her. In sum, all negligence cases place additional burdens on the person who has to adjust her or his expectations to accord with

society's prevailing norms, but individualism implies that a person can choose not to be psychologically affected by having to make these adjustments.

The belief that she can so easily adjust her expectations to accord with society's prevailing norms goes a long way towards explaining how Unikel can maintain that the majority ruling in Rabidue was an excellent example of the proper use of the reasonableness standard. Even though Judge Krupansky did little to acknowledge or factor in female perspectives, it could still be argued that he did enough given the relative unimportance of group identity. After all, Krupansky did recognize that women would be offended by the rough hewn and vulgar behavior that men often use in some work environments, but he also assumed that Rabidue could reject the views proffered by Henry and other co-workers without suffering psychological harm. He then proceeded to rely on the prevailing social norms at newsstands, on prime-time television, at the cinema, and in other public places in order to define what constitutes substandard behavior in such an environment in keeping with the principle of formal equality and concluded that the work environment at Osceola Refining was offensive but not abusive.²⁸⁹

For Unikel, the difference between what he describes as "the more simplistic reasonable person standard utilized in Rabidue" and the modified reasonable person standard that he proposes courts adopt is very small. The only difference between the two is the extent to which they acknowledge and factor female's perspectives into reasonableness considerations and using such an approach will not change the outcomes

of these types of cases. So long as this standard "refuses to differentiate between ideally fungible individuals on the basis of gender,"²⁹⁰ meaning that it must respect the idea that gender influences but does not permeate individual women or men, claims that "the sexualization of the workplace" has a "profound" effect on women and only a "vanishingly small" one on men will simply be rejected.²⁹¹ The fact that Unikel argues that jury instructions ought "to incorporate female norms and ideals into the judicial decisionmaking process"²⁹² does not entail that courts would incorporate the psychological effects that an anti-female environment has on women into determinations because he does not believe that rational women will suffer such effects. Since this standard is still supposed to be formally neutral, women's viewpoints and perspectives, which presumably reflect the idea that they find such displays and conduct highly offensive, would have to be balanced against men's viewpoints and perspectives, which presumably reflect the idea that they approve of such conduct and displays. Since court's should refuse "to establish one group's ideals as dominant."²⁹³ women's perspectives would not prevail in these types of cases because the reasonable person standard would still rely "on (the) prevailing social norms for its definition."²⁹⁴

This brings us back to Nancy Ehrenreich's argument that appeals to the prevailing social norms "serve as a vehicle for importing an already arrived at political solution into the law"²⁹⁵ and that they consequently end up approximating the view of the dominant group in society, men's. Her view contrasts sharply with Unikel's claim that these norms approximate "the objectivity and neutrality that are ideally required by the concept of

'reasonableness'.²⁹⁶ Unikel's implicit assumption that these norms are neutral and objective is derived from the idea that people are primarily individuals and only secondarily members of groups. Since they can reflectively reexamine the worth of the various social contexts they are embedded in, then, given equal access to institutions (exactly the kind of equality of opportunity that Unikel wants to promote), then everyone is assumed to be in a fundamentally equal position to help shape the prevailing norms that will be said to constitute a society's consensus. The social consensus on a given issue will then be seen to be the product of a fair debate conducted among equal individuals who are indebted to, but not permeated by, various group memberships. On this view and in this particular instance, the conduct that Rabidue was subject to should not be considered extreme because it was in keeping with a fairly arrived at consensus concerning how women should be treated, even if it did end up approximating the views generally held by men.

Liberal individualism also makes the idea that society should promote the widest possible toleration of conflicting views, i.e., the tolerance of diversity argument made in Rabidue, seem more credible. Kymlicka's explanation of why wide-ranging tolerance is presumed to be of value to everyone is especially relevant here. Remember that Kymlicka's starts with the traditional liberal premise that our essential interest is in living what he calls the good life and cautions that one's views about what counts as such a life may be mistaken and might change over time. Both Rabidue's and Henry's employment at Osceola Refining should be seen as part of their respective quests to live such a life,

and they both need to realize that their judgements about how to live such a life might be revised later. It follows that Henry may someday conclude that his attitude towards women is misguided or even reprehensible, but it also follows that Rabidue might later abandon the idea that Henry's conduct is inappropriate and offensive. Further, although they might be mistaken about what they should value, it does not follow that either person's best interest is represented by a community that imposes the proper values upon him or her. To the contrary, both of them need "whatever information and examples and arguments our culture can provide" in order for each of them to make the best life choices.²⁹⁷ Hence we need to tolerate unorthodox and unpopular views, like Henry's, or Rabidue's, even if her views are out of touch with prevailing norms, and protect his and her liberties, so that both of them can have an opportunity to draw upon enough collective cultural resources to critically evaluate the worth of their respective beliefs. All of the above implies that tolerating conduct like Henry's is actually in Rabidue's best interest because it provides her with more information and examples and arguments to draw upon while she is trying to figure out what the good life is for her.

The ability to do this without being psychologically affected presupposes that both of them are equally able and free to examine and act upon their respective beliefs about what constitutes the good life, if only each is provided a sufficient amount of liberty and if there are enough collective cultural resources for them to draw upon, e.g., if one has an adequate education and enough exposure to different views about how to live. It follows that some or all of the views they come to hold might amount to a rejection of the views

held by most members of either person's given group; they both can affirm or reject the "authoritative horizons" of the groups that they are members of. Thus, the traditional liberal defense of the ideal of tolerance for diversity rests on the assumption that group identity is not primary: members of particular groups are thought to be able to reexamine—and if need be reject—the views held by most members of their own group or by members of other groups about them, even when those views are extremely obscene and vulgar. In essence, the conduct Henry directed at Rabidue should not stigmatize her because she is capable of knowing that what Henry says about her is not true.

Of course Kymlicka does acknowledge that psychological and sociological factors might deter someone like Rabidue from succeeding in an environment like Osceola Refining's, but by his own admission he does not have a theoretical explanation for why such failures occur and he ultimately concludes that someone like her can succeed if she makes the right judgments in the light of good reason. The making of such quality judgments would mean that she has overcome the psychological and sociological factors, i.e., resisted and rejected the relationship that have shaped who she is, that might otherwise deter her from succeeding. The possibility of successfully rejecting these relationships is ultimately based upon the idea that Rabidue and Henry are inherently no different from one another even though they are indebted to very different group identities. Both of them are completely free to choose any ends available to them. And, since their various group memberships are only of secondary importance, as they influence but do not permeate their individuality, they are beyond being psychologically

harmd by the views expressed by others, even if they are quite disparaging. Thus, the views expressed about him or her by other's should not interfere with a reasonable person's ability to pursue the ends open to him or her.

Finally, in direct contradiction with Ehrenreich's view, liberal individualism implies that formal equality will insure women equal employment opportunities because it assumes that both sexes are already similarly situated. Because group memberships are only of secondary importance, the effects of the long history of legal and political subordination that women have been subject to will have only a minimal influence upon their ability to compete with men in the workplace so long as they are not denied tangible workplace benefits. In our example, if Vivienne Rabidue was not denied objective employment opportunities and benefits, e.g., raises based on merit or equal access to perks,²⁹⁸ then she was considered to be in an equal position to compete with the other salaried managers at Osceola Refining, even if she was subject to extremely crude behavior; such behavior would have a minimal psychological effect upon her because she is in a position to reflectively examine and distance herself from the comments and displays being directed at her and other women. This is also illustrated by one of Krupansky's previously quoted comments:

It cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar . . . (I)t can never be forgotten that Title VII is the Federal Court's mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was meant to bring about a magical transformation in the social norms of American workers.²⁹⁹

The point presumably is that the federal courts do not need to bring about a magical transformation of an admittedly rough hewn and vulgar environment in order to assist women in their struggles for equal employment opportunities. Ehrenreich is correct when she argues that a model that relies on the traditional liberal principle of assumption of risk, tolerance for diversity, and social consensus as mediator "does not conceive of discrimination as the perpetuation of structures of inequality,"³⁰⁰ but it would not be appropriate for it to do so if one starts from a social atomistic premise. It is this premise that make it plausible for the majority in Rabidue to claim that even extremely crude behavior should not have a sufficiently severe psychological effect upon her, since if it did it is her fault for being unreasonably sensitive, to deny her an equal employment opportunity at Osceola Refining.

CHAPTER IX

THE UNREASONABLE IMPLICATIONS THAT FOLLOW
FROM POSITING INDIVIDUALISM

Thus far I have argued that what Nancy Ehrenreich described as "the traditional mediating constructs used in liberal legal thought"³⁰¹—social consensus as mediator, tolerance of diversity, and assumption of risk—cannot be justified without positing individualism, i.e., the majority holding in Rabidue ultimately rests on the idea that a rational female employee can simply refuse to be hurt by being subjected to an anti-female work environment like the one that existed at Osceola Refining. I now want to go one step farther and argue that individualism can be completely separated from liberalism and that taking a group-rights based perspective is not necessarily incompatible with the basic ideals that underlie liberalism. First, I am going to briefly identify the common features that Hobbes' and Locke's social contract theories share. Second, I will use a distinction between Individualist and altruistic models of jurisprudence drawn by legal scholar Duncan Kennedy³⁰² in order to demonstrate that the moral content of individualism is separable from the basic features of Hobbes and Locke's social contract theories, even if both of them were committed to social atomism. And third, I will argue that the distinction between individualist and altruistic models that Kennedy argues for

should be replaced by a distinction between individual-rights and group-rights based models; I think that Kennedy's contrast is ill advised because it strongly implies that adopting a group-rights based reasonableness standard amounts to asking a man like Douglas Henry to sacrifice his legitimate self-interests to help a woman like Vivienne Rabidue because she is not capable of being self-reliant. Instead, I will argue that adopting a group-rights based reasonableness standard is quite compatible with the individualist' ideal of self-reliance.

As I outlined in Part Two, for Hobbes and Locke, the reason that we all agree to establish a civil government with a written version of the laws and a viable law enforcement system is that doing so helps move us out of the state of nature and into civil society. The pursuit of our respective appetites leads us to a state of war, but reason makes us realize that we can better pursue and secure our respective appetites by forming a civil government that establishes objective standards for what counts as substandard conduct. Similarly, the legal concept of reasonableness provides us a means by which can distinguish a protected expression from an excessive infringement on the rights of another. We can no longer do whatever we want to, as we could if there were no enforceable objective standards, and we may strongly disagree with many of the particular standards that are established, but it is still prudent for all of us to respect the constraints placed upon our behavior so long as the same constraints are being placed on everyone else. This entails that we, as individuals and members of various groups, are all supposed to be treated equally. Conflicts inevitably arise because people act prudentially and are

often biased, but the reasonableness standard is supposed to provide a neutral mechanism for the adjudication of these controversies; ideally, it is a means by which our often competing concerns can be fairly balanced without favoring particular individuals or groups. Finally, if the objective laws are not neutral, if they favor particular individuals or groups, the disaffected individuals or groups are within their rights to return to the state of nature. Simply put, it would not be prudent for particular individuals or groups to respect the constraints being placed upon their behavior if the same constraints are not being placed on everyone else.

One reason that we enter into civil society is to better pursue our respective appetites, i.e., to be in a better position to attain our respective desires while being less subject to our respective aversions, but we also agree to abide by a social contract for a moral reason: Conflicts inevitably arise in both the state of nature and civil society, but one advantage of the latter is that there is an objective law enforcement system that is supposed to facilitate fair competition among individuals and group while we pursue our respective appetites. In other words, the justification for agreeing to enter into a social contract goes beyond prudence or egoism, as the ideal of facilitating fair competition entails that we sometimes have a moral obligation to refuse to act in our best interest because doing so would violate the rights of another. As legal scholar Duncan Kennedy explains, "A pure egoist defends the laws against force on the sole grounds that they are necessary to prevent civil war," but "the demand for respect for the right of others" has a "strong affirmative moral content."³⁰³

The exact nature of the affirmative moral content depends upon the theory of the self that is posited. "The essence of individualism," as Kennedy explains,

is the making of a sharp distinction between one's interests and those of others, combined with a belief that a preference in conduct for one's own interests is legitimate, but that one should respect the rules that make it possible to co-exist with others similarly self-interested.³⁰⁴

The idea that an individual is free to pursue one's interests as long as one respects the rules that make it possible for others to also act in a self-interested fashion implies that individuals do not have an obligation to sacrifice their legitimate self-interests in order to promote the interests of others. Thus, as Kennedy explains, the affirmative moral content that characterizes individualism is self-reliance:

This means an insistence on defining and achieving objectives without help from others (i.e., without being dependent on them or asking sacrifices of them).³⁰⁵

According to this view, the only thing that we should ask of others is that they respect the rules that make it possible for us to co-exist peacefully. Kennedy contrasts the individualist model with what he refers to as the altruistic model of jurisprudence. As he explains it, simply put,

The essence of altruism is the belief that one ought not to indulge a sharp preference for one's interests over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful.³⁰⁶

According to this view, individuals should sometimes sacrifice their legitimate self-interests in order to promote the interests of others; even if the altruistic individual is not responsible for the situation that the other finds her or himself in.

The individualist model clearly underlies the arguments made by Kymlicka, Unikel, and Judge Krupansky, but I do not think that it is fair to suggest that an altruistic model underlies arguments for the adoption of a group-rights based standard, as Kennedy's dichotomy implies.

The idea that individuals can define and achieve objective aims without help from others underlies Kymlicka's rejection of the claim that

(g)overnment should encourage certain communal values, and discourage non-conforming values, in order to try to ensure that our judgments are confirmed by society.³⁰⁷

His point is that individuals do not need social affirmation of the objectives they choose in order to successfully achieve them. Further, the idea that government should encourage certain values and discourage others appears to contradict the ideal of self-reliance: it appears to force individuals or groups to sacrifice their legitimate self-interests to help others because the law would now favor the values held by certain individuals and groups. This is why Unikel claims that adopting a group-rights based perspective towards hostile environment claims is non-neutral. As he elaborates,

Judicial neutrality requires that courts "refuse to ground decisions on personal preferences for particular perspectives or political judgments about the importance of certain group interests."³⁰⁸

On this view, courts fail to treat individuals equally when they base their judgments on these kinds of preferences. Moreover, since it is not prudent for particular individuals or groups to respect the constraints being placed on their behavior if the same constraints are not being placed on everyone else, these disaffected individuals or groups, i.e., men, are within their rights to return to the state of nature. Thus, on this view, calls for the

adoption of a group-rights based reasonableness standard undermine the moral reason that is supposed to prompt us to enter into a social contract in the first place: fair competition.

Consequently, the answer to the question about whether a group-rights based reasonableness standard is neutral depends upon the theory of the self that is being posited. Suffice it to say that from the point of view of individualism it is non-neutral because it unnecessarily favors the views held by most women over the views held by most men. But if courts posit a theory of the self that demonstrates why most women would be psychologically harmed by behavior that would have no effect on most men, adopting a group-rights based reasonableness standard that favors the views generally held by women is neutral because it helps ensure women an equal employment opportunity that they would not have with an individual-rights based standard. In other words, reasonableness determinations about what it means to claim that individuals can compete on equal terms in these types of cases follow from the theory of the self that is being explicitly or implicitly posited. It follows that the adoption of a group-rights based reasonableness standard is not inconsistent with the ideal of fair competition that is at the moral heart of liberal social contract theory.

First of all, taking a group-rights based perspective is consistent with the idea that we enter into civil society in order to have an equal opportunity to better pursue our respective appetites. As applied to hostile environment sexual harassment cases, it is supposed to help facilitate fair competition between men and women when conflicts about what constitutes substandard conduct at the workplace arise. On this view, there is

still an objective standard, now based in an important sense upon the idea that women cannot be expected to simply refuse to be psychologically hurt when working in a sexist, traditionally all male environment, which establishes what counts as appropriate and inappropriate behavior. It is important to note that this view rejects the traditional liberal claim that

One side's freedom can always be seen as the other side's loss of security, one side's equal treatment can seem like the other's unequal treatment, one group's pursuit of its own interest can always be called intolerance of any other group that is affected by that pursuit.³⁰⁹

The reason is that the constraints being placed upon men if the courts adopt a group-rights based standard will not interfere with their ability to have an equal employment opportunity to the same extent that the standards derived from an individual-rights based model, e.g., those adopted by the Rabidue majority, interfered with women's equal employment opportunities. The Douglas Henrys of the world might not be free to direct rough hewn and vulgar remarks and displays towards female colleagues any longer, but this does not entail any loss of security for them, because they are not going to suffer any psychological harm by having to adjust their expectations to accord with these standards. In sum, the fact that these standards favor women generally held views for what counts as freedom or loss of security, equal or unequal treatment, the legitimate pursuit of one's interests or intolerance of others can still be said to be neutral because they are promoting conditions that facilitate fair competition for employment opportunities between women and men.

Second, a group-rights based theory of the self also has a strong affirmative moral content that is compatible with the individualist' ideal of self-reliance. However, on this view, the ideal of self-reliance is not inconsistent with the proposition that government should encourage certain communal values and discourage others. Individualism presupposes that men and women are now similarly situated, but, as Catherine MacKinnon counters,

To the extent that women and men are not similarly situated sexually, the reason is pervasive social inequality.³¹⁰

And Lucinda Finley adds,

parceling out goods such as workplace benefits according to egalitarian distributive principles may not result in people's positions actually coming out equal in the end. . . Individual needs and positions may have to be taken into account in order to achieve equality of outcome.³¹¹

Given the pervasive social inequality between women and men, using the traditional liberal ideals of social consensus as mediator, tolerance of diversity, and assumption of risk to determine what counts as substandard conduct in a sexist, traditionally all male work environment will not result in women's and men's positions actually coming out equal in the end; women will not have an equal opportunity to compete or achieve equality of outcome unless courts recognize that they will be corrosively psychologically affected by sexual remarks and jokes, sexually oriented pictures of women, and the non-sexual rejection by co-workers. Consequently, courts should encourage certain communal values and discourage others in order to ensure women equal employment opportunities.

The claim that encouraging certain values and discouraging others undercuts the ideal of self-reliance is based on the assumption that doing this amounts to altruism: in this instance, it appears to force men to sacrifice the pursuit of their legitimate self-interests in order to help women, as it enjoins them to treat women mercifully. It appears to undercut the essence of the individualist model, which is based on the idea that it is legitimate to indulge a sharp preference for one's interests over those of others. But if the claim that behaving this way is a legitimate expression of self-interest is mistaken, if behaving this way unreasonably interferes with a woman's ability to do her job, then encouraging certain views and discouraging others fosters self-reliance, because it puts women in a position where they can rely on their professional skills to compete with men on equal terms. Given that group identity is primary, the idea that courts should not encourage certain views and discourage others would mean that being self-reliant entails that it is reasonable to expect a woman to succeed even though she is at a substantial competitive disadvantage. In sum, an altruistic model seems, by definition, to be incompatible with the ideal self-reliance, but a group-rights based model is not: this model does not suggest that men should not indulge a sharp preference for their interests over those of women, and it does not enjoin them to treat women mercifully, it only requires men to treat women respectfully enough to allow them an equal chance to compete.

And third, just as individualism underlies the claim that courts should remain neutral and refuse to ground decisions on preferences for particular political perspectives,

the theory of the self developed here can underlie the claim that courts should favor the views generally held by women over those generally held by men in order to level the playing field. Just as the former view entails that courts fail to treat individuals, in this case men, equally when they base their judgments on these kinds of preferences, the latter view entails that courts fail to treat individuals, in this case women, equally when they do not base their decisions on these kinds of preferences. Finally, given that women would not have an equal employment opportunity if an individual-rights based reasonableness standard is adopted at this time, and since it is not prudent for particular individuals to respect the constraints being placed upon their behavior if the same constraints are not being placed on everyone else, these disaffected women would be well within their rights to return to the state of nature. Thus, on this view, calls for the adoption of an individual-rights based reasonableness standard undermine the moral reason that is supposed to prompt women to enter into a social contract in the first place: fair competition.

In conclusion, it is the theory of the self that is posited that determines what follows from accepting Hobbes' and Locke's social contract theories, in general, and using a reasonableness standard in hostile environment sexual harassment cases, in particular. In a sense Unikel is right, adopting a group-rights based reasonableness standard does violate the individualistic model of equality, but it does not necessarily violate a liberal model of equality.

It might be argued that the reasonableness standard is not supposed to be based upon the idea that we are all equally able to examine the worth of, and if need be reject, society's customs and habits. After all, the reasonableness test is only supposed to be measured "by the (person) of ordinary prudence."³¹² Presumably, the person of ordinary prudence would not reasonably be expected to engage in a such a thoroughgoing critique of society's customs and habits while going about her or his daily affairs. Without such a thoroughgoing critique, such a person cannot be expected to resist and reject the roles and relationships that have shaped her or him, or at least she or he should not be expected to make such adjustments without having to suffer unduly during the process. If the above is true, the average person cannot simply choose not to be hurt by how others view her or him. Given this, it would appear to be perfectly normal for a person like *Rabidue* to be more than de minimus psychologically affected by the conduct she was subject to at *Osceola Refining*.

I think that the problem with basing the reasonableness standard on the person of ordinary prudence is that doing so is fundamentally at odds with the legal assumption of interchangeability, and it is this assumption that underlies the concepts of voluntary entry point, tolerance for diversity, and social consensus as mediator used by the majority in the *Rabidue* ruling, in particular, and the liberal legal tradition, in general. The idea that "individual members of different groups are inherently no different from one another by virtue of their group identity"³¹³ ultimately rests on liberal individualism's assumption that they can reflectively distance themselves from their various group identities. If they

did not have the ability to do this, the Supreme Court could not maintain that "(g)iven the necessary training and experience, a constituent of one racial, ethnic, or sexual group could take the place of another."³¹⁴ The idea that a member of one group can take the place of another assumes that they can revise their social roles and identities, which, in turn, presupposes the type of reflective abilities posited by the 17th century and contemporary individualists.

I do not think that it is possible to explicitly acknowledge and reflect female perspectives, or any group's perspectives, beyond a superficial point without abandoning the individualistic model of equality with its accompanying assumptions about our reflective abilities. If this is correct, the primary issue should not concern whether the courts should adopt a reasonable woman or a modified reasonable person standard, rather it should concern whether group membership should be considered of primary or secondary importance.

Consider what it would mean for courts to adopt the modified reasonable person standard if group membership is of primary importance. In a case like Rabidue or Robinson, courts would consider both men's and women's ideals and norms, and their respective general views about what constitutes appropriate or inappropriate behavior in a traditionally male work place in determining what constitutes a hostile environment. If Susan Fiske, the psychologist who provided expert testimony in Robinson, is correct, by implication, in part they would have to account for the fact that the sexualization of the workplace tends to have a "profound" effect on women and only a "vanishingly small"

one on men.³¹⁵ How could a court then conclude that these type of sexual remarks and jokes, sexually oriented pictures of women, and the non-sexual rejection of women by co-workers would not unreasonably interfere with a reasonable woman's, or a reasonable person who is a woman's, ability to do her job? In order to do so, they would have to argue that conduct and displays that are admittedly likely to have profound effects on women still do not unreasonably interfere with a woman's ability to do her job under such circumstance. Courts are probably not going to make such an argument. Thus, under such circumstances the adoption of a modified reasonable person standard would amount to a de facto reasonable woman standard. It would still be a formally neutral standard, one that considers both male and female perspectives, but it would end up favoring the perspective of the reasonable person who is a female because of the psychological effects that such work environments are likely to have on them.

It is important to understand that this kind of modified reasonable person standard is fundamentally different than the one Unikel defends. In fact, the adoption of a reasonableness standard that privileged group identity over individual identity would entail the more or less complete abandonment of the individualistic model of equality. The idea that group identity is primary in the sense that individual members of certain groups might reasonably be expected to suffer psychological harm that they would not suffer if they were not members of those groups runs counter to the assumption of interchangeability that underlies individualism: Even given the necessary training and experience, a constituent of one racial, ethnic, or sexual group could not reasonably be

expected to take the place of another person under certain circumstances. Individualism is based on the idea that individual members of various groups are inherently no different from one another because they are all equally able to reexamine the worth of the different social contexts they are embedded in, which in part implies that acting rationally shields one from being harmed by the views expressed by others. By contrast, the idea that most women would be profoundly affected by working in an anti-female environment implies that individual members of various groups are socialized to be different from one another to the extent that one's group membership largely shapes how she or he will react under certain circumstances. Thus, women and men are not inherently different from one another in the important sense that they are both equally capable of doing most kinds of work, but they are socialized to be different from one another and these differences sometimes effect how members of different groups will react under similar circumstances.

This logic is well illustrated by the Robinson court's claim that most women could not accept the level of abuse inherent in the traditionally all male work environment at Jacksonville Shipyards. The court did not claim that most people could not accept such a level of abuse, the implication being that women's group identity is primary in the sense that most women would reasonably be expected to suffer psychological harm that they would not suffer if they were men; in other words, in my view, a man would not suffer similar psychological harm if the women working there subjected him to similar conduct and displays. Even given the necessary training and experience as a welder, a woman can

not reasonably be expected to take the place of a man in such a sexually charged, predominantly male work environment. This rests on the idea that women and men are socialized to be different from one another in the sense that their respective group memberships largely shape how they will react to being continually exposed to numerous anti-female or anti-male sexual comments and pornographic displays.

This may seem rather obvious, but it runs completely contrary to the rationale that underlies the majority's ruling in Rabidue. Judge Krupansky's claim that a reasonable person in Vivienne Rabidue's position would not be severely affected by admittedly extremely vulgar and crude behavior, even when it is directed at her specifically, rests on the assumption that being a woman should not largely determine how she will react to such a work environment. On this view, individual identity is thought to be primary in the sense that one's gender identity should not determine how someone will react to pornographic displays and anti-female obscenities.

I have attempted to show that this view is ultimately based on the assumption Rabidue should not be severely affected because she is capable of rationally reflecting on the worth of the norms and values at Osceola Refining. Given this ability, a woman can reasonably be expected to take the place of a man under such circumstances because her gender identity has dropped out of the analysis; if she thinks through the issues rationally, the pornographic displays and anti-female obscenities should not make her feel less confident about her abilities or place her at a competitive disadvantage even though the men she is competing with are not being subjected to similar conduct and displays. In

sum, the majority ruling in Rabidue assumes the following: individual identity is primary in the sense that we are all equally capable of examining the worth of the social contexts we are embedded and working in. Self-confidence in one's abilities ultimately results from exercising our rational capacities, and it cannot be undermined by crude displays and conduct. If it is undermined, it is because the individual is acting irrationally; she is letting her group identity shape how she reacts under such circumstances.

Finally, again, the answer to questions about whether the reasonable woman standard is nonneutral, whether it favors women or provides them with special treatment, depends upon which theory of the self is adopted. If one accepts that individualism is correct in maintaining that we are free to accept and reject, and be psychologically unaffected by, society's customs and habits, then the reasonable woman standard is non-neutral. It favors women by unnecessarily privileging their norms and values over men's. It is unnecessary because it is not required for them to have equal employment opportunities. One reason given for the adoption of a reasonable woman standard is that "(t)aking women's perspectives into account helps assure that workplaces are hospitable to both male and female workers."³¹⁶ But individualism implies that women do not need to be in a hospitable environment, because they will not be profoundly affected by how their male co-workers conduct themselves. On the other hand, if one rejects this tenet of individualism, then it makes sense to argue that an admittedly partial standard nonetheless does not favor women because it helps assure them equal employment opportunities. To clarify, if a theory of the self that explains why women are

psychologically harmed by pornographic displays and anti-female obscenities in a traditionally male work environment is more persuasive than liberal individualism, then it is possible to justify the use of a reasonable woman standard as a means to help level the playing field. By implication, calls for the adoption of a reasonable woman standard assume that a work environment that is hospitable to women is necessary for them to have equal employment opportunities and that there is reason for work environments to be more hospitable than society at large.

Of course, if society's prevailing norms change over time, then the traditional reasonable person standard will likely reflect that, and what was once a protected expression will then be considered an excessive exercise of freedom. Conduct like that directed towards Rabidue and the other female employees at Osceola would then be said to constitute unreasonable interference with a woman's ability to do her job, and, by implication, it would be judged to have been, in Judge Krupansky's words, sufficiently "startling as to have affected seriously the psyches of the plaintiff or other female employees."³¹⁷ This type of change has occurred in regards to how the courts view racial issues. The prevailing view of African-Americans has evolved to the point where the reasonable person standard probably affords them adequate legal protection when they are being subjected to racist remarks and displays at the workplace; since most of us agree that such remarks and displays are entirely inappropriate and offensive, a reasonable African-American standard is probably superfluous.³¹⁸ This, however, puts women,

African-Americans, and members of any oppressed group in the position of having to rely upon society's prevailing norms for legal protection, and, as the Rabidue case well illustrates, this can be a pretty precarious position to be in.

Judge Krupansky's comments also illustrate the fact that in this case questions about whether someone has been psychologically harmed are intertwined with society's norms regarding how members of certain groups should be treated. A reasonable person in Rabidue's position is said not to have been psychologically harmed to the extent that her work performance was unreasonably interfered with in large part because the disparaging comments and displays that she was subject to at her workplace were in keeping with the views expressed throughout the whole of society. Conversely, if she was subject to the same comments and displays when society at large did not condone such expressions, then she, as a reasonable person, would be considered to have been psychologically harmed by them. This point is illustrated by Judge Krupansky's use of the phrase "not so startling as to have affected seriously;" the implication being that such expressions, although "extremely vulgar and crude," should not have shocked Rabidue given "the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica."³¹⁹ It follows that extremely crude and vulgar behavior would presumably startle someone in Rabidue's position if such expressions were out of touch with the norms generally held throughout the rest of society. She presumably would be startled to the point where her ability to do her job would have been unreasonably interfered with, the assumption being that to be startled is

to be more than de minimus affected. In sum, extremely vulgar and crude behavior is said to have a "de minimus" effect on women when considered in the context of a society that systematically disparages them, while it would, by implication, unreasonably interfere with the ability of women to work by causing them psychological injury if it occurs in the context of a society that does not systematically disparage them.

This view of the circumstances in which psychological injury can reasonably be said to have occurred effectively privileges individual identity over group membership. It does so because members of oppressed groups have to overcome the systematic discrimination they have faced to a great extent before they are legally protected from expressions like the ones Rabidue was subject to. The claim, made by advocates of the reasonable woman standard, that our respective identities are primarily constituted by our various group memberships rests, in a case like Rabidue, on the idea that she is more likely to feel threatened by unwelcome verbal encounters or disparaging displays because of women's historical vulnerability in the workforce. But this vulnerability largely disappears if society's prevailing norms are generally approving of the idea that women have an equal right to employment opportunity and that they should not be viewed as sexual objects; if such a transformation occurs, most people will then see her more as a credible coworker deserving of respect than as an object of sexual desire. At this point, the effects of history will have largely been overcome from a psychological point of view: she could then feel secure in the fact that other coworkers and managers will no longer be prejudiced against her because she is a woman; her success or failure will be based upon her

individual merits. Ironically, so long as the reasonableness test reflects prevailing norms, it will offer women legal protection from such expressions precisely at the point when they are least in psychological need of it: derogatory displays and expressions will actually have a de minimus effect on female employees in the context of a society that does not condone such behavior, rather than in the opposite circumstances, as Judge Krupansky maintained. Such treatment will not feel as threatening in such a context because women can feel more secure that most people do not perceive them in that way; such expressions will then reflect more about the person who instigates them than about women or about society at large.

This, in essence, is the logic that underlies the Robinson court's conclusion that sexual remarks and jokes, sexually oriented pictures of women, and "the non-sexual rejection of women by co-workers"³²⁰ will corrosively affect the psychological well-being of a reasonable woman placed in a work environment that has "historically been all male or historically excluded women intentionally."³²¹ Their ruling assumes that at this point in time group identity is primary in the sense that Unikel has disapprovingly used the term. The idea that a reasonable woman will be corrosively psychologically affected by such conduct rests on a theory of the self which maintains that she is not completely free to reject and psychologically distance herself from society's and her male co-worker's customs and habits.

The only thing that is missing is the actual theory of the self that would explain why a reasonable woman would be seriously psychologically affected by the type of

conduct that Rabidue and Robinson were subject to. I am now going to attempt to develop such a theory.

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PART III

A PHENOMENOLOGICAL ACCOUNT OF THE
EXPERIENCE OF HOSTILE ENVIRONMENT
SEXUAL HARASSMENT

The fundamental problem at the root of men's behavior in the world, including sexual assault, rape, wife battering, sexual harassment, keeping women in the home and in unequal opportunities and conditions, treating them as objects for conquest and protection—the root problem behind the reality of men's relations with women, is the way men see women, is Seeing.

— Susanne Kappeler³²²

CHAPTER X

INTRODUCTION

In the second part of this dissertation I argued that a commitment to individualism implicitly underlies the use of the three core liberal principle— social consensus as mediator, tolerance of diversity, and assumption of risk— used by the majority in Rabidue.³²³ According to this theory, we are first and foremost individuals and only secondarily members of a group, meaning that our various group associations influence but do permeate us. They do not permeate us because, as Will Kymlicka, a defender of 20th century liberal individualism, maintains, we are free to affirm or reject the possibilities furnished by the "matrix of understandings and alternatives passed down to us by previous generations."³²⁴ We can affirm or reject the value of these alternatives and understandings because of our ability to subject these customs and habits to rational scrutiny. Given this ability to "make the right judgments in the light of good reason,"³²⁵ it is difficult to see why even the most crude and vulgar anti-female expressions should have more than a de minimus psychological effect upon a woman if she reacts rationally; it is difficult to see why, as the ruling in Robinson v Jacksonville Shipyards, Inc. claims, sexual remarks and jokes, sexually oriented pictures of women and "the non-sexual rejection of women by co-workers"³²⁶ will corrosively affect the psychological well-being

of a reasonable woman placed in a work environment that has "historically been all male or historically excluded women intentionally."³²⁷

Simply put, the purpose of this part of my dissertation is to sketch a theory of the self that provides a more adequate explanation of why such conduct and displays would be expected to have more than a de minimus psychological effect on a reasonable woman working in an environment like Osceola Refining or Jacksonville Shipyards. In disagreement with Will Kymlicka's claim that "confidence in one's moral judgments" from the first person perspective "is essentially a by-product . . . of making the right judgment in the light of good reason,"³²⁸ I will argue that it would be reasonable to expect a woman to be deleteriously affected by such a work environment even if she is cognitively aware of the fact that the views being expressed about women in general and her in particular are ignorant. In essence, I want to develop a theory of the self that supports the claim made by Judge Keith's in his Rabidue dissent that "the pervasive degradation and exploitation of female sexuality in American culture . . . stifles female potential and instills the debased sense of self-worth which accompanies stigmatization" in most of them.³²⁹

First, I am going to briefly outline and then analyze the theory of the self developed by Jean-Paul Sartre in Being and Nothingness.³³⁰ His theory, which he describes as an existential phenomenological ontology, though largely similar to those examined in the second part of this work, has one unique feature, his concept of "the look of the other." This concept offers us a radically different account of how we experience

our relations with others, i.e., Sartre argues that the attitudes that others take towards us forces us to pass judgment on ourselves from their point of view. And I will argue that this idea offers us the beginning of a way to account for the psychological effects that a sexually charged workplace has on women like Vivienne Rabidue and Lois Robinson because it helps explain why they cannot refuse to be hurt by how their co-workers treat them. I say the beginning of an account because I will also argue that Sartre's theory of the self does not offer us an adequate sociological account of the conditions that give rise to such adverse psychological effects. It does not provide us a way of distinguishing between the psychological effect that a sexually charged environment has on women in environments that have historically been all male and environments that have not been. Nor does it help us distinguish between the effects that such an environment would have on a reasonable woman in the context of a society that largely condones such conduct and displays as opposed to the effects it would have in the context of a society that does not do so. Finally, although his concept of the look of the other accounts for the immediate psychological effects that men's and society's views can have on women, his theory ultimately mistakenly asserts that women can overcome those effects through acts of will, through the choices she makes as a free subject.

I will then outline George Herbert Mead's theory of social development.³³¹ Mead argues that our self-definitions are ultimately derived from the attitudes that others take towards us, through what he refers to as our ability "to take the role of the other."

Although I think that his theory, left by itself, ultimately fails to prove that our self-

definitions are derived from the attitudes of others, I will argue that some of the concepts he has developed can help us better understand how sociological factors shape our psychological reactions to how we are being treated and viewed by others.

I am then going to compare and contrast their respective theories in order to develop a more comprehensive theory of the self. This theory will explain how psychological and sociological factors shape individual identity. I will argue that the basic framework of Mead's theory can be used to fruitfully supplement Sartre's concept of the look of the other and thus help us better understand the circumstances under which a woman would reasonably be expected to be psychologically harmed by the views expressed by others. Contrary to what Robert Unikel maintains,³³² I hope to show that group membership permeates, rather than just influences, the individual.

I will then use this theory to account for the events that occurred at Jacksonville Shipyards, Inc. ("JSI") and the rationale that underlies the ruling in Robinson. At this point, I will offer a systematic explanation of why the sexually charged environment at JSI would reasonably be expected to have had such a corrosive psychological effect on Lois Robinson.

CHAPTER XI

THE LOOK OF THE OTHER: SARTRE'S ATTEMPT TO REINTEGRATE
PSYCHOLOGY INTO A THEORY OF THE SELF

One of the most striking features of Sartre's theory of the self, perhaps the one that most strongly separates his phenomenological ontology from the various views of individualism and the other theories of the self outlined in Part Two, is his claim that psychology and philosophy can not and should not be separated from one another. As I noted in chapter 7, Will Kymlicka and Bernard Williams, for instance, both argue that questions about which sociological and psychological conditions give rise to confidence in one's moral judgments are not philosophical in nature. According to them, although psychological and sociological factors no doubt play some role, such confidence, at least from the first person perspective, is ultimately a "by-product" of "making the right judgment in the light of good reason."³³³ Conversely, failure to make such judgments when one is sufficiently fortified with adequate evidence seems to imply that one is being irrational, that one is making the wrong judgment because she has not used enough reason to shed sufficient light on the situation. Sartre, on the other hand, claims that philosophy is "a methodical description of man's inner states, of his psychological life,"³³⁴ and, as a consequence,

(t)here is philosophy, but there is no psychology. Psychology does not exist; either it is idle talk or it is an effort to establish what man is, starting from philosophical notions.³³⁵

And what man is for Sartre, as we shall see straight away, is a being who is both rational and irrational, capable of radical freedom and incapable of avoiding being unreasonably affected by even the most irrational and unfounded views of others. I hope to show that the differences between Sartre's "phenomenological existential ontology" and both 17th century and contemporary liberal individualism, as well as the other theories of the self examined in Part Two, are two-fold: While liberal theorists concede that we often act irrationally, and even that such behavior is sometimes excusable and in some sense understandable, they do not offer any adequate accounts of why such failures occur and they cling to the possibility that we can all become fully rational beings. Sartre has no such hopes. Instead, he offers us a systematic explanation of why we act irrationally and of why none of us will ever attain full rationality, and he is only able to accomplish this because he reintegrates psychology back into philosophy.

Sartre divides being into three categories: being for-itself, being in-itself, and being for others. The first two categories are largely consistent with the liberal individualist accounts of the self that were analyzed in Part Two in that they explain how and why we are supposedly free to choose our values and act as we see fit as we go about our daily affairs and make our future plans. But being for others is a fundamentally different category, one that offers us a thorough account of how we lose our freedom when we are interacting with others.

Sartre illustrates the concepts of being for-itself and being in-itself by describing the inability of a waiter to do his job quite properly:

His movement is quick and forward, a little too precise, a little too rapid. He comes towards the patrons with a step a little too quick. . . . All his behavior seems to us a game.³³⁶

In a sense the waiter is not really a waiter, and he still wouldn't be one if he performed his task with the utmost aplomb; rather, he is actually "playing at being a waiter in a cafe."³³⁷

The point is that no one can ever fully be the role that one is presently playing, nor can one be reduced to any given role, even if the public makes such demands upon one. The reason is that all human beings possess consciousness, or what Sartre refers to as the for-itself, and consciousness can always become conscious of the possibility of not being or doing in the future what one has done or been in the past or is being or doing in the present. Consciousness, or the for-itself, is completely free to realize its possibilities in the future precisely because it has no fixed identity, as it is what Sartre calls "nothingness":

But if I (the for-itself) represent myself as him, I am not he (the waiter); I am separated from him as the object from the subject, separated by *nothing*, but this nothing isolates me from him. I can not be he, I can only play at being him. . . . I am a waiter in the mode of *being what I am not*. (italics Sartre's; parentheses mine)³³⁸

He must play at being what he is not because he is nothing but open possibilities. What does this mean?

The limits placed upon one's possibilities constitute one's facticity, that is, one's past history, present circumstances, physical and characteristics, etc are part of the objective conditions that constitute a person's in-itself. These objective conditions

delimit what one can choose to do in the future. For example, someone entirely lacking in waiting experience is unlikely to have the option of being hired as a waiter at an upscale restaurant at the present time, but they do not help one choose what one will attempt to become in the future. For example, on this view, an experienced waiter has as much reason to work at a truck stop as he does to work at an upscale restaurant. This is the case because a person's past and present circumstances effectively narrow the opportunities open to one in the future, but they do not help anyone when choosing among the available options because each one of us is completely free to accept or reject the values that we once held or now hold. The reason for this is that consciousness, which by definition has to be aware, or conscious, of the values one has held or holds is also conscious of the fact that one need not hold them any longer. As Sartre commentator Joseph Catalano illustrates:

Am I an American? Am I a male? When I ask such questions, I recognize that, indeed, I am an American and a male, but only in the sense that the living of these characteristics is a free interpretive act. When I question myself in this way, I recognize that no characteristics define my existence: my existence precedes my essence.³³⁹

In the case of our friend the experienced waiter, this means that he is aware of the fact that he works at the upscale restaurant instead of at the truck stop because he values better pay, customers less likely to shout obscenities at him, serving more refined food, and so on. But these values do not constitute who he is because who he is what he is going to choose to do in the future, and what he can choose to do in the future is entirely open. He might choose to discard his previously held values in favor of new ones that would be better served if he worked at a truck stop, e.g., he might develop a greater degree of class

consciousness. In sum, the for-itself is nothingness precisely because it is always distanced from one's past and present actions and values. In fact, consciousness would disappear if one's presently held views dictated one's future actions, because consciousness presupposes the possibility of not being or doing what one has been or done before. Sartre is not just trying to demonstrate that we are radically free, he is also arguing that claiming that we are not free is absurd because not being free would mean not possessing consciousness.

Sartre then goes on to argue that most of us try to deny the fact that we are radically free by acting as though we are not free to do what we want come the future. As Sartre commentator Mitchell Aboulafia explains,

The lack of a substantial, or substance like, foundation yields a radically free consciousness and leads to the psychological need to overcome this terrifying freedom by transforming consciousness into a thing, an in-itself.³⁴⁰

The concept of the in-itself refers to the idea that something is an object or thing, i.e., the idea that someone or something is not capable of being otherwise, of being different than what one now is. Sartre argues that we often tend to act as though we can't help but make the choice we are making, or as if we are meant to act in certain ways or do certain things.

Excellent examples of this are provided by the person who claims "I was destined to become this" or "I felt no choice but to do that" or "We were meant to be together."

Maybe a person deserved to become this or should have done that, but, in Sartre's view, no one is destined or meant to become anything and no one can abdicate their responsibility to choose when confronted with alternatives. Thus we have an irrational

psychological need to arrest our spontaneity by denying that we are free to choose what we are going to do; we try to assuage the terror we feel because of the lack of objective meaning in the world by trying to act as though, or by trying to make ourselves believe that, there is objective meaning out there.

These attempts to deny that we are free inevitably give rise to reflection, and as Sartre explains in his own rather technical vocabulary,

by reflection the for-itself, which has lost itself outside itself, attempts to put itself inside its own being.³⁴¹

In order to understand what he means, we must first understand his distinction between pre-reflective and reflective consciousness. Most of the time we are pre-reflectively conscious, meaning that we are only indirectly aware of ourselves as we are going about our activities. A waiter normally performs all of his various tasks without directly reflecting on the fact that he is doing so. He may make a conscious effort to do a better job of remembering who ordered what, but he does not usually make his choice to be a waiter in the first place an object of examination at such times. Nevertheless, even in this pre-reflective state consciousness is outside of itself, that is, "it is not that of which it is aware."³⁴² It is always beyond and more than any particular role even while it is performing that role, for example, a waiter might stop and chat with a customer or quickly grab something to eat from the kitchen. Reflective consciousness, on the other hand, arises when we question the worth of the roles we have performed or the values we have accepted. At such times we experience what Sartre calls anguish, the fear of failing through our own will and choices, and we attempt to alleviate these fears by trying to

deny that we free to choose or be what we want, or by engaging in what Sartre calls acts of bad faith; in other words, we attempt to lie to ourselves. Thus the waiter tries to resign himself to this occupation on the grounds that this is his fate or by claiming that he is capable of nothing greater. The point is that we want to avoid the anguish that comes with acknowledging that we are free to choose, and we are sometimes willing to resign ourselves to even the most undesirable roles and identities in order to avoid facing it. This is what Sartre means when he says that the for-itself tries to put itself inside its own being. The for-itself tries to act as though it is an in-itself, an object incapable of choosing. Our ontological make-up is such that we try to minimize the times that we experience anguish, as Catalano explains,

I also attain a fleeting glimpse of the possibility of reevaluating the decisions on which my whole life is based. . . . In a similar way, I have a fleeting awareness of the possibility of overturning my entire system of values. But normally my everyday morality is a way of escaping the anguish that would result from realizing that all my values are "givens"; they are freely held in existence by my consciousness and my consciousness has no foundation other than itself.³⁴³

So, although consciousness has no foundation other than itself, in that the choices we make are a result of our own free interpretive acts, we nonetheless have an irrational inclination to escape the accompanying anguish by acting as though we are no longer free to choose what we are going to believe or do.

Not surprisingly, these attempts never fully succeed. The problem, as you might expect, is that we are still conscious of the phenomenological fact that we are free (Sartre says, "condemned to be free"³⁴⁴) to choose. The fact that we are conscious of the possibility of rejecting our previously held values almost inevitably leads to a certain

amount of anguish. To clarify, even though the for-itself is nothingness and thus completely free, Sartre is not claiming that every choice we make or every value we choose constitutes an act of bad faith; in fact, he thinks that it is possible to act in what he calls good faith while making choices. Quoting Catalano again,

Bad faith is distinguished from good faith precisely in its attitude toward this evidence. When I am in good faith, I first "decide" what is reasonable to believe. Although this may be different for each person, nevertheless, the criteria are faced consciously and some attempt is made to be critical . . . to be convinced on the basis of what we consider to be a reasonable amount of evidence.³⁴⁵

Conversely, bad faith occurs when I decide what to believe before I have given adequate consideration to the available evidence. Thus, Sartre is not opposed to the for-itself assuming identities or accepting values; he only asks that we do so with the full understanding that these identities and values do not constitute who we are because we are free to reevaluate and abandon them.

Up to this point, and one needs to remember that there is a major twist in this Sartrean ontological tale soon to come, his theory of the self is more or less consistent with the social atomism argued for by the 17th century liberals and the socially embedded subject posited by contemporary liberal and communitarian theorists alike. That is, Sartre's theory is ultimately compatible with the idea that we are first and foremost individuals and only secondarily members of groups, though he does offer a more thorough explanation of why we sometimes, or even usually, fail to realize our rational potentials to choose our values. I believe that this view of the relationship between consciousness and one's objective conditions would plausibly support the majority ruling

in Rabidue. This ruling claimed that the admittedly offensive gestures directed towards Vivienne Rabidue should not reasonably be expected to affect her to the degree that her ability to do her job would be unreasonably interfered with. The Sartrian view thus far outlined also suggests that these types of gestures should only have a de minimus psychological effect upon her. Given that she has enough evidence to make an informed choice about her values and identity, it is up to her to choose whether the sexist gestures directed at her will have a substantial effect upon her. In fact, Sartre's view implies that she acted in bad faith and chose to play the role of the deeply affected female co-worker. If she had only acted in good faith, on the basis of all the evidence which suggests that women are co-workers deserving of respect rather than sex objects or worse, she would have been able to consciously distance herself from the values expressed by these male co-workers. On this view, it is understandable that she would act as though she was an in-itself, a being who resigned herself to accepting even the most offensive definitions of who she is, rather than face the anguish of having to choose a totally new identity and set of values. But the point is that she was free to do exactly that, and she should not blame others for her own failings.

Thus far Sartre's view has not been any more sympathetic to women like Rabidue than his liberal predecessors. All of these views suggest that a reasonable person (who is a woman) should not be severely affected by this type of behavior, and they all suggest that any severe effects that did occur would not have if she had only acted rationally, if she had only seen fit to reject society's (men's) ignorant customs and habits. I want to

again suggest that the problem with all of the theories that have been examined so far is that they assume that we react, or at least that we can choose to react, to the views expressed about us in a deliberative or reflective fashion without being psychologically affected. Being reasonable educated and having had sufficient opportunity to examine the worth of these views, women are thought to be free to accept or reject them depending upon their merits or lack thereof. Next, assuming that these views are found to be wanting, they are thought to be in a position where they will not be psychologically affected by them. Finally, if they are adversely affected by them, it is thought to be because they have not fully, or at least adequately, exercised their rational capacities. A fundamentally different approach is needed, and I hope to show that one is provided by Sartre's concept of the look of the other.

As we have seen, the relationship between being for-itself and being in-itself is one of transcendence, as we are consciously aware of the possibility of abandoning the values and identities we once held. However, the ability to transcend these disappears, at least temporarily, when we experience what Sartre calls "the look of the other." According to this theory, we do not experience others by reflecting upon what they think about us; rather, we immediately experience ourselves as objects subject to the judgment of others. For example, as Catalano explains,

(S)hame . . . does not come about by a secondary . . . act of reflection, but by immediately recognizing that we are as other people see us. Thus, when we perform some vulgar or awkward act and are surprised to see someone seeing us, we are immediately ashamed.³⁴⁶

The fact that we experience shame indicates that we have a responsibility to others when we act and that we immediately feel their approval or disapproval when we are aware of, or think that we are, being looked at.

Sartre first claims that we sometimes do not experience others as subjects, but only as objects:

The woman whom I see coming before me, the man who is passing by in the street, this beggar whom I hear calling before my window, all are for me objects— of that there is no doubt.³⁴⁷

But the fact they are all for him objects is not meant to suggest that their appearance does not cause a change in his consciousness. There is an important difference between perceiving a human objects and other objects. I always perceive objects in relation to my own projects, but when I perceive another person I become phenomenologically aware of the fact that this person perceives the world in relation to her projects:

The other is first the permanent flight of things toward a goal which I apprehend as an object at a certain distance from me but which escapes me inasmuch as it unfolds about itself its own distances.³⁴⁸

I can apprehend the other as an object because the other is doing something that relates her to other objects, e.g., walking in a park, but her objectivity escapes me in the sense that her orientation towards the trees, birds, park benches, etc escapes me. She is free to choose how she is going to relate to the objects around her— including me. As a result, the objects around me, including her, remain a certain distance from me, but all of these objects take on their meaning in relation to her. This occurs because she can impose her subjectivity on me and turn me into an object.³⁴⁹

Although human objects occupy this privileged space, the difference between being a subject and being an object is metaphorically the difference between looking and being aware of being looked at. When we are looking we are still subjects, organizing the world before us in relation to our future possibilities, and the other person is just an aspect of our possibilities, but when we are being looked at we are now objects, which means to be, as Catalano puts it,

conscious of being seen, of being immediately thrown back to ourselves as having a body and being visible to the other.³⁵⁰

And this visibility before the other puts us in a position where we cannot help but see ourselves as other people see us.

Sartre uses a specific example of the circumstances when one might experience shame to illustrate his point: Someone driven by jealousy is spying on their lover by looking through a keyhole. At this point this person is not aware of being observed and he is free to realize the possibilities before him, including catering to his jealousy by being a peeping Tom. He is only pre-reflectively and indirectly, that is, unself-consciously, aware of himself, just like the waiter performing all of his various tasks: The lighting in the hall and in his lovers room, the keyhole, his coordination or lack thereof, and his mores and desires are all just part of the objective background (facticity) against which he exercises his subjectivity (being for-itself) by choosing whether to continue to look through the keyhole. Just as the waiter was playing the role of being a waiter, he is playing at being a voyeur. He is acting jealously, but, because he is a free subject, he

cannot be reduced to being just jealous— or at least not until he suddenly realizes that someone is watching him.

If all of a sudden he hears footsteps, he becomes pre-reflectively and directly, that is, self-consciously, aware of himself because he is being observed by someone else. Now he cannot help but experience himself as an object. Sartre offers the following description of this transformation:

I have just made an awkward or vulgar gesture. This gesture clings to me; I neither judge it nor blame it. I simply live it. I realize it in the mode of for-itself. But now suddenly I raise my head. Somebody was there and has seen me. Suddenly I realize the vulgarity of my gesture and I am ashamed.³⁵¹

Once he realizes that someone is watching him, he is no longer able to concentrate his attention upon the keyhole or on any other future possibilities because he is now overcome with self-consciousness; this type of self-consciousness, which arises when we are aware that we are being viewed or judged by another, robs us of our freedom. In this case, his perception of how the other sees him leads to an overwhelming feeling of shamefulness, which Sartre characterizes as

an immediate shudder that runs through me from head to foot without any discursive preparation.³⁵²

When this occurs he is not capable of transcending what he was apprehended doing; he realizes that he is nothing more than a shameful being spying through a keyhole in the eyes of the other.

The relationship between being for-itself and being in-itself is characterized by unconditional freedom within the limits established by one's facticity, but the way we

experience our being for others nullifies that freedom and forces us to experience our

"natures":

The other, as the look, alienates me from my possibilities, removing me from the original innocence by which the instrumentality of things is an embodiment of my freedom. By the other's look, I am fixed within the world . . . I am aware of this and now recognize myself as being in the world with my possibilities objectified and fixed by him.³⁵³

The other is now in a position to treat us as an object, as one among other instruments in his world. The look of the other forces him to be related to the door, the keyhole, his lover, and his apparent lack of mores as a fixed totality subject to the other's judgment. Thus, there is always the possibility that our freedom will be limited by others in the sense that our consciousness of the possibility of doing this or that can always be transformed into self-consciousness of being this or that.

The experience that we have of being objects does not occur on a reflective level. The person looking through the keyhole does not hear someone approaching and then ponder what that person will think of him; instead, he pre-reflectively experiences the disparaging judgment that the other is likely to wield. As Catalano describes it, "(O)ur original awareness of the other is not a matter of judgment but an unreflective response to a foreign freedom."³⁵⁴ The look of the other also affects how we see ourselves. As being for-itself, we cannot be reduced to being what we are doing; I may be acting jealously or shamefully, but I can choose not to continue to do so, and thus my fundamental identity is still empty and undetermined (nothingness). But being for others reduces us to being what we are doing: it makes me aware of the fact that I am a jealous or shameful man, and consequently part of my identity is established and fixed.

However, we do not always have to be objects when we are being subjected to the gazes of others; we can turn the tables, or more accurately, our gazes, on them and attempt to turn them into objects while simultaneously restoring our subjectivity. It is the unwelcome emotion of shamefulness that leads the voyeur to try to do this. When the person looking through the keyhole heard the approaching footsteps he experienced his possibilities being limited by the other; he felt self-conscious and was unable to focus his attention on the activity that consumed his attention only a moment ago. He soon realizes that the only way he can reclaim his subjectivity is to limit the subjectivity of the other by turning that person into an object. Sartre uses the metaphor of being naked to explain what it means to be an object and of putting on clothes to explain what it means to recapture one's subjectivity:

Modesty and in particular the fear of being surprised in a state of nakedness are only a symbolic specification of the original shame; the body symbolizes here our defenseless state as objects. To put on clothes is to hide one's object-state; it is to claim the right of seeing without being seen; that is, to be pure subject. . . The reaction to shame will consist exactly in apprehending as an object the one who apprehended my own object-state.³⁵⁵

Unfortunately, Sartre does not provide an example to illustrate the value of his metaphor, but I think that its meaning can be clarified by considering how the person looking through the keyhole might respond to the person who is looking at him. He might turn and confront the approaching person and suggest that she would do well to mind her own affairs since she has no idea about what is really going on. At first, he feels exposed as being a shameful object because he realizes that the only thing she sees is a man acting voyeuristically. He then attempts to cover for his seemingly shameful behavior by

implying that she would not judge him so severely if she knew more about why he is looking through the keyhole. At the same time, he attempts to strip her down to being nothing more than nosey and ignorant, to being a disparaged object who has no business passing judgment on him. If he is successful, he will once again feel free to go about his dubious business as he had before he was intruded upon.

I think that there is a great deal to be gained by adopting Sartre's concepts of what it means to be a subject and an object. His theory about the conditions under which being for-itself is transformed into being for others helps explain why someone cannot choose not to be affected by how others view her or him. But I also think that there are some important problems with his account of the conditions under which we experience either mode of being. One, as we shall see very shortly, his account sometimes seems to suggest that regaining one's subjectivity is a simple matter of individual will. If this is true, it greatly minimizes the importance of the look of the other. Two, I do not think that regaining one's subjectivity necessarily entails turning the other into an object; I will argue that it is possible for two or more people to retain their subjectivity while interacting with each other. And three, Sartre's theory mistakenly privileges being for-itself over being for others; in the next two chapters I will argue that being for others is our primary mode of being and that being for-itself is confined within the expectations that others have for us.

On the positive side, Sartre's concept of the look of the other can be used to help explain why someone like Vivienne Rabidue cannot help but be affected the way that her

co-workers view her. The look of the other is manifested, for example, when co-worker Douglas Henry says, "All that bitch needs is a good lay" to her.³⁵⁶ Expressions like these force her to see herself as an object subject to the judgment of others. It is important to note that the feeling of being a shameful sexual object does not come about by a secondary act of reflection— as all of the other theories that we have examined imply— but by recognizing that she is as her co-workers see her; it is an immediate shudder that runs through her from head to foot without any discursive preparation. Further, since the look of the other engenders self-consciousness, she is no longer able to concentrate on the tasks before her; her consciousness of the possibility of doing this or that has been transformed into a self-conscious feeling of being this or that. At least for the moment, she is not capable of transcending what she was apprehended being, a disparaged sexual object.

On the negative side, Sartre often suggests that the experience of the look of the other can easily be reversed. Consider, for example, the following:

It is by thrusting myself towards my possibles that I shall escape (shame) to the extent that I shall consider my object-ness as non-essential. This can happen only if I apprehend myself as being responsible for the Other's being. The Other becomes then that which I make myself not-be, and his possibilities are possibilities which I refuse and which I simply contemplate— hence dead possibilities.³⁵⁷

On this view, Vivienne Rabidue can escape feeling shameful by considering all the possible avenues open to her and by realizing that her feeling of being a disparaged sexual object is not essential to who she is. She only has to recognize that the circumstances she finds herself in have allowed the other to turn her into an object. She

is then free to choose to not to be the possibilities that Douglas Henry or other co-workers have imposed upon her. She can simply refuse to accept their views of who she is by contemplating their worth. If she does this, their views of her have now become "dead possibilities" because they no longer engender the look of the other.

If Sartre is correct in asserting that the look of the other can so easily be transcended, then this concept does not adequately explain why Rabidue would be severely affected by being in an anti-female work environment. The look of the other may momentarily force her to pass judgment upon herself as being a disparaged sexual object, but she can freely interpret what her future identity will be within the limits established by the possibilities open to her. If this is an accurate phenomenological account, Judge Krupansky's claim that Rabidue should be merely annoyed by such displays and conduct seems quite reasonable. The idea that she can refuse Henry's remarks and transform them into "dead possibilities" through simple acts of contemplation makes Sartre's theory compatible with the idea that group identity influences but does not permeate the individual; after all, she is, to paraphrase Locke, free to reject her co-worker's and society's views of who she is unless she becomes fully convinced, as a rational creature, of their solidity, truth, and certainty.³⁵⁸ The look of the other, which momentarily forces her to identify with how she feels other people are perceiving her, then becomes just another surmountable obstacle standing in the way of complete freedom (being for-itself).

What is needed is a theory of the self that would explain why it would be reasonable for the look of the other to have a far more substantial psychological effect on women than Sartre's theory implies. I will now attempt to develop such a theory by combining Sartre's concept of being for others with George Herbert Mead's theory of social development. I will argue that being for others is our primary mode of existence and that being for-itself often if not always arises within the context of trying to establish who we are in relation to how others perceive us. After having done this, I will then offer a systematic phenomenological explanation of what it means to claim that group identity is of primary importance while individual identity is only of secondary importance. I will then apply this explanation to the aforeoutlined sexual harassment cases in order to illustrate why a reasonable woman would normally be severely psychologically affected by the type of conduct that Vivienne Rabinovitch and Lois Robinson were subjected to.

CHAPTER XII

MEAD'S THEORY OF THE SOCIALLY DEVELOPED SELF

Mead claimed that the social development of human individuals emerges through the use of what he calls significant gestures, which enable us to take the role of both people and objects while we are interacting with them.³⁵⁹ This ability to take the role of others makes it possible for us to see ourselves as objects, allowing us to see ourselves as other people see us. And this, in turn, helps us understand what roles we are expected to play in particular communities and throughout society at large.

The gesture is the essential mechanism that facilitates such interaction. There are non-significant (unself-conscious) gestures that non-human animals always use. Mead uses the example of a dogfight to illustrate this:

The act of each dog becomes the stimulus to the other dog for his response. . . . The very fact that a dog is ready to attack another becomes a stimulus to the other dog to change his own position or his own attitude. He has no sooner done this than the change of attitude in the second dog in turn causes the first dog to change his attitude. We have here a conversation of gestures.³⁶⁰

This conversation of gestures does not involve the use of language because language requires the use of what Mead calls significant (self-conscious) gestures, which are beyond the capacities of dogs:

We do not assume that the dog says to himself, "If the animal comes from this direction he is going to spring at my throat and I will turn in such a way." What does take place is an actual change in his own position due to the direction of the approach of the other dog.³⁶¹

Human beings also often use non-significant gestures as they go about their social interactions. A boxing match or fencing contest, for example, often resembles a dogfight in form:

If the individual is successful a great deal of his attack and defense must be not considered, it must take place immediately. He must adjust himself "instinctively" to the attitude of the other individual.³⁶²

But human beings can also respond reflectively; "(h)e may," as Mead puts it, "deliberately feint in order to open up a place of attack."³⁶³ Thus, human beings respond to situations using both non-significant and significant gestures. Sometimes we unself-consciously react to feeling threatened by glaring or clenching our fists, and at other times we self-consciously respond by making an effort to act nonchalantly in order to try to convey the message that we are not really feeling threatened, which, according to Mead, is something that other animals cannot do.

The ability to use significant gestures in order to act nonchalantly when one is actually feeling threatened or to deliberately feint during a fight rests on our ability to imperfectly take the role of the other person that is being interacted with. I use the term "imperfectly" because Mead argues that our knowledge about someone cannot be measured against some absolute standard, but only to the extent that we can make more or less educated predictions about how someone will respond to the various courses of action open to us. As Mead commentator David L. Miller explains,

If an organism, by its gesture, calls out in itself the same response that it evokes in another participant in the social process, then that gesture is a significant symbol— which is to say, that the gesture is a linguistic gesture and its meaning is shared by both the one who makes it and by the other, to whom it is addressed.³⁶⁴

Significant symbols make it possible for human beings to have the power of imagination, to think, for example, of new and inventive ways of winning a fencing match or coping with feeling threatened. We can do this because we can take the role of others and make ourselves objects of our own reflection, that is, we can make an educated guess about how someone else will respond to the possible courses of action open to us, e.g., perhaps the other person will not realize that I feel threatened if I act nonchalantly. In other words, the use of significant symbols allows us to empathize, or at least to attempt to empathize, with how our actions are being received by others and this explains how, e.g., a fencer can empathize with an opponent to the point that she can predict his response to a move. She can take the role of the other and imagine how she is appearing as an object before that person.³⁶⁵

The ability to take the role of the other also makes it possible for human beings to know what constitutes appropriate or inappropriate behavior, as well as allowing one to develop an understanding of who he or she is by making it possible for one to empathize with how others view him or her while interacting with them. Our sense of self emerges, that is, our consciousness expands, with our increasing ability to take on ever more complicated roles.

Child play, the first step in this gradual transformation, involves taking the role of one other person but not of more than one at a time. At this stage a child acts as though

he is someone else, a teacher, a mother, a police officer, etc.. A child becomes self-conscious of who he or she is by playing these different roles, by taking the roles of others:

He plays that he is, for instance, offering himself something, and he buys it; he gives a letter to himself and takes it away; he addresses himself as a parent, as a teacher; he arrests himself as a policeman.³⁶⁶

The child is calling out in her or himself the responses that she or he would expect to receive from a clerk, a postal worker, or a police officer. The child is now beginning to understand the nature of the different social roles that one can occupy by learning to be an object of her or his own experience, e.g., one cannot know what it means to be a customer unless one can take the role of being a sales clerk. The child is now learning to play particular roles, but one cannot not develop a full sense of self until one has organized the responses of others into a structural whole.

The breakthrough to this stage occurs when the child is able to play complex games, when one is forced to use one's mind to take the role of several other players in order to make predictions about how they will respond to one another under certain circumstance. The fact that one must take the role of several others at the same time introduces a qualitatively different problem:

If he gets in a ball nine (a baseball team) he must have the responses of each position involved in his own position. He must know what everyone else is going to do in order to carry out his own play. He has to take all of these roles. They do not all have to be present in consciousness at the same time, but at some moment he has to have three or four individuals present in his own attitude, such as the one who is going to throw the ball, the one who is going to catch it, and so on.³⁶⁷

The fact that the ballplayer has to take the role of several other players means that he may no longer randomly shift from one role to another, as one could as a child. As Karen Hanson explains,

Instead he has a definite position, and his position and his actions in fulfilling it are defined, governed, by his organization of the position, the actions, the expectations of the other participants.³⁶⁸

The expectations that the participants have for each other because of their respective positions on the team "constitute a point of reference against which the appropriateness of particular acts can be understood or assessed."³⁶⁹

The rules and expectations that govern one's performance during a baseball game may be more rigid than in most other social settings, but the form of interaction required remains essentially the same. Sartre's example of the waiter provides a good example. A waiter must have the responses of the customers and other staff members involved in his own position. He must know what the patrons, dishwashers, managers, and busboys are going to do in order to carry out his own task. He normally cannot shift from role to role randomly and his position with accompanying responsibilities are governed by the expectations of the other people in the restaurant. Finally, it is these expectations about a waiter's appropriate role that furnish the standards against which his performance will be measured.³⁷⁰

Mead claims that an individual becomes a unified self when that person has successfully internalized most of the explicit and implicit rules of interaction in a given social setting. She is now able to take the role of what Mead refers to as "the generalized other," which he describes as follows:

The organized community or social group which gives to the individual his unity of self may be called "the generalized other." The attitude of the generalized other is the attitude of the whole community. Thus, for example, in the case of such a social group as a ball team, the team is the generalized other in so far as it enters— as an organized process or social activity— into the experience of any one of the individual members of it.³⁷¹

An individual comes to know what roles that she is expected to perform precisely to the extent that she has internalized the generalized other. The individual now has a unified sense of self because she is consciously aware of who she is in relation to the others around her.

Mead ultimately argues that there is no self without self-consciousness. A sense of self cannot develop unless one has the reflective ability to be both subject and object to one's self. It is the ability to use significant symbols in social settings that allows one to be both a subject and an object by taking the role of the other. By doing so one develops a sense of self because she has internalized the collective attitudes that a society or group has taken towards her. An individual is ultimately nothing more than the internalization of the collective attitudes of the various groups of which she is a member. As commentator Mitchell Aboulafia explains,

I do no merely watch myself from the perspective of the generalized other;
I see myself from this perspective as it orders and frames the behaviors I
view as myself.³⁷²

There is no soul or transcendent ego in the sense that there are no categories or meanings prior to social interaction; the collective attitudes she derives by taking the role of the other furnish her with all of the shared meanings that allow her to act and react as she goes about her daily affairs.³⁷³

The fact that the self is entirely derived from these collective attitudes is not meant to imply that an individual plays only a passive role in this process; he or she also plays an active role. The passive role corresponds to what Mead refers to as the development of the "me," and the active role corresponds to what he refers to as the response of the "I." The "me" is the definition of one's self derived from the attitudes of others, and the "I" attempts to redefine the self by responding to these attitudes. The "me" is the calculated object, and the "I" is the incalculable subject; as Lewis Coser explains,

(t)he self, as a whole, . . . is a compound of the stabilized reflection of the 'generalized' other in the 'me' and the incalculable spontaneity of the I.³⁷⁴

On the one hand, an individual is always indebted to, and one's acts always spring from, a culture's socio-historical evolution; on the other hand, an individual makes a unique and unpredetermined contribution to the future evolution to that pool of knowledge.³⁷⁵

An individual can draw upon that pool of knowledge in order to take a critical perspective towards the various groups that she or he is a member of. As Aboulafia explains, "one can distance one-self from a particular social system by contemplating it from the perspective of a more encompassing social order."³⁷⁶ One can take the perspective of a more encompassing social order by self-consciously taking the roles of others in order to reflect on a problem from a different point of view, and it is this ability that allows human beings to solve problems in novel ways. David Miller offers a more detailed explanation:

Under these circumstances, the individual is in a situation in which he may construct a new act or a newly proposed hypothesis or a new organization of events aimed at permitting the impeded act of adjustment to continue.³⁷⁷

Thus if an individual is not satisfied with role that she is supposed to play in virtue of being a member of a particular group, she can problematize that view by constructing a new perspective about the appropriateness of that role.

However, problematizing the appropriateness of the old role does not necessarily result in a new social identity. A person might try to change how he or she is perceived by others, but, if others reject this attempt, he or she is still going to be aware of that socially derived fact because of her ability to take the role of the other. At this point she will experience conflicting attitudes; her sense of self will be disorganized as a result of the existing conflict between the socially derived definition of herself (the stabilized me), and her attempt to establish a new identity (the responses of the I). There will not be an organized sense of self again until these two poles of the self are reconciled, until the role she expects to play conforms with the role others expect her to play.

I think that several facets of Mead's theory of social development can be used to help better explain why Vivienne Rabidue cannot simply refuse to be psychologically affected while working in an anti-female work environment like Osceola Refining, but Mead's theory by itself still cannot fully explain this.

Mead's theory provides a useful elaboration of the communitarian's claim that "the story of my life is always embedded in the story of those communities from which I derive my identity."³⁷⁸ Vivienne Rabidue's ability to take the role of the other makes it possible for her to come to an awareness of the various narrative "histories" or "stories"

she is "embedded" in and allows her to recognize the goods specified in them. Her ability to use significant symbols imperfectly enables her to see herself as other people see her. Because she can organize the responses of her other co-workers into a structural whole, she can come to know what constitutes appropriate or inappropriate behavior at a workplace where language is rough hewn and vulgar. She develops an understanding of who she is by empathizing with her male co-workers while she is interacting with them, and she can then come to know them to the extent that she can make educated predictions about how they will respond to the different courses of action open to her, e.g., she might try to act nonchalantly even though she feels deeply hurt by their conduct if she thinks this will cause her co-workers stop acting so obscenely.

Like MacIntyre and Sandel, Mead argues that one's sense of self is entirely derived from the collective attitudes of the various communities that one finds one's self part of. Rabidue has no self without self-consciousness. By taking the role of the other she develops a sense of self because she has internalized the collective attitudes that American society and various groups she is a member of have taken towards her. Consequently, to paraphrase Aboulafia,

She does not merely watch herself from the perspective of society at large or her co-workers; she sees herself from this perspective as it frames and orders the behaviors she views as herself.³⁷⁹

She has no soul or transcendental ego in the sense that there are no categories or meanings prior to social interaction; the collective attitudes of her co-worker and of the other groups she is a member of furnish her with all of the shared meanings that allow her to act and react while she is working.

For our purposes, the problem with Mead's theory centers around the relationship between the objective (the "me") and the subjective (the "I") aspects of his theory of the self. The social definition of herself that Rabidue derives from her co-workers is that being a female manager is not an appropriate role for her to occupy. She responds by rejecting this role and tries to establish the idea that she is a co-worker deserving of respect. There will not be a unified sense of self until these two poles of the self are reconciled, until the role she expects to play conforms with the role her co-workers expect her to play. But, according to Mead's theory, the fact that her sense of self is not unified does not entail that she will suffer any psychological harm. The experience of her identity may be socially derived, but it is not phenomenologically analogous to Sartre's concept of being for others. The experience of being an object (a "me") does not necessarily cause her to feel shameful; it is merely the attitude of her co-workers and she is free to accept or reject their views. As Mead claims, "(t)he situation is there for (her) to act in a self-conscious fashion."³⁸⁰ She can draw upon the pool of significances acquired from the various communities that she is a member of in order to reject her co-workers view of her.

Consequently, Mead's theory left by itself no better explains why the views expressed about Rabidue and other female employees by her co-workers and society at large would cause her enough psychological harm to instill a debased sense of self worth in her. Nonetheless, over the course of the next two sections I will attempt to demonstrate that some aspects of his theory— his concepts of taking the role of the other,

the stages of social development, and the I/me relationship— can be fruitfully used to develop just such a theory of the self if they are combined with Sartre's concept of the look of the other. This theory will explain why group identity permeates individuals under certain circumstances to the point that one cannot simply refuse to be affected by the views expressed by others, even when one realizes that the views expressed by them have no merit.

CHAPTER XIII

DEVELOPING A NEW THEORY OF THE SELF

BY COMBINING SARTRE AND MEAD

I am now going to further examine Sartre's and Mead's theories of the self in order to demonstrate that the problems with their respective theories can be fruitfully solved by the other's theory. To be more specific, I will argue that Mead's theory of social development would be more cogent if it incorporated Sartre's theory of the look of the other and that the circumstances under which the look of the other cannot be overcome can be better clarified by incorporating aspects of Mead's theory of social development. I shall then show that a combination of these two theories can explain why, and give us a coherent understanding of what it means to claim that, group identity takes primacy over individual identity. In turn, this will justify the use of a group-rights based reasonableness standard by allowing us to better understand why someone like Rabidue or Robinson would normally be severely psychologically affected by a sexually charged work environment to a point where it would unreasonably interfere with her ability to do her job properly.

Mead's theory of social development differs from Sartre's theory of the look of the other in two very important respects: First, Mead, just like all of his predecessors within

the western philosophical tradition, presupposes that we do not experience ourselves cognitively when we are interacting with others. According to Mead, we derive our respective self-definitions by taking the role of the other in order to draw inferences about how others see us based upon our assumptions about the prevailing social consensus and the behavior of others around us. For example, the person looking through the keyhole concludes that the approaching onlooker disapproves of his actions because such disapproval is in keeping with his assumptions about the prevailing social consensus. And if the other shakes her head at him after he offers up an explanation for his behavior, he can infer that her gestures indicate that she still finds his behavior wanting.

Unlike Sartre, Mead does not claim that we experience self-consciousness directly, that is, we do not lose our ability to focus our attention upon our activities when we take the role of the other. The other does not limit our respective possibilities through his or her look because the look does not deprive us of our subjectivity; the attitude of the other is just one object among others that we consider before acting. As Gila J. Hayim explains, according to Mead,

(a) person is ashamed of himself from the moral point of view of the Other, which point of view becomes his own morality. . . . He has internalized the Other, which means that the Other does not necessarily have to be present in order for him to experience shame.³⁸¹

Sartre, on the other hand, makes a distinction between how I would experience shame before and after the appearance of the other. Before the other appears I only experience shame indirectly, meaning that the guilt that I might feel is just one factor among others that I consider before choosing one of the available possibilities open to me;

(m)y consciousness sticks to my acts, it is my acts; and my acts are commanded only by the ends to be attained and by the instruments to be employed. My attitude . . . has no 'outside'; it is the pure process of relating the instrument (the keyhole) to the end to be attained (the spectacle to be seen).³⁸²

But after the other appears I become cognitively aware of myself as an object, "I see myself because somebody sees me," and what I have been caught doing becomes the direct object of my consciousness.³⁸³ And, as a consequence, my consciousness is no longer able to stick to its acts, to the instruments to be employed in order to attain certain ends; in other words, my being is now permeated with feelings of self-consciousness, in this instance, an overwhelming feeling of shamefulness, and these feelings constrain and inhibit my ability to act as I had before the appearance of the other. By contrast, for Mead, the act of taking the role of the other does not inhibit or constrain my ability to employ certain instruments in order to attain certain ends, because the actual appearance of the other does not completely restructure my consciousness by making me feel shameful; instead, the attitude of the other is just one factor among a plurality of others that I consider before acting (the response of the "I").

The second major difference between their theories concerns how we respond to the attitudes of others. For Sartre, as was outlined earlier, we may respond to the unwelcome feeling of being objectified by trying to restore our subjectivity which entails that we must simultaneously turn the other into an object. If this attempt is successful, we are free to go about our activities as we had before the other appeared. According to Mead, on the other hand, the "I" is free to actively respond to the attitudes expressed by others, the "me," by trying to change the attitudes that others take toward us, and if this

attempt is successful, we will have a new social identity, a new role in society. Thus, Sartre argues that we respond to the attitudes expressed by others in order to be free of their constraining influence upon us, while Mead argues that we respond in order to create a new social identity, and this new social identity restores our unified sense of self.

By implication, and in strong disagreement with Sartre, Mead is claiming that we can never be free of the constraining influences of others, at least when we are in social settings, because our actions are directed towards securing certain social identities in the eyes of others. Further, having a given identity is not an unwelcome prospect for Mead, as it is for Sartre, because a given identity might very well conform to the role that we would like to play in society; the response of the "I" might be in accordance with a desired social definition of the self, the "me." For Sartre, this would be an act of bad faith, an attempt to deny one's freedom (being for-itself) by acting as though one was an object (a being in-itself). As I outlined earlier, Sartre is not opposed to the for-itself accepting certain identities or playing certain roles, he only asks that we do so with the full understanding that these identities and roles do not constitute who we are because we are free to reevaluate their worth and abandon them; as Catalano explained, "the living of these characteristics is a free interpretive act."³⁸⁴ Mead also argues that we are free to reevaluate and abandon our identities and roles, but we ultimately do so in order to create new identities and roles rather than to be radically free, as Sartre maintains.

For our purposes, the major problem with Mead's theory of social development is that it does not explain how others can so constrain a woman when she is working in a

sexist environment that her ability to do her job is fundamentally interfered with. I think that Mead has offered us an elaborate and plausible theory about how she derives her self-definitions from others, but Mead's theory by itself still does not account for why she or any other reasonable woman would be adversely psychologically affected by these kind of gestures. The reason is that on this view, through the response of the "I," she would still be free to reflect on, and if necessary reject, society's and her co-workers customs and values if they are found wanting. Given this ability, such conduct should not prevent her from feeling equal in the workplace, nor should it stifle her potential by instilling a debased sense of self-worth in her. In the end, Mead's theory is compatible with the socially imbedded individualism posited by Kymlicka, Greschner, and the communitarians. His theory still ends up separating psychological and sociological factors from one's ability to make "the right judgment in the light of good reason."³⁸⁵ By contrast, Sartre's concept of the look of the offers us an account of how and why we are deeply affected by even the most irrational views expressed by others, but I do not think that this account is entirely accurate.

First of all, our relations with others are not always filled with conflict, meaning that it is not always the case that one person's subjectivity entails that the other person is an object or vice versa. There are plenty of occasions when two or more people are around each other, and paying attention to one other, without any one experiencing the look of the other; on such occasions everyone still feels free to relate the instruments available to them to the ends they are trying to achieve, at least, as we shall shortly see,

within certain parameters. For example, my friend Don and I often walk to school without experiencing such judgments from each other. We are able to wholly focus our attention on the topics under discussion or the scenery around us without feeling self-conscious. As was quoted earlier, Sartre described being a subject in the following way:

The woman whom I see coming before me, the man who is passing by in the street, this beggar whom I hear calling before my window, all are for me objects— of that there is no doubt.³⁸⁶

Perhaps there is no doubt that all are for him objects, but it does not follow that they experience themselves as such. The woman coming before him might also see him as an object, as the man she sees coming before her. The point is that both parties can come into contact and even interact with each other without either one losing his or her subjectivity. At such times there is no phenomenological evidence of conflict. Neither person's consciousness has been restructured even though another person has appeared before him or her. Thus, there is still the possibility that either person's freedom will be limited by the freedom of the other in the sense that either person's consciousness of the possibility of doing this or that can be transformed into a self-conscious feeling of being this or that. But such a transformation is not inevitable, even when the other person is exercising his or her subjectivity.

Nevertheless, Sartre argues that we are always either subjects or objects, and that we are phenomenologically free of the constraining influence of others when we are the former.

The other has not only revealed to me what I was; he has established me in a new type of being which can support new qualifications. This being was

not in me potentially before the appearance of the other, for it could not have found any place in the for-itself.³⁸⁷

Thus when we are in the presence of others as subjects, we are said to be free to organize the world before us in relation to our future possibilities. Sartre's conclusion is based upon the introspective observation that there are times when we do not feel directly self-conscious when we are around other people and that we never feel so when we are alone. This is true, but it does not follow that we are as free in the former circumstances as we are in the latter.

I think that the being of the other is in all of us potentially although it cannot find any place in the for-itself. Ironically, this is illustrated by the distinction Sartre makes between how we experience human and non-human objects:

The other is first the permanent flight of things toward a goal which I apprehend as an object at a certain distance from me but which escapes me inasmuch as it unfolds about its own distances.³⁸⁸

According to Sartre, the reason that human objects escape me is that they are capable of being subjects. Since they can be subjects, we are always aware of the possibility of the other imposing his or her look upon us. My point is that this delimits the possible actions open to us if we do not want to experience the look. For example, my friend Don and I often walk to school without ever experiencing the other's look, but we both realize that we will feel directly self-conscious if either one of us does something that strays too far from our expected social roles. If I am absentmindedly doing something that is inappropriate and I suddenly realize that he notices, I will feel embarrassed and my

consciousness will be restructured in such a way that I am temporarily unable to focus my attention on the topics we were just discussing or on the scenery around us.

I would like to suggest that we are almost always aware of these kind of possibilities even if we do not consciously consider them. This is evidenced by the simple fact that we feel much less inhibited when we are completely alone, the reason being that we cannot feel embarrassed about what we are doing without the concrete presence of another person. Conversely, we are more constrained when we are around others because of the possibility of being turned into an object through the other's look. If this analysis is correct, we should abandon the dichotomy of being either a subject or an object when we are around others. Instead, we should ask whether the other is foregrounded or backgrounded: the foregrounding of the other being equivalent to Sartre's concept of the look of the other; and the backgrounding of the other being consistent with the idea that the other constrains our actions even when we do not feel directly self-conscious because we are still able to focus our attention on whatever matters are before us while still being pre-reflectively aware of the deleterious phenomenological possibility of being subjected to the look of the other if we violate the tacit social expectation that govern a given interaction beyond a certain point. On this view, there are now three distinctive modes of being: being for-itself, which is the completely uninhibited mode of being that we only experience when are alone, and the two modes of being for others that were just outlined, being backgrounded for others and being foregrounded for others.

The dichotomy between being for-itself and being for others that Sartre posits leads to a second problem, namely it leads him to conclude that our fundamental desire is to be radically free. In light of this dichotomy, his conclusion is understandable. Since the experience of being for others, being a negatively judged object, is obviously an undesirable mode of existence to be in, and given that the only alternative is to restore one's subjectivity by turning the other into an object, being for-itself is clearly preferable. But, if I am right, such complete freedom is no longer a realizable option when we are keeping company with others. Instead, the possibility of going about our activities without experiencing self-consciousness directly, but all the while pre-reflectively realizing that others can subject us to their judgment if we act inappropriately in their eyes, is the best we can hope for. In other words, we want to keep the experience of being for others in the background, but this mode of existence can only be maintained by behaving in such a way that our actions do not call forth the other's look. So long as we manage to keep the look of the other from being foregrounded, our consciousness will not be restructured and we will still free to concentrate on the activities before us.

So the look of the other sometimes, but not always, arises when we are around other people. What, then, are the circumstances that give rise to experiencing self-consciousness directly? Although Mead's theory does not account for the fact that our consciousness is restructured when we experience the look of the other, it nonetheless can still help us further clarify the conditions that keep the other's look from being foregrounded.

Mead's explanation of how language, our ability to use and understand significant gestures, makes it possible for us to put ourselves in another's person's position when we are interacting with them can be used to help better explain how the look of the other arises. The use of significant gestures allows me to take the role of the other, and doing this forces me to see myself as other people see me. Significant gestures, like looking through a keyhole, call out in me the same response that they do in the person who caught me peeping. It forces me to see how I appear as an object in the eyes of that person. This partially explain why we feel self-conscious, in the Sartrian sense of the term, when we fail to conform to the roles prescribed for us by others. If I was doing something innocent, like looking at a bulletin board, when the other person approached me from behind, I might be startled but the look of the other would not arise. Looking at the bulletin board calls out the same response for both of us, but it does not engender the look of the other because such behavior is well in keeping with what society deems acceptable. Thus, the experience of being an object is not identical with experiencing the look of the other, as Sartre maintains; being a social object only makes one feel self-conscious when that person is behaving in a substandard fashion.

As was indicated earlier, having a given social identity is not necessarily an unwelcome prospect for Mead, as it is for Sartre, because a given identity might very well conform to the role or roles that we would like to play in society; the response of the "I" might be in accordance with the desired social definition of the self, the "me." When this occurs, our being for others will remain in the background. The process is imperfect, but

through our ability to take the role of the other we can come to know the roles that we are expected to play, and if the expectations that others have of us conform to the roles we desire to play, the judgment of the other will remain in the background. Consider the example of the waiter. He is interacting with some patrons: they greet, he takes their orders, he refills their wine glasses punctually, they request more bread, etc. Everything goes smoothly, and at no point do the waiter or the patrons feel self-conscious; they would appear to be able to co-exist peacefully, co-operating as free subjects. But in a sense this is an illusion. The only reason that they do not feel self-conscious is that all of the parties are playing their respective roles adequately. The waiter is cordial and subtly servile, punctual, and knowledgeable about the menu. The diners are friendly and well mannered, capable of ordering an appropriate wine, and they tip well. Everyone appears to be acting freely, but the look of the other is still delimiting their respective possibilities. Both the waiter and the patrons are pre-reflectively aware that deviations from their expected roles will introduce the look of the other. If the waiter takes far too long to serve them or bumbles through his various tasks, he will become self-conscious and feel adjudged to be irresponsible or incompetent. If the patrons converse too loudly about inappropriate subject matters or condescend to the waiter, they will become self-conscious and feel adjudged to be vulgar and arrogant. So even when the waiter and patrons appear to be free subjects, figuring out what to order and talk about, their freedom is actually modified by the social expectations that others impose upon them because failure to meet these expectations can force them to experience the look of the other.

Thus, our relationships with the other members of the various groups we belong to is always mediated by the possibility that being for others will become foregrounded if we fail to conform to certain norms. This, however, is not necessarily a problem, a source of conflict, so long as we are comfortable with the roles that we are performing.

But what happens when the expectations that others have of us do not conform to the roles we want to play? Mead's theory of social development can also be used to help explain whose views prevail when such conflicts about which social roles are appropriate or inappropriate do arise. His theory of regarding our ability to take the role of the other in order to identify our socially derived roles at the game stage and his theory of the generalized other can help further clarify the conditions under which being for others becomes foregrounded. I think that it becomes foregrounded when the prevailing role expectations that exist at the game stage, for example, at the workplace, or throughout society at large, are being sufficiently violated.

To be more specific, Mead's theory of the generalized other can offer us further insight into what the person looking through the keyhole experienced when he heard those approaching footsteps. It is important to note that he presumably does not know who is approaching him from behind. For all he knows it could be a prurient person who approves of such voyeuristic acts, but he feels shame because he takes the generalized role of the average other person, one might even say the average reasonable person, and realizes that the average person would strongly frown upon such behavior. According to Mead, an individual develops a unified sense of self when that person has successfully

internalized most of the explicit and implicit rules of interaction in a given social setting. In this instance, it is the internalization of the idea that it is inappropriate to spy on someone that forces him to feel shameful and self-conscious when the other appears. It is our ability to take the role of the other in order to identify society's consensus about the prevailing norms regarding what constitutes appropriate or inappropriate behavior that forces him to see himself as he assumes the average person in society would see him, as someone who is behaving voyeuristically.

It is important to note that the feeling of embarrassment that the other engenders in him does not necessarily entail that he is doing something that merits condemnation. There might actually be a justifiable reason for why he is spying on someone, but the experience of the look of the other results from his perception about how his conduct must appear to the onlooker. He might think and be sincerely convinced that his behavior is above reproach, but the appearance of another makes him feel like he is doing something that he shouldn't be. The person observing him might approve of his conduct if she understood his motives, but he pre-reflectively realizes that she knows nothing about the context and assumes that she disapproves because he empathizes with her and see himself as he thinks he must appear to her. Thus, the experience of the look of the other occurs because we cannot help but pass judgment on our actions from what we assume to be the moral point of view of the other and it is this rather than actual merits or lack there of our actions that makes us feel embarrassed about what we are doing.³⁸⁹

Similarly, our ability to know what roles we are supposed to play in specific social contexts, Mead's theory of social development at the game stage, allows us to make sense of the circumstances that would lead to the foregrounding of the other in a restaurant. The point is probably obvious by now, but briefly, through his ability to take the role of the other, the waiter is implicitly aware of the social fact that he is supposed to behave courteously around patrons, to the point of being subtly servile, and that failure to do so beyond a certain point will bring forth the look of the other. The same two people would probably have different social roles to play if they ran into each other an hour later at a park; in this social context it would no longer be appropriate for the patron to issue periodic demands to the off-duty waiter. In sum, the various social contexts we participate in often impose differing behavioral expectations upon us and the transgression of these expectations beyond a certain point will engender the look of the other.

Sometimes these expectations are even more or less in conflict with the prevailing social consensus that exists in society at large. A good example of this occurs at most bachelor parties, where behavior that is normally frowned upon is encouraged, and a refusal to participate in the "festivities" is socially sanctioned against. In this context, because of his ability to identify the prevailing social consensus by taking the roles of the other members of the group, one might feel prudish and emasculated because he refuses to go to a strip joint. Further, his assumptions about the prevailing social expectations within the group might very well discourage him from even voicing concerns about the

ethics of going to a strip joint because he knows that such comments will only engender a very lusty reproach. The fear of expressing these views is not just that others will disagree, that one's views will be found wanting after a thorough, rational discussion. In fact, most of the participants, if reluctantly pressed, would probably concede that such activities are hard to justify. Rather, this fear is based on the phenomenological fact that the lusty reproaches of others will make him feel bad about himself; he will be made to feel prudish or worse for having dared to bring up this issue at all. The fact that most members of society would condemn such behavior does not necessarily lead to the foregrounding of the other. Just as the person looking through the keyhole does not become cognitively aware of himself as a shameful object, even though he is pre-reflectively aware of the fact that he is behaving shamefully, until he realizes that someone is observing him, a man going to a strip joint will not become cognitively aware of himself as a judged object, even though he may think that he is behaving inappropriately, until he is confronted by someone, e.g., his wife, who is in a position to turn him into an object. In sum— and this is a crucially important point— the social consensus that prevails within a group takes phenomenological precedence over the social consensus that prevails throughout society at large because the foregrounding of the other requires the concrete presence of a subject who can pass judgment on someone as an object.

Mead's theory of what he refers to as the relationship between the "I" and the "me" offers us a plausible explanation of how our multiple group identities intersect. Take the

example of the interaction between the patrons at a restaurant. Normally, all of the parties have certain standard social expectations of the other and of themselves. For instance, it's generally not appropriate for patrons to disturb one another while dining. But this is no longer the case if one of the patrons is famous. At this point all social bets are off, and many people will violate that public figure's space because they just must get an autograph. The introduction of the group identity of being a celebrity transforms both parties social roles. Not only do the other patrons now feel that they have the right to approach the celebrity, but the celebrity is also made to feel that it would be bad manners to refuse their requests. Thus the social roles that we are all expected to play make various group identities more or less important, depending upon the social context we are in.

The idea that being for others can become foregrounded sheds more light on the conflict filled struggles that sometimes occur when we interact with others. As one should recall, Sartre argued that we are either subjects or objects during social interactions, and we want to restore our subjectivity, which simultaneously entails that we must turn the other into an object, when we are confronted by the other's look. For example, the embarrassed voyeur tries to reestablish his subjectivity while attempting to turn the other into an object by accusing the approaching onlooker of being both nosey and ignorant. For Mead, the "me" is the passive definition of one's self derived from the attitudes of others; in this instance, the awareness that one is being defined in a less than positive way. And the "I" actively attempts to redefine the self by responding to this

attitude, for example, when he suggests that the other person should mind his own affairs since he has no idea about what's really going on, he is trying to establish a new definition of himself in the other's eyes by suggesting that the other would not condemn him if he understood why he was peeping through the keyhole. This attempt to establish a new definition of one's self might fail, however. The other might still see his actions as being inexcusable, and she might indicate this by frowning or shaking her head at him. If this occurs, he will realize that his self-definition before the other is still more or less as it was before, negative and disapproving. For our purposes, the important point is that the attempt to redefine one's self, the response of the "I," is always limited by the definition of one's self derived from the attitudes expressed by others, the development of the "me." Thus, the establishment of a new self-definition ultimately requires that others accept this new definition. In Sartrean terms, this would mean that he had failed to regain his subjectivity, and he would still experience himself as a disparaged object before the gaze of the other. He also would have failed to turn the other into an object, that is, the approaching onlooker, having rejected the idea that there is a good explanation for such voyeurism, would not experience himself as being either nosey or ignorant. Thus, Mead's theory of the development of the self, and his claim that our self-definitions are ultimately derived from the attitudes of others, partially explains why we sometimes remain objects subject to the other's gaze even after we have attempted to reassert our subjectivity.

I am not sure whether the theory of social interaction developed in the preceding pages, what amounts to an amalgamation of Sartre and Mead, completely explains why

people are so strongly affected, often adversely, by the views expressed by others, even when they know that the other person's views lack merit. But I do think that it takes us an important step in the right direction. It does this by providing us a plausible account of why we cannot just relate to the views expressed by others in a rational manner. If the proponents of the various forms of individualism are right, we have the rational capacity to distance ourselves from the opinions expressed by others, reject society's ignorant customs and habits, if only we are sufficiently arduous and reflective. The advantage of the theory developed here is that it helps explain why no amount of reflective rigor can prevent others from making us feel disparaged and devalued under certain circumstances. Contrary to what Will Kymlicka claims, confidence in one's abilities is only partially a "by-product" of "making the right judgment in the light of good reason."³⁹⁰ The gaining of such confidence also requires that the roles we want to perform more or less conform with a community's expectations for us. This claim is based on four fundamental, very interrelated conclusions about the nature of human social interaction: One, being for others rather than being for-itself is our primary mode of existence when we are in social settings. Two, being for others can either be foregrounded or backgrounded. Three, being for others becomes foregrounded when we stray too far from the social role expectations that prevail in a given community, even if that social consensus is found to be lacking in merit. And four, the foregrounding of the other has a deleterious psychological effect because it makes one feel self-conscious and objectified. Instead of providing a more detailed summary here, I would rather demonstrate this in a

thoroughgoing manner by turning our attention back to the logic and details of the

Robinson ruling.

CHAPTER XIV

A PHENOMENOLOGICAL ACCOUNT OF THE EXPERIENCE
OF HOSTILE ENVIRONMENT SEXUAL HARASSMENT

By way of brief reminder, in Robinson, the District Court for the Middle District of Florida held that "a reasonable woman . . . would perceive that an abusive work environment has been created" at Jacksonville Shipyards, Inc ("JSI").³⁹¹ It specifically concluded that sexual remarks and jokes, sexually oriented pictures of women, and "the non-sexual rejection of women by co-workers" will corrosively affect the psychological well-being of a reasonable woman placed in an environment like JSI's.³⁹² Allowing Robinson and other women to be continually exposed to such conduct cannot be squared with Title VII's promise to open the workplace to women:

When the pre-existing state of the work environment receives weight in evaluating its hostility to women, only those women who are willing to and can accept the level of abuse inherent in a given workplace— a place that may have historically been all male or historically excluded women intentionally— will apply to and continue to work there. It is absurd to believe that Title VII opened the doors to such places in form and closed them in substance.³⁹³

It's also worth remembering that these conclusions about the psychological effects of sexually charged conduct in the workplace were drawn from the expert testimony of two witnesses, Susan Fiske, who studied stereotyping, which she defined as "category based

responses in the human thought and perceptual processes," and K.C. Wagner, whose studies focused on "common patterns and responses to sexual harassment."³⁹⁴ I will now try to demonstrate that the theory of the self developed in the previous chapter plausibly explains why most reasonable women will not apply to, accept the level of abuse inherent in, or continue to work at a workplace that has historically excluded women intentionally, like JSI.

Ideally, Lois Robinson would be able to focus all of her desired attention on the tasks before her at JSI. In Sartrean terms, the relationship between herself and her work would only be characterized by the relationship between being for-itself and being in-itself. She would be unconditionally free to relate the instruments available to her to the obstacles that confront her in order to achieve the ends she desired. And she would be judged by others on the merits of her ability to do her job properly, period.

The problem of hostile environment sexual harassment arises because of the incongruity between the role expectations that her co-workers and the management at JSI, as well as members of society at large, have for women, on the one hand, and the expectations she has, on the other. She thinks that the role of being a craftswoman is open to her, while the prevailing view of the others, well expressed by the extraordinary proliferation of sexual remarks and pornographic displays at JSI, is that she is first and foremost a sexual object, and only secondarily, if at all, a craftswoman. In Mead's terms, there is more than a little tension between the "I" and the "me," between the social self-definition that she derives by taking the attitudes of the others, and the redefinition of

herself that she is proposing by responding to this attitude. The problem with Mead's theory, which is that it cannot adequately explain why the expression of her co-workers views should not instill a debased sense of self in her, can be solved by combining it with Sartre's theory of the look of the other.

To begin with, the look of the other manifests itself as an internalization of the views expressed by others. The other forces us to become cognitively aware of ourselves as objects. In Robinson's case, the disparaging views of her co-workers become the direct object of her consciousness. In a phenomenological sense, she is forced to recognize that she is as the others she works with see her. Her perception of how her co-workers see her leads to an overwhelming feeling of shamefulness, a feeling of being nothing more than a disparaged sexual object, and this manifests itself as "an immediate shudder that runs through (her) from head to foot without any discursive preparation."³⁹⁵ Thus, the feelings that her co-workers views engender in her has nothing to do with the rational merits of their views; no amount of discursive preparation can prevent her from feeling shameful when a co-worker leaves a picture of a naked woman with her legs spread apart on her tool box.³⁹⁶ The experience she has of being a disparaged sexual object does not occur on a reflective level: She does not come across a picture of a spatula pressed against a woman's pubic area and then ponder what its possible meaning could be;³⁹⁷ instead, the judgment of her co-workers pre-reflectively manifests itself as a foreign freedom beyond her control.

Further, since the manifestation of the look of the other transforms our consciousness from the possibility of doing this or that into a self-conscious feeling of being this or that, it also interferes with her ability to focus attention on the tasks before her. The relationship between being for-itself and being in-itself is characterized by unconditional freedom within the limits established by one's facticity. Paraphrasing Sartre,

Lois Robinson's consciousness sticks to her acts, it is her acts; and her acts are only commanded by the ends to be attained and by the instruments to be employed. Her attitude . . . has no outside; it is the pure process of relating the instruments (the tools she uses to weld) to the end to be attained (the welding that she is supposed to do).³⁹⁸

But she becomes cognitively aware of herself as an object after the other appears, and, as a consequence, her consciousness is no longer able to stick to its acts, to the instruments to be employed in order to attain certain ends. Thus, the look of the other has a deleterious effect upon her job performance because it makes her feel self-conscious while she is working. And these feelings of self-consciousness make it more difficult for her to engage in the pure process of relating her abilities and the tools she uses to weld to the welding that she is supposed to do.

Given the severity of the look of the other, the self-consciousness and feelings of shame it engenders, it is not surprising the look of the other is something to be avoided at almost all costs. One way to accomplish this would be to more or less conform to the roles expected by her co-workers. This would explain why women must, as Fiske explains, "constantly monitor" their behavior and "conform" it to the existing stereotypes,

either by becoming sexy and responsive to the men who flirt with them or by becoming rigid, standoffish, and distant so as to make it clear that they are not interested in the status of sex object.³⁹⁹

As varied as these two responses are, they are both nonetheless attempts to avoid the look or foregrounding of the other.

The woman who acts sexy and responsive will not experience the look of the other because her behavior will largely conform to the expectations of her co-workers. This is what Wagner identified as a coping strategy: She is "engaging in joking or other banter in the language of the workplace in order to defuse the situation."⁴⁰⁰ If she succeeds in doing this, she might not be subjected to some of the more pejorative displays and conduct, and at least she will then be able to avoid the worse "stress effects" of sexual harassment by keeping being for others in the background. She will have to concede that she is seen first and foremost as a sex object, conforming to the expectation of being "sexy, affectionate, and attractive,"⁴⁰¹ but then she might at least be free to concentrate on the work related tasks before her, because she will not be subject to as many hostile reactions from her co-workers.

On the other hand, the woman who refuses to be "sexy and responsive to the men who flirt with her" is taking the more difficult path of attempting to establish a new identity for herself. She is responding to the prevailing view expressed by others "by becoming rigid, standoffish, and distant so as to make it clear that (she is) not interested in the status of sex object." These gestures, which involve the coping strategy that Wagner describes as "telling the harasser to stop,"⁴⁰² are an attempt to force her co-workers to see her differently. If she succeeds, the role expectations that they have for

her, and possibly for other women, will change; the hope is that by completely desexualizing her behavior, she will force the others to see her more as a co-worker deserving of respect than as a sex object. Or, perhaps, they will at least leave her alone. If they come to see her as a respectable co-worker, she probably will no longer feel a need to "constantly monitor" her behavior in order to avoid being subject sexualized displays and conduct because she will no longer be straying too far from the prevailing social consensus.

Finally, the idea that the look of the other can become foregrounded even if the views expressed lack merit is well illustrated by the fact that some women do not file formal complaints because they experience "embarrassment in the process of reporting."⁴⁰³ The desire to file a formal complaint usually signifies that someone thinks that they are being treated extremely unjustly. So why would someone feel embarrassed about attempting to redress this kind of problem? It does not appear to be a rational response to the unjust circumstances that exist. Further, the truly crude behavior directed at Robinson and other female co-workers at JSI is probably not in keeping with the prevailing views held throughout society at large. It is hard to imagine that most people would condone leaving a picture of a naked woman with her legs spread apart on Robinson's tool box. So why would a woman like Robinson feel embarrassed about filing a formal complaint regarding what most people in society would see as substandard conduct. The most plausible answer is that she, like the person attending the bachelor party, would feel embarrassed because the harsh reproaches of her co-workers will make

her feel bad about herself. Using Mead's terms, in this instance the role expectations that prevail at the game stage take precedence over those that prevail in society at large because of the concrete presence of her disapproving co-workers. The social consensus about what constitutes appropriate or inappropriate behavior at JSI dictates that a woman would be acting very inappropriately if she filed a formal complaint, even if the complaint would be well received throughout society at large. The feeling of embarrassment, or the foregrounding of the other, thus results from not conforming to the prevailing workplace norms.

In sum, group identity takes primacy over individual identity in hostile environment sexual harassment cases for four reasons, all of which involve the possibility of the foregrounding of the look of the other. First, the experience that women have of their self-definition in the eyes of male co-workers can not be transcended through reflective scrutiny; the foregrounding of the other forces a woman to become cognitively aware of herself as a sex object, and makes her recognize that she is what her co-workers define her as being. Two, the foregrounding of the other prevents her from focusing on her tasks, because it makes her self-conscious of her sexual identity while she is attempting to work. Three, the experience of her group identity forces women to constantly monitor their behavior while they are working in order to avoid the foregrounding of the other. And four, the foregrounding of the other occurs when women do not conform to the prevailing workplace norms, even when those norms are at the

minimum more extreme than the norms that are generally held by members of society at large.

Will Kymlicka rejects the argument that "we need considerable social affirmation of (the value of the purposes we could pursue) in order to have any confidence in it" and the entailing conclusion that

(g)overnment should encourage certain communal values, and discourage non-conforming values, in order to try to ensure that our judgments are confirmed by society.⁴⁰⁴

In his view, the claim that government needs to confirm such judgments is based upon the mistaken assumption that "we can't believe in our judgments unless someone else confirms the judgments for us."⁴⁰⁵ Although he acknowledges

the importance of securing the social preconditions of self-respect— i.e., the conditions which give a person 'the conviction that his conception of the good, his plan of life, is worth carrying out,'⁴⁰⁶

such "self-respect is better secured by providing the conditions for freely judging and choosing our potential ends" rather than by providing social confirmation of their worth.⁴⁰⁷ In fact, we would lose confidence in our moral views if we realized that we did not consciously choose them:

We can see ourselves as having come to a judgment for external causal reasons, but we can't stay with it unless we endorse it as independently valid.⁴⁰⁸

Thus, questions about the social and psychological conditions that help foster confidence in moral judgments are important, but from the first person perspective such confidence

"is . . . essentially a by-product . . . of making the right judgment in the light of good reason."⁴⁰⁹

I do not think that this account is correct. In an important sense, confidence in the value of the purposes an individual pursues does require social confirmation from the people she or he is interacting with under certain circumstances. One can be rationally convinced of the value of her or his judgments without having any confidence in it under certain circumstances. For example, let's assume that a female worker is very well qualified to be a welder and that her consciousness has been raised by reading large amounts of feminist literature. From the first person perspective not only is she rationally convinced that she is a more than capable craftswoman, she also has a thorough theoretical understanding of the social and psychological factors that lead men to proliferate a traditionally all-male workplace with sexual remarks and jokes and sexually oriented pictures of women. In Mead's terms, if she is not satisfied with the role she is supposed to play in virtue of being a woman, she can now problematize that view by constructing a new perspective based upon her theoretical understandings of the inappropriateness of that role. However, even given these most favorable of circumstances from the first person perspective, I still think that the non-sexual rejection of her by co-workers will probably corrosively affect her psychological well-being to a point where she will not have an equal employment opportunity.

According to liberal individualism, e.g., Locke, being critical means that she does not have to accept the views of her co-workers, even if many other people accept them

and have done so for a long time, "till (she is) fully convinced, as (a) rational creature, of their solidity, truth, and certainty."⁴¹⁰ As Locke commentator Peter Schouls further explains, "(She) can withdraw her commitment to any tenet once (she) recognize(s) that (she has) accepted it on some authority other than that of (her) own reason."⁴¹¹ Given her welding qualifications and the fact that her consciousness has been raised by reading copious amounts of feminist literature, she is thought to be able to withdraw any commitment she might have had to the tenet that she is not a co-worker deserving of respect, even if the prevailing consensus at her workplace and throughout the larger society suggests that women are incapable of doing this kind of work and systematically discourages them from proving otherwise. In sum, on this view, her ability to make the right judgment in the light of good reason makes it possible for her to have confidence in the value of the purposes she has chosen because her identity is derived internally, by how she views herself, rather than externally, by how others view her. It is this ability that prevents even the most disparaging views expressed about women in general and her in particular by her co-workers and members of society at large from instilling in her the debased sense of self-worth which accompanies stigmatization.

The idea that a woman can withdraw her emotional commitment to the views expressed about her by subjecting them to rational scrutiny is contradicted if she undergoes the phenomenological experience of the foregrounding of the other. If the look of the other arises, she experiences an "immediate shudder that runs through (her) from head to foot without any discursive preparation,"⁴¹² forces her to become cognitively

aware of herself as a disparaged sex object. Because the look of the other manifests itself as a foreign freedom beyond her control, no amount of rational scrutiny can prevent her from temporarily recognizing that she is as her co-workers see her. The idea that she must temporarily recognize that she is as her co-workers see her means that she feels like a disparaged sex object and that no amount of evidence to the contrary can contravene that experience for the moment.

The problem with this aspect of Sartre's theory is that it does not adequately clarify what set of circumstances will make it possible for an individual to simply refuse the look of the other. I think that the idea that a woman welder in an extremely sexist, traditionally all-male work environment can turn the views of her co-workers into "dead possibilities" by simply refusing to accept them is wrong. In my view, the ability to successfully do this only exists under certain circumstances and these circumstances can be clarified by further considering Mead's theory of social development at the game stage.

For Sartre, the ability to refuse the look of the other requires an individual to reassert one's subjectivity while simultaneously turning the other person into an object. It is worth recalling that Sartre uses the metaphor of being naked to explain what it means to experience being an object and of putting on clothes to explain what it means to recapture one's subjectivity:

The body here symbolizes our defenseless state as objects. To put on clothes is to hide one's object state; it is to claim the right of seeing without being seen; that is, to be pure subject. . . The reaction to shame will consist exactly in apprehending as an object the one who apprehended my own object-state.⁴¹³

For example, just as the person looking through the keyhole might confront the approaching person and suggest that she should mind her own business since she has no idea what's really going on, the woman welder might confront a co-workers by calling him a pig and telling him to leave her alone so that she get back to work. Just as the person looking through the keyhole feels exposed as a shameful object because he realizes that the only thing the onlooker sees is him behaving voyeuristically, the woman welder feels exposed as a shameful object because she realizes that the only thing her co-worker sees is a disparaged sex object. Just as the the person looking through the keyhole attempts to cover for his seemingly shameful behavior by implying that she would not judge him so severely if she knew more about why he is spying on someone, the woman welder attempts to reassert her subjectivity by asking her co-worker to let her do her job, the implication being that she is a welder deserving of professional respect and not a sex object. Finally, just as calling the onlooker nosey and ignorant is an attempt to strip that person down to being a disparaged object who has no business passing judgment on him, calling her co-worker a pig is an attempt to strip him down to being an ignorant and crude person who should feel embarrassed about treating her and other women that way. If either the person looking through the keyhole or the woman welder is successful, that individual will once again feel free to go about his or her business as he or she had before the intrusion.

According to Mead, an individual does not develop a full sense of self until one has organized the responses of others into a structural whole. As Karen Hanson explains,

the ability to recognize the expectations that all of the participants in a given community have for each other given their different positions "constitute(s) a point of reference against which the appropriateness of particular acts can be understood and assessed."⁴¹⁴

In the case of an extremely sexist, traditionally all-male work environment, the attitudes of the males working there constitutes the point of reference against which the appropriateness of sexual remarks and displays can be understood and assessed. Thus sexual remarks and jokes, sexually oriented pictures of women, and the non-sexual rejection of women by co-workers constitute appropriate behavior and the internalization of these attitudes forces a woman to recognize the expectations that the majority of her male co-workers have for her. However, if Mead is correct, she could still distance herself from the attitudes of her co-workers by contemplating their worth from the more encompassing moral point of view of her theoretical understanding of gender relations. She would then be free to reject the definition of herself derived from her co-workers; even if it manifested itself in the form of the look of the other, she could simply refuse to accept their views of who she is and choose not to be psychologically affected by them.

However, in my view, the success of an individual's attempt to reassert her or his subjectivity and to simultaneously turn the other into an object is determined by the prevailing social consensus within a given group. A woman working in a sexist, traditionally all male environment cannot simply reassert her subjectivity when a male co-worker leaves a picture of a naked woman with her legs spread apart on her tool box.⁴¹⁵

Not only does the experience of being a disparaged sex object temporarily manifest itself

as a pre-reflective foreign freedom that permeates her entire being, that feeling remains with her unless she is able to turn her co-workers into objects. This is an important obstacle because her ability to turn them into objects is very limited in this context. The person who leaves the crude picture on her tool box is conforming to the prevailing workplace norms for what counts as appropriate behavior, and her response, e.g., calling him a pig, is going to be judged by workplace norms rather than by the norms that prevail throughout the larger society. The fact that she can look at him, attempt to pass judgment on him, probably is not going to make him feel bad about his behavior; she cannot make him experience the look of the other and pass judgment on himself because his behavior conforms with the prevailing workplace standards and these standards take precedence over the standards that prevail throughout the larger society because only the concrete presence of others can engender the look of the other. Worse still, since she cannot turn him into an object, she continues to be deprived of her subjectivity; the views expressed by her co-workers force her to recognize that she still is as her co-workers see her, a disparaged sexual object rather than a credible co-worker deserving of respect. She may think that she is a co-worker deserving of respect, but the prevailing social consensus at her workplace makes her feel like a disparaged sex object.

The phenomenological importance of the prevailing social consensus can be further elaborated by considering how such conduct would be received in a generally non-sexist work environment. Ironically, Gretchen Morgenson, who argues that feminists and liberals have exaggerated the importance of hostile environment issues,⁴¹⁶ plausibly

illustrates that the look of the other can be easily transcended if it is only an isolated incident. What she describes as the "closest thing"⁴¹⁷ to sexual harassment she experienced during her 15-year career occurred after she had brought in the largest account at Dean Witter Reynolds while she was a stockbroker-in-training:

My fellow brokers were curious, but only one was brutish enough to walk right up to me and pop the question: "How did you get that account? Did you sleep with the guy?"⁴¹⁸

She then describes what occurred next:

Instead of running away in tears, I dealt with him as I would any rude person. "Yeah," I answered. "Eat your heart out." He turned on his heel and never bothered me again.⁴¹⁹

In other words, she was only momentarily bothered by an isolated incident that occurred after she had undeniably established her professional credentials in an overwhelmingly non-sexist environment. In this kind of environment, it is his comment rather than her response that appears out of place. This allows her to reassert her subjectivity by never being bothered again because she can reduce his insinuation to a dead possibility, something that she can simply refuse. Would she have been able to dismiss him as she "would any rude person"—note that his rudeness is now dissociated from his gender—if the work environment had been permeated with anti-female conduct and displays? Would he have left her alone if his remark had been repeated and amplified by other colleagues? Even she concedes that, "No woman should have to run a gauntlet a daily inuendoes,"⁴²⁰ the implication presumably being that having to do so would unreasonably interfere with her ability to do her job. Perhaps if she had to run a gauntlet of daily inuendoes, the remarks of her co-workers would have bothered her again and again.

The importance of the mediating role that the social context plays can also be illustrated by considering how anti-female conduct might be received outside of the workplace. Let us assume that the man who left the crude picture on the woman's toolbox is married and that the female welder tells his wife about what he had done in front of him and a few other women at a company social. In this context, where the prevailing norms are quite likely to be very different from those at the workplace, he would probably experience the look of the other. The looks received from the other women and especially his wife would make him feel shameful and embarrassed in this setting. And any attempts he made to reestablish his subjectivity, e.g., if he suggested that his antics should not be taken seriously, would probably be met with incredulous stares that would force him to continue to see himself as a pig.⁴²¹ The point is that the differences between the prevailing norms in these social contexts determines who is reduced to being an object and who is allowed to be a subject.

Finally, I think that the prevailing workplace standards will also have a phenomenological effect on how male co-workers see one another. In a sexist, traditionally all male environment, a male who tries to defend a female colleague or criticizes his male colleagues or refuses to participate will also be critiqued from the point of view of the prevailing social consensus at the workplace. The attitudes that his male colleagues take towards him if he fails to conform to this consensus, openly questions its worth, or assists a woman who files a complains with supervisors, is likely to be quite hostile, possibly to the point where he will experience the look of the other for being a

traitor. Consequently, a male who might otherwise be indifferent about working with women might feel compelled to subject them to sexist remarks or displays in order to fit in, or a male who approves of the idea of working with women might refrain from voicing his opinion or defending them because of the flack he is going to receive from his colleagues. Conversely, in Moregnson's example, the fact that no male seconded her co-worker's question about how she secured that account plausibly indicates that the prevailing consensus was that one should not address these types of comments to her; as she phrased it, "my fellow brokers were curious, but only one . . . was brutish enough to pop the question," one implication being that the others had the good manners to keep any less than complimentary thoughts that they might have had to themselves. Given these kinds of social expectations, the brutish broker might have turned on his heel and never bothered her again because the lack of affirmation from his fellow co-workers made him feel embarrassed about his conduct. In both types of instances, the prevailing workplace standards will encourage males to behave in certain ways and discourage them from behaving in others because of the phenomenological effect that conforming or failing to conform to these norms will have on them.

If the prevailing social consensus regarding what constitutes appropriate and inappropriate behavior limits one's ability to reestablish her or his subjectivity, then the look of the other is far more than just a temporary setback. In a sexist, traditionally all-male work environment, a woman would experience the look of the other very often. Further, even when her consciousness was not being restructured by theses experiences,

she would be more or less constantly aware of the possibility of being subjected to them, especially if she does not conform to the role expectations that her co-workers have for her. Given the severity and pervasiveness of these experiences, and the fact that she cannot simply refuse to be affected by them, the idea that such an environment would probably stigmatize her by instilling a debased sense of self worth in her is not surprising. If the above account is correct, her self identity is not derived internally, by how she looks at herself, but externally, by how others force her to see herself. The fact that she knows that the views expressed about women in general and her in particular are totally ignorant does not entail that she can simply choose not to be hurt by them.

The idea that an individual cannot simply refuse to be hurt by the views expressed by others if they accord with the prevailing social consensus in a given community marks a major difference between this theory of the self and all of the other ones that have been examined here. Rather than claiming that being corrosively psychologically affected by the views expressed by others only occurs if a person has failed to act rationally, this theory maintains that the views expressed by others will have a corrosive psychological effect on a person under certain circumstances even if she or he is completely convinced that these views are wrong. Kymlicka claims that from the first person perspective confidence in one's moral judgments "is essentially a by-product . . . of making the right judgment in the light of good reason,"⁴²² the assumption being that a person can withdraw commitment to any tenet unless one is convinced of its truthfulness. In my view, the ability to withdraw such commitments is limited. A person can withdraw one's

commitments to any tenet in the sense that one can think that the views being expressed about her or him are simply wrong, but the fact that one can think that these views are simply wrong will not stop that person from feeling psychologically affected by them under certain circumstances. Thus, whatever confidence that a person might have gained by thinking rationally can always be superceded by experiencing the look of the other, which irrationally forces a person to feel self-conscious and shameful by necessitating that a person passes judgment on her or himself from the point of view of the other.

This account is not meant to suggest that taking a critical perspective towards her co-workers has no value. After all, "Without it," as Donna Greschner argues, "(women) have no ground(s) upon which to criticize the conservative hierarchies protected by tradition . . ."⁴²³ The ability to do this is indeed the first necessary step that must be taken if a woman is going to reject these hierarchies and if there is to be any hope of transforming them. But this step is of more limited value than Kymlicka, for example, supposes. According to him, the claim that government needs to confirm certain communal values is based upon the mistaken assumption that "we can't believe in our judgments unless someone else confirms the judgments for us."⁴²⁴ His claim is that we can believe in our judgments because we can confirm their values. Given this ability, government does not need to do for us what we can do for ourselves. In hostile environment cases, this view implies that the courts do not need to confirm certain values, as a group-rights based reasonableness standard would, because women can confirm the value of their own judgments. Again, the idea that women can confirm the

value of their judgments is based upon the assumption that they are capable of responding to their co-workers in a completely rational fashion. Their identity and sense of self worth can be derived internally, by what they think about themselves, rather than externally, by how others view them.

The problem with this theory is that psychological and sociological factors are only of secondary importance in comparison with a woman's ability behave rationally. To repeat the point one last time, given that she has all of the information that she needs to make an informed decision, she allegedly can simply choose not to be hurt by the views expressed about her and other women by her co-workers and members of society at large. By contrast, in my view, a woman's ability to reject these attachments requires that she must be willing to be psychologically hurt by the views expressed by her co-workers. The ability to make the right judgments in the light of good reason is not going to spare her from feeling hurt by the views expressed by others. If anything, the fact that her view of herself is so out of accord with the views of her male co-workers is going to make the effect of having to endure their views all the more acute; she will suffer an increased amount of psychological harm because of the pressure to conform to values that she has completely rejected. The real value of making the right judgment in the light of good reason is that a woman can make a conscious choice to endure all of the psychological harm that she is going to suffer in order to help slowly bring about a change in the attitudes of her co-workers.

In part, the Robinson ruling is based upon the idea that women should have to endure so much psychological harm cannot be squared with Title VII's promise to give women an equal employment opportunity. To paraphrase the court's summation, only those women who are willing to and can accept the level of abuse inherent in a workplace that has been historically all male or historically excluded women intentionally will apply to and continue to work there.⁴²⁵ Liberal individualism implies that most women can accept the level of abuse inherent in this kind of workplace because they are free to reject society's customs and habits, and also suggests that the failure of most women to adjust their expectations to these realities results from acting irrationally. In my view, most women cannot accept this level of abuse, but the reason that they will not apply to or continue to work in this kind of environment is not because they irrational; rather the opposite, they are rational enough not to subject themselves to being psychologically harmed by their male co-workers on a daily basis; their ability to make the right judgment in the light of good reason, e.g., identifying the expectations that they should have when entering into such an environment, informs them that they cannot have an equal employment opportunity while experiencing stress related problems and having to "constantly monitor" their behavior and conform it to existing stereotypes.⁴²⁶ In sum, the value of a group-rights based reasonableness standard is that it affirms communal values that encourage male co-workers to treat female co-workers respectfully. And treating them respectfully will make it reasonable for most women to apply to and continue to

work in a traditionally all male work environment because they will not have to suffer psychological harm in order to succeed.

What I have presented are two different types of theories of the self that attempt to explain why we are sometimes adversely psychologically effected by the ways that others view and treat us. One type of approach, if my critique is correct— taken by 17th century and modern individualists, communitarians, and at least one cultural feminist— either explicitly claims, strongly implies, or at least does not offer a theory to explain why it isn't the case, that we can simply choose not to be hurt by any disparaging views that others express about us; according to what I am going to refer to as an individualist approach, if we have enough evidence to conclude that these views are mistaken, we can refuse to accept or be psychologically effected by them. It follows that a sufficiently informed person who is adversely effected by such expressions is responding irrationally; they are only being hurt because they have failed to make the right judgment in the light of good reason. By contrast, the approach I have taken by combining the work done by Sartre and Mead maintains that even someone who has a surfeit of evidence to make the right judgment in the light of good reason will still be adversely psychologically effected under certain sociological circumstances. The key to this theory is the idea that sometimes no amount of reflective rigor can prevent us from feeling pre-reflectively disparaged by the attitudes that others take toward us.

Even if one concedes that the latter approach is preferable because it plausibly accounts for why and when someone who acts rationally should reasonably be expected to suffer psychological harm, it still does not follow that this theory is true. It is one thing to claim that a theory can be reconciled with the available facts, but it is quite another to claim that it does a better job of doing so than another theory. The apparent fact most women would suffer psychological harm by having to work in an environment like the one at Jacksonville Shipyards does not ipso facto establish why such harm occurs. It could occur because a reasonable woman cannot help but be pre-reflectively effected by the misogynous views expressed by her co-workers in a traditionally all male environment, but then again it could also occur because most women respond irrationally to the circumstances they face while working in such an environment. The latter view might be undesirable because it suggests that women must share an important part of the blame for any psychological harm they suffer, but that might very well be the case. So, given these concerns, what evidence is there to suggest that the theory I have developed is more accurate than the one I have criticized?

I have used two different kinds of methods to acquire evidence, empirical sociological methods like the ones used to defend the holding in Robinson⁴²⁷ and an introspective phenomenological method like the one used by Sartre (what he described as a "methodical description of man's inner states")⁴²⁸. I now want to consider whether the evidence obtained by using these methods lends more support to either type of theory of the self. Does the evidence suggest that most women are psychologically effected

because they are responding irrationally or does such harm occur even if they respond rationally because of the problems associated with experiencing the look of the other? This problem is further complicated by questions about what can or should count as evidence or proof that one theory is preferable and I will conclude by considering the epistemological status of both methods of inquiry, especially the phenomenological approach, in order to argue that constructing a theory of the self requires the use of an introspective method.

The Robinson ruling primarily relied on empirical studies conducted by Susan Fiske and K.C. Wagner. Taken together, these studies have three essential components: First, they claim that a sexually charged, traditionally all male work environment has a profound effect on most women and only a vanishingly small one on men. Second, women adopt a variety of "coping strategies" in order to try to combat the problems they face because of being a small minority in a nontraditional field. And third, women are more likely to be stereotyped by male co-workers because they comprise a small minority of the workforce in a sexually charged environment.

The fact that most women are profoundly effected by having to work in such an environment does not help us choose between these two different types of theories of the self. If Wagner is correct, under such circumstances a high percentage of women can be expected to suffer three different types of stress effects, of the "work performance," emotional, and physical variety.⁴²⁹ First of all, it's worth noting in passing that Judge Krupansky's claim that sexually oriented posters had a de minimus effect on the plaintiff

when considered in the context of a society that condones such displays cannot be reconciled with Wagner's empirical findings.⁴³⁰ Second, there are some good reasons for why a woman who responds rationally will still suffer these kinds of stress effects, e.g., she might justifiably fear that verbal abuse will escalate to physical abuse or that she is not going to receive fair evaluations from prejudiced male supervisors.⁴³¹ But there is an important difference between these kinds of concerns and the instilling of a debased sense of self-worth in her, e.g., a woman should not feel guilty or embarrassed, as Wagner claims many women do,⁴³² when she knows that she has not acted inappropriately. So why does a woman feel this way when she has not done anything wrong? The fact that she suffers these kinds of stress effects by itself cannot help us answer this question. It could be that she is responding irrationally, as the other theories of the self imply, or it could be that she experiences such guilt or embarrassment pre-reflectively, as I have argued.

The fact that women adopt a variety of "common coping" strategies in order to confront the problems they face while working in a nontraditional field⁴³³ is more difficult to reconcile with an individualist theory of the self. According to Wagner, there are five typical coping strategies that women select depending on "her personal style, the type of incident, and her expectation that the situation is susceptible to resolution:

- (1) denying the impact of the event, blocking it out;
- (2) avoiding the workplace of the harasser;
- (3) telling the harasser to stop;
- (4) engaging in joking or other banter in the language of the workplace in order to defuse the situation; and
- (5) threatening to make or actually making an informal or formal complaint.⁴³⁴

And, according to Fiske, women must "constantly monitor" their behavior and "conform" it to existing stereotypes, "either by becoming sexy and responsive to the men who flirt with them or by becoming rigid, standoffish, and distant so as to make it clear that they are not interested in the status of sex object."⁴³⁵ Thus, the various ways that women respond to working in a nontraditional field appear for the most part to be quite rational. One, they are consciously aware that they are not interested in the status of being sex objects, presumably meaning that they want to be treated as respected co-workers, even though they are working in a field traditionally off limits to women. This seems to imply that these women have managed to negotiate the difficult process of rejecting society's prevailing view about what kind of professions are and should be open to them. And two, the fact that they adopt various coping strategies and constantly monitor their behavior depending, in part, upon the extent to which the situation is susceptible to remedy suggests that they are making a calculated attempt to redress these kinds of problems.⁴³⁶ Does it then seem plausible to suggest that women are adversely psychologically effected, e.g., experiencing embarrassment or humiliation, because they are responding irrationally to the conduct and displays being directed at them? This seems to suggest that the same women who rejected society's customs and habits about gender roles by making a conscious and presumably informed decision to enter into a nontraditional field while making a calculated effort to discourage their male colleagues from treating them as sex objects, or who have even chose to act like sex objects in order to defuse a situation, are then going to be adversely effected psychologically because they have failed to make the

right judgment in the light of good reason. It seems more plausible to conclude that they suffer such psychological harm despite the fact that they think they are co-workers deserving of respect; in other words, the views expressed about them by their co-workers can make them feel humiliated and embarrassed even though they think the views being expressed about them are wrong. The individualist approach does not seem to adequately account for this idea.

The idea that women are more likely to be stereotyped by men while working in a sexually charged nontraditional field is better accounted for by my theory of the self rather than the individualist model. Fiske argued that stereotyping, which she defined as "category based responses in the human thought and perceptual processes," effects how men view women in employment settings.⁴³⁷ People tend to "maximize the differences among people, exaggerating those differences, and minimize the differences within groups" when categorizing others along group lines. And the tendency to do so is enhanced by several factors: it is more likely to occur if women comprise a small percentage of the workforce, if "specific stimuli (e.g., pornographic displays) . . . prime certain categories for the application of stereotypical thinking, if the management hierarchy is dominated by men, and if an unprofessional ambience exists at the workplace (e.g., women are much more likely to be treated as sex objects when profanity or sexual joking occur).⁴³⁸

Why do these factors make men more likely to stereotype women? According to the individualist model, it is because men fail to act rationally; they assent to the

prevailing workplace views because they have not subjected them to critical scrutiny. And Locke might add that they are unlikely to question these views because they are emotionally comfortable with the fact they comprise the vast majority of the workforce, i.e., they lack the emotional incentive (what Locke would call "the master passion") to consider the issue fairly.⁴³⁹ This is a plausible account, but is it the most plausible? If Fiske is correct, people generally tend to stereotype members of other groups more than members of their own groups, but why are these effects enhanced if women work in an environment like the one at Jacksonville Shipyards? I think that individualist account is right to a point, men are indeed acting irrationally, but it is also plausible to claim men act even more irrationally under the circumstances that Fiske identified because they have an emotional commitment to fit into their gender group. Thus, if I am correct, under such circumstances a man is going to be more likely to direct such conduct and displays towards a female colleague and abstain from criticizing or assisting in a complaint against a male colleague (e.g., Wagner reports that one main reason that women do not file formal complaints is that they fear that their problems will escalate afterwards⁴⁴⁰) because he will experience the look of the other for failing to conform to the prevailing norms within his gender group. He not only has no emotional incentive to question the prevailing standards, as Locke's theory implies, but the experience of the look of the other provides him with an emotional reason to condone or at least tolerate such activity, even if he might otherwise be indifferent to how women are treated or thinks that such conduct and displays are inappropriate, because the prevailing views of his co-workers will force

him to pass judgment on himself from that perspective and make him feel like he has betrayed his colleagues. In sum, my theory is preferable because it more fully explains why the effects of stereotyping are enhanced under such circumstances because it more thoroughly demonstrates how the experience of one's group identity, being a male in this instance, encourages them to stereotype women; the individualist model is not wrong, just insufficiently precise to account for this.

Even if I have now successfully argued that my theory of the self does a better job of accounting for why these kinds of conduct and displays directed at a woman in a sexist, traditionally all male work environment are more likely to have a corrosive psychological effect on her than a theory based on the individualist model does, it still does not follow that the positive theory I have offered is correct. What kind of empirical evidence is there to support the kind of phenomenological claims I have made about changes in women's and men's inner states? The type of empirical evidence provided by Fiske and Wagner supports the claim that a person who acts rationally, who makes the right judgment in the light of good reason, still cannot help but be psychologically effected by the views expressed by others under certain sociological circumstances, but this kind of empirical evidence by itself cannot specifically prove that the reason that one is so effected is because of the experience of the look of the other. I will now argue that it is impossible to develop a theory of the self— whether it is based on the individualist model or the Sartrean model— solely the basis of this kind of empirical evidence.

Consider the individualist model's claim that a sufficiently well informed person is free to reject particular values one was socialized to hold. The empirical evidence clearly suggests that some people are able to reject such values and it also might prove that those who manage to do so had access to more information and perspectives to consider than those who failed, e.g., it would probably be possible to design a study that could test whether women who are more educated are less likely to suffer stress effects while working in an environment like Jacksonville Shipyards. But it would be far more difficult to adequately demonstrate that the people who have managed to reject aspects of their received traditions have done so because they have acted rationally, let alone prove that sufficiently well informed people who fail to do so have acted irrationally. How can you empirically prove that one person was deleteriously effected by the views expressed by others because he failed to make the right judgment in the light of good reason and that another will not be effected because she refused to assent to the views expressed about her unless she was fully convinced of their truth and certainty. We simply do not have direct access to people's inner states, and consequently the only thing we can do is draw inferences based upon our own subjective experiences and detailed accounts of other people's subjective experiences.

The individualist theories of the self rely every bit as much on an account of changes our inner states as does the Sartrian phenomenology or the theory of the self I have developed by combining some of Sartre's and Mead's concepts. How do we prove that we can reject aspects of our socialization if we subject them to critical scrutiny? The

answer is that through introspection we recognize the occasions when we have rejected a once held value because we have since come to find it lacking in merit and quite rightly infer that other people are capable of doing the same. We cannot be absolutely certain that this explains why someone else is behaving differently than they were before, but it certainly seems reasonable to infer that this is the case, especially if that person gives us a first person account claiming that she has come to see the error of her former ways.

Similarly, Sartre's claim that we all have free will is derived from the fact that we all possess consciousness, his point being that consciousness of holding a given value entails the possibility of refusing to continue to hold that value.⁴⁴¹ He cannot actually prove that every person who is not mentally infirm has consciousness, but he is well capable of experiencing his own feelings of consciousness and can draw the conclusion that other people's behavior and their accounts of it suggests that they also possess consciousness.

Or consider Locke's claim that one of the reasons that we sometimes fail to act rationally is because we are temporarily consumed by a passion, e.g., someone who simply will not acknowledge their romantic partner's flaws because they are head over heels in love.

Locke cannot absolutely prove that this is the reason why someone will not submit to an obvious argument,⁴⁴² but he can consider his own similar experiences (assuming he had them), other people's accounts of their experiences, and the person in question's account and behavior in order to draw a reasonably supported conclusion. My point is that these kinds of claims about people cannot be based on empirical methods alone; they also

presuppose that we have similar subjective experiences, that we undergo similar changes in our inner states of mind.

The claims made by proponents of individualism are relatively simple, e.g., only a fool or a philosopher could argue that other people don't have minds or consciousness, but the basic method is the same one that Sartre uses to support his more complex phenomenological claims about psychology. Consider his argument by example about how the look of the other arises:

I have just made an awkward or vulgar gesture. This gesture clings to me; I neither judge it or blame it. I simply live it. I realize it in the mode of for-itself. But now suddenly I raise my head. Somebody was there and has seen me. I suddenly realize the vulgarity of my gesture and I am ashamed.⁴⁴³

If Sartre was just claiming that only he had his consciousness restructured and felt shameful when he realized that someone was watching him, then his theory would be of no general value. Instead, he is implicitly claiming that all of us would have a similar experience under the same circumstances and he is asking us as readers to consider whether his account rings true to our own experiences. The risk in using this kind of method, of course, is that someone will simply claim that they would not react in the same manner if confronted with similar circumstances, and how can Sartre prove that his account offers a more accurate portrayal of their experiences than the one they counter with. My point is that arguments for his type of theories of the self are no different in form from the kinds of arguments Locke or Kymlicka made, but the level of complexity that is introduced by considering psychological variables makes it more likely that someone will argue that a given account does not ring true for them; people are not likely

to argue against the proposition that we all possess consciousness or that we sometimes fail to submit to an obvious argument because we are gripped by passion, but they are more likely to reject the claim that their consciousness is restructured when they're caught doing something embarrassing.

Although introducing psychological, let alone sociological, considerations into an attempt to construct a theory of the self necessarily runs the risk of being subject to these kinds of objections, it does not follow that such risks are not worth taking. These risks are worth taking if we want to develop a theory of the self that accounts for anything subtle or complicated. Worse still, a simplistic theory, like the one Kymlicka proffers, which he concedes does not adequately account for psychological or sociological factors,⁴⁴⁴ tends to de facto marginalize the importance of those factors, e.g., Kymlicka acknowledges that these kind of factors are important but argues that they can be transcended if one makes the right judgment in the light of good reason. Kymlicka is right when he maintains that we need a theory of the self that explains why people sometimes lack the confidence in their own views that they need in order to flourish, but a theory that does not explicitly incorporate psychological and sociological considerations cannot explain this. That's why I have attempted to develop such a theory, all the while being fully aware of the risks entailed by attempting to do so.

CHAPTER XV

CONCLUSION

I have made three principal arguments in this dissertation.

I first argued that the Rabidue majority's use of the reasonable person standard and Robert Unikel's proposal that courts should adopt a modified version of that same standard rest on a commitment to one crucial aspect of social atomism: the idea that a rational individual can choose not to be psychologically affected by the views that others express about her or him. These commitments imply that a woman will only deleteriously psychologically affected by working in a traditionally all male, anti-female environment if she responds irrationally, if she fails to make the right choice in the light of good reason. This idea underlies the way that the Rabidue majority used the traditional liberal ideals of social consensus as mediator, assumption of risk, and tolerance of diversity and Unikel's claim that we are primarily individuals and only secondarily members of a group, his defense of the individualistic model of equality, as well as the entailing assumption of interchangeability.

. Second, I argued that the theories of the self developed by modern individualists, some modern communitarians, and some cultural feminists, which purport to criticize the excessive individualism posited by social atomism, all fail because they do

not adequately account for the experience of how our various group identities can sometimes force us to be psychologically affected by others. The problem with these theories is that they posit a dualism between an object and a subject, between an individual who is partially constituted by all the information and resources she or he has available, on the one hand, and her or his ability to freely choose what to do or believe on the basis of them, on the other. Consequently, these theories are insufficiently precise to explain why a adequately well-informed woman cannot simply refuse to be affected by her colleagues while working in a hostile environment.

Third, given this problem, the purpose of the third part of my dissertation has been to use Jean-Paul Sartre's concept of the look of the other and George Herbert Mead's theory of social development in order to develop a theory of the self that would justify courts adopting a group-rights based reasonableness standard while adjudicating hostile environment sexual harassment claims. I argued that this theory of the self justifies such a standard because it explains why a significant percentage of women might reasonably be expected to suffer psychological harm while working in a traditionally all male, misogynous work environment. I think that this theory accomplishes this objective because it separates what we think about ourselves from how others can make us feel about ourselves, and consequently it plausibly explains why the views expressed about us can have a profound psychological effect under certain sociological circumstances, even if we act rationally. On this view, the experience of one's various group identities is mediated by the social expectations that others have for us; different social contexts will

make particular group memberships more or less important. In this instance, the pervasive experience of the look of the other accounts for why it would be reasonable to expect a normally self-confident, well informed woman to feel humiliated or embarrassed or lose self-confidence while working in an environment like the one at Osceola Refining or Jacksonville Shipyards. In sum, as compared to a liberal individualist theory of the self, it justifies the use of a group-rights based standard because it coherently explains why having to work in an traditionally all male, anti female environment will quite likely unreasonably interfere with a woman's ability to compete with men on equal terms.

ENDNOTES

¹ Caroline Forell, "Essentialism, Empathy, and the Reasonable Woman," *University of Illinois Law Review*, v. 1994, no. 4 (1995), p. 805.

² Robert Unikel, "'Reasonable' Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence," *Northwestern University Law Review*, v. 87, no. 1 (1992), p. 356-7.

³ Cited in Kathryn Abrams, "Gender Discrimination and the Transformation of Workplace Norms," *Vanderbilt Law Review*, V. 42, (1989), p. 1205.

⁴ Abrams, p.1206.

⁵ *Rabidue v. Osceola Refining Co.*, 805 F.2d (6th Cir. 1986) (Keith, J., dissenting), p. 611, 626.

⁶ *Radtke v. Everett*, 471 N. W. (Mich. Ct App. 1991), p. 664.

⁷ Unikel, p. 332-3..

⁸ Ibid., p. 349.

⁹ Ibid., p. 340.

¹⁰ Linda S. Krieger. and Patricia N. Cooney, "The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality," *Golden State University Law Review*, v. 13, (1983), p. 553.

¹¹ Unikel, p. 340.

¹² Ibid., p. 341.

¹³ Catharine MacKinnon, *Sexual Harassment of Working Women: A Case For Sex Discrimination*, (New Haven, Ct: Yale University Press), 1979, p. 215.

¹⁴ Lucinda M. Finley, "Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate," *Columbia Law Review*, v. 86, (1986), p. 1144.

¹⁵ *Rabidue v. Osceola Refining Co.*, (Keith J., dissenting), p. 627.

¹⁶ *Ibid.*, p. 611.

¹⁷ *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp (1991), p. 1486.

¹⁸ Thomas Hobbes, *Leviathan or the Matter, Form, and Power of a Commonwealth: Ecclesiastical and Civil*, (1651), in *The English Philosophers From Bacon to Mill*, ed. by Edwin A. Burt, (New York: Random House) 1967.

¹⁹ John Locke, *An Essay Concerning the True Original, Extent, and End of Government* (1690), in *The English Philosophers From Bacon To Mill*, ed. by Edwin A. Burt (New York: Random House) 1967.

²⁰ I will use Hobbes' *Leviathan* and Locke's *Conduct of the Understanding in the Works of John Locke*, (London, 1823; rpt, Aalen, 1963) as the primary examples of 17th century individualism, and Will Kymlicka's "Liberalism and Communitarianism," *Canadian Journal of Philosophy*, v. 18, no. 2, (June 1988), p. 181, as the example of modern individualism.

²¹ I will use Donna Greschner's "Feminist Concerns With the New Communitarianism: We Don't Need Another Hero, in *Law and the Community: The End of Individualism*, ed. by Allan C. Hutchinson and Leslie J.M. Green, 1989, p. 119 as an example of a cultural feminist approach and Alasdair MacIntyre's *After Virtue*, 2nd ed., (South Bend, Indiana: University of Notre Dame Press), 1984, as the primary example of communitarianism.

²² Jean-Paul Sartre, *Being and Nothingness: An Essay on Phenomonological Ontology*, trans. by Hazel E. Barnes, (New York: Philosophical Library), 1956.

²³ George Herbert Mead, *Mind, Self, and Society From the Standpoint of Social Behaviorist*, ed. with an intro. by Charles W. Morris, (Chicago: University Of Chicago Press), 1934.

²⁴ Nancy S. Ehrenreich, "Pluralist Myths and Powerless Men: the Ideology of Reasonableness In Sexual Harassment Law, *Yale Law Journal*, v. 99 (1990), p. 1195. I decided to use this summation of the case because the references from the case itself are far less succinct. They can be found between pages 620 and 622 of *Rabidue*

²⁵ *Rabidue*, (Keith, J., dissenting), p. 623-4.

²⁶ *Ibid.*, (Keith J., dissenting) p. 624.

²⁷ We will discuss this in greater detail later, but it is important to note that the defense did dispute her claim that she had been denied certain privileges given to other similarly situated male employees, e.g., free lunches and gasoline, entertainment accounts, etc. See *Rabidue*, (Keith, J. dissenting), p. 624.

²⁸ *Ibid.*, p. 619.

²⁹ *Ibid.*, p. 615.

³⁰ *Ibid.*, p. 622.

³¹ *Ibid.*, p. 620.

³² *Ibid.*, pp. 620-1.

³³ *Ibid.*, p. 622.

³⁴ Ehrenreich, p. 1197.

³⁵ *Ibid.*, p. 1197.

³⁶ *Ibid.*, p. 1221.

³⁷ Unikel, pp. 329-30.

³⁸ "Admittedly obscene" is meant to be a summation of Judge Krupansky's comments on page 615 of *Rabidue* where he characterized Douglas Henry as "an extremely vulgar and crude individual."

³⁹ *Rabidue*, (Keith, J. dissenting), p. 626.

⁴⁰ *Ibid.*, p. 622.

⁴¹ Will Kymlicka, "Liberalism and Communitarianism," *Canadian Journal of Philosophy*, v. 18, no. 2 (June 1988), p. 197.

⁴² Ehrenreich, p. 1181.

⁴³ Forell, p. 772.

⁴⁴ Unikel, p. 326.

⁴⁵ Forell, p. 772.

- ⁴⁶ Oliver W. Holmes, *The Common Law*. (Boston: Little Brown), 1881, p. 108.
- ⁴⁷ Forell, p. 773.
- ⁴⁸ Thomas Hobbes, *Leviathan*.
- ⁴⁹ John Locke, *An Essay Concerning the True Original, Extent, and End of Government*.
- ⁵⁰ Unikel, p. 330-1.
- ⁵¹ Forell, p. 774.
- ⁵² Ehrenreich, p. 1192.
- ⁵³ Forell, p. 775.
- ⁵⁴ 42 U.S.C. 2000e-2(a)(1).
- ⁵⁵ *Meritor Savings Bank v Vinson*, 477 U.S. 91 L Ed 2d 49, 106 S. Ct 2399: 58.
- ⁵⁶ Catharine MacKinnon, *Sexual Harassment of Working Women: A Case For Sex Discrimination*, p. 32.
- ⁵⁷ *Meritor*, p. 58.
- ⁵⁸ *Ibid.*, p. 55.
- ⁵⁹ *Ibid.*, p. 55.
- ⁶⁰ *Ibid.*, p. 56.
- ⁶¹ *Ibid.*, p. 56.
- ⁶² *Ibid.*, p. 57.
- ⁶³ *Ibid.*, p. 56.
- ⁶⁴ *Ibid.*, p. 58.
- ⁶⁵ *Ibid.*, p. 58-9.
- ⁶⁶ *Ibid.*, p. 59.
- ⁶⁷ *Rogers v EEOC*, 454 F2d 234 (Ca5), cert. denied, 406 US 957, 32 L Ed 2d 343, 92 S. Ct. 2058 (1972).

⁶⁸ *Meritor*, p. 59.

⁶⁹ *Henson v Dundee*, 682 F2d, 897, 902 (1982).

⁷⁰ *Meritor*, p. 59.

⁷¹ *Ibid.*, p. 60.

⁷² *Downes v Federal Aviation Administration*, 775 F2d (1985), p. 288.

⁷³ *Ibid.*, p. 293.

⁷⁴ *Ibid.*, p. 294.

⁷⁵ *Ibid.*, p. 294.

⁷⁶ *Ibid.*, p. 295.

⁷⁷ *Meritor*, p. 60.

⁷⁸ *Ibid.*.

⁷⁹ *Ibid.*, pp. 55, 57, and 60.

⁸⁰ *Ibid.*, p. 61. The Court was here suggesting that it would be appropriate to consider such factors as "dress" or "provocative speech" (see p. 60-1) among others when making such judgments.

⁸¹ *Rabidue*, p. 615.

⁸² *Ibid.*, p. 622.

⁸³ *Ibid.*, p. 619.

⁸⁴ *Harris v Forklift Systems Inc.*, 114 S. Ct 367 (1993), p. 370.

⁸⁵ *Ibid.*, p. 369.

⁸⁶ *Ibid.*, p. 369.

⁸⁷ *Ibid.*, p. 369.

⁸⁸ *Ibid.*, p. 370.

⁸⁹ *Ibid.*, p. 370.

⁹⁰ Ibid., p. 371.

⁹¹ Ibid., p. 371.

⁹² Ibid., p. 371.

⁹³ *Meritor*, p. 61.

⁹⁴ C.F.R. § 1604.11(a) of the Equal Employment Opportunity Commission guidelines. I sighted them from *Rabidue*, p. 619.

⁹⁵ Ibid., p. 371.

⁹⁶ Ibid., p. 370.

⁹⁷ *Rabidue*, (Keith J., dissenting), p. 627.

⁹⁸ *Harris*, p. 371.

⁹⁹ *Forell*, p. 805.

¹⁰⁰ *Rabidue*, (Keith J., dissenting), p. 626.

¹⁰¹ *Unikel*, p. 332-3.

¹⁰² See *Unikel* and also Shirley Robin Letwin, "Law and the Unreasonable Woman." *National Review*, (Nov. 18, 1991), p. 34.

¹⁰³ *Unikel*, p. 340.

¹⁰⁴ Ibid..

¹⁰⁵ Ibid., p. 371.

¹⁰⁶ Ibid., p. 372.

¹⁰⁷ Ibid., p. 373.

¹⁰⁸ Ibid..

¹⁰⁹ Ibid., p. 334.

¹¹⁰ Ibid., p. 335.

¹¹¹ Ibid..

¹¹² Ehrenreich, p. 1192.

¹¹³ *Rabidue*, p. 620.

¹¹⁴ Unikel, p. 372.

¹¹⁵ *Rabidue*. Compare the majority's summation on page 615 with the dissent's on page 624.

¹¹⁶ *Ibid.*, p. 615. Judge Krupansky described her as "capable, independent, ambitious, aggressive, intractable, and opinionated."

¹¹⁷ *Ibid.* See Judge Keith's comments on page 624.

¹¹⁸ *Robinson*, p. 1486.

¹¹⁹ *Ibid.*, p. 1493.

¹²⁰ *Ibid.*, p. 1495.

¹²¹ *Ibid.*, p. 1497.

¹²² *Ibid.*, p. 1494.

¹²³ *Ibid.*, p. 1500.

¹²⁴ *Ibid.*, p. 1524.

¹²⁵ *Ibid.*, p. 1525. This quote was originally from *Rabidue*, p. 622.

¹²⁶ *Ibid.*, p. 1524.

¹²⁷ *Ibid.*.

¹²⁸ *Ibid.*, p. 1526.

¹²⁹ *Ibid.*, p. 1505. Summaries of their qualification and testimony can be found between pages 1502 and 1507.

¹³⁰ *Ibid.*, p. 1502.

¹³¹ *Ibid.*

¹³² *Ibid.*, pp. 1502-3.

¹³³ Ibid., p. 1503.

¹³⁴ Ibid.

¹³⁵ Ibid., p. 1504.

¹³⁶ Ibid., pp. 1504-5.

¹³⁷ Ibid., p. 1505.

¹³⁸ Ibid..

¹³⁹ Ibid., p. 1506.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid., p. 1507.

¹⁴³ Ibid..

¹⁴⁴ Ibid., p. 1524.

¹⁴⁵ Ibid., p. 1525. See *Walker v Ford Motor Co.*, 684 F2d, (11th Cir, 1982), p. 1355, 1359.

¹⁴⁶ Ibid..

¹⁴⁷ Ibid., p. 1526. Summarized from Abrams, p. 1212.

¹⁴⁸ See Ehrenreich, p. 1197.

¹⁴⁹ Unikel, pp. 349-50.

¹⁵⁰ Ibid., p. 351.

¹⁵¹ Maureen Dowd, "Anita Hill Was Right and Still Is," *The Register Guard*, Eugene, Or, October 2nd, 1997, p. 13A.

¹⁵² Gretchen Morgenson, "May I Have the Pleasure . . .," *National Review*, November 18th, 1991, p. 41.

¹⁵³ *Rabidue*, p. 611.

¹⁵⁴ For a fuller explication of Judge Krupansky's views, see *Rabidue*, especially pages 615, 619, and 622.

¹⁵⁵ Unikel, p. 334.

¹⁵⁶ *Ibid.*, p. 372.

¹⁵⁷ *Ibid.*, p. 335.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, 340.

¹⁶⁰ *Ibid.*, p. 351.

¹⁶¹ *Ibid.*, pp. 349-50.

¹⁶² *Rabidue*, (Keith J., dissenting), p. 627.

¹⁶³ Ehrenreich, p. 1197.

¹⁶⁴ Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review*, v. 89 (1976), p. 1685.

¹⁶⁵ Hobbes, *Leviathan*, pt I, ch. 6, p. 148-9.

¹⁶⁶ The above was summed up from Hobbes, *Leviathan*, pt I, ch. 6.

¹⁶⁷ *Ibid.*, pt. 1, ch. 13, p. 139.

¹⁶⁸ *Ibid.*, pt. 1, ch. 13, p. 160.

¹⁶⁹ *Ibid.*, pt. I, ch. 13, p. 161.

¹⁷⁰ *Ibid.*, pt. I, ch. 13, p. 161.

¹⁷¹ Frederick Coplestone, *A History of Philosophy*, v. 5: *Modern Philosophy: the British Philosophers, pt. 1: Hobbes to Paley*. (New York: Image Books) 1964, p. 43.

¹⁷² Hobbes, *Leviathan*, pt. I, ch. 14, p. 163.

¹⁷³ For a summary see Hobbes, pt. I, ch. 14.

¹⁷⁴ John Locke, *An Essay Concerning Human Understanding*, 5th edition (1706), edited with an introduction by A. D. Woozley. (New York: Signet) 1964, bk. 1, ch. I, sect. 3.

¹⁷⁵ This was originally quoted in H. R. Fox Bourne's, *The Life of John Locke*, 1876, v. 1, pp. 403-4. I quoted it from C. B. Macpherson's introduction to Locke's *Second Treatise of Government*, 1980, pp. XI-XII.

¹⁷⁶ John Locke, *An Essay Concerning Human Understanding*. bk 2, ch. XX, sect. 2.

¹⁷⁷ *Ibid.*, bk 1, ch. III, paragraph. 13.

¹⁷⁸ Locke, *Second Treatise of Government*, ch. 2, sect. 6.

¹⁷⁹ Locke discussed the above points in ch. 9 of the *Second Treatise of Government*, especially in sections 123-7.

¹⁸⁰ Hobbes preferred an absolute monarchy while Locke argued that such a form of government ran contrary to the reason we entered into a social contract to begin with. Locke instead preferred a form of majoritarian rule. For a far fuller explanation see Hobbes' *Leviathan*, pt. II, ch. 17 and Locke's *Second Treatise of Government*, ch. 7, sect. 90.

¹⁸¹ *Rabidue*, p. 622.

¹⁸² *Ibid.*, pp. 620-1.

¹⁸³ Hobbes, pt 1, ch. 14, p. 163.

¹⁸⁴ *Rabidue*, p. 620.

¹⁸⁵ *Ibid.*, pp. 620-1.

¹⁸⁶ *Ibid.*, p. 615.

¹⁸⁷ *Ibid.*, p. 619.

¹⁸⁸ *Ibid.*, p. 622.

¹⁸⁹ *Ibid.*, (Keith J., dissenting), p. 624.

¹⁹⁰ *Robinson*, p. 1525.

¹⁹¹ *Ibid.*, p. 1524.

¹⁹² *Ibid.*, p. 1526.

¹⁹³ I decided to use Judge Keith's comment from his dissent in *Rabidue* because it better captures what it means to be corrosively psychologically affected than any phrase I could find in *Robinson*.

¹⁹⁴ Rene Descartes, "Discourse on Method" in *The Philosophical Works of Descartes*, trans. Elizabeth Haldane and G. R. T. Ross, vol. 1, (Cambridge: Cambridge University Press), 1967, p. 81.

¹⁹⁵ Rene Descartes, *Discourse on Method*, p. 134.

¹⁹⁶ Elizabeth Wolgast, *The Grammar of Justice*, (Ithaca, N.Y.: Cornell University Press), 1967, pp. 4-5.

¹⁹⁷ George Shelton, *Morality and Sovereignty in the Philosophy of Hobbes*. (London: MacMillan), 1992, p. 8.

¹⁹⁸ Hobbes, pt. III, ch. 49.

¹⁹⁹ Shelton, p. 235.

²⁰⁰ John Locke, *Conduct of the Understanding*, which can be found in the *Works of John Locke* (London, 1823; rpt, Aalen), 1963, pp. 231-2.

²⁰¹ Peter A. Schouls, *Reasoned Freedom: John Locke and Enlightenment*, (Ithaca and London: Cornell University Press, 1992), p. 8.

²⁰² *Ibid.*, p. 8.

²⁰³ Locke, *An Essay Concerning Human Understanding*, bk 2. Ch.21. Paragraph 67 (2.21.67)

²⁰⁴ *Ibid.*, 2.21.69.

²⁰⁵ *Ibid.*, 4.20.2-4.

²⁰⁶ *Ibid.*, 4.20.6

²⁰⁷ *Ibid.*, 4.20.11.

²⁰⁸ *Ibid.*, 4.20.12-6.

²⁰⁹ *Ibid.*, 4.20.17-8.

²¹⁰ Schouls, p. 102.

²¹¹ Ibid., p. 103.

²¹² Ibid., p. 104.

²¹³ Locke, *Conduct of the Understanding*, pp. 231-2.

²¹⁴ Locke, *An Essay Concerning Human Understanding*, 2.20.7-10.

²¹⁵ I will elaborate on this point later in this chapter.

²¹⁶ Will Kymlicka, "Liberalism and Communitarianism," *Canadian Journal of Philosophy*, v. 18, no. 2, June 1988, pp. 181-204.

²¹⁷ Donna Greschner, "Feminist Concerns With the New Communitarians: We Don't Need Another Hero," in *Law and the Community: the End of Individualism*, ed. by Allan C. Hutchinson and Leslie J.M. Green, (1989) pp. 119-50.

²¹⁸ The choice of these authors is not accidental; they are two of the authors that Unikel cites, but does not analyze, in his article to support his claim that we are primarily individuals and only secondarily members of a group. He cites Greschner as an example of someone who mistakenly takes a group-rights perspective (footnote 158) and Kymlicka as someone who properly takes an individual-rights perspective. See Unikel, 350-1.

²¹⁹ The two works that both Kymlicka and Greschner respond to are by Michael Sandel and Alasdair MacIntyre: Sandel, *Liberalism and the Limits of Justice*, (London: Cambridge University Press), 1982 and MacIntyre, *After Virtue*, 2nd ed. (Notre Dame, Indiana: University of Notre Dame Press), 1984.

²²⁰ Kymlicka, p. 181.

²²¹ Ibid., p. 181.

²²² MacIntyre, p. 220.

²²³ Kymlicka., p. 183.

²²⁴ Ibid., p. 182.

²²⁵ Ibid., p. 184.

²²⁶ Ibid., p. 189.

²²⁷ Ibid., p. 190.

²²⁸ Ibid., pp. 188-9.

²²⁹ MacIntyre, p. 220.

²³⁰ MacIntyre, p. 221.

²³¹ Kymlicka, 193-4. Kymlicka makes a similar point about Michael Sandel on page 192.

²³² Ibid., p. 196. See also Bernard Williams, *Ethics and the Limits of Philosophy*, (London: Fontana Press), 1985, p. 170.

²³³ Ibid., p. 197.

²³⁴ Ibid., p. 197.

²³⁵ See Greschner, pp. 128-33 for her discussion of the communitarians gendered assumptions and inattentiveness to gender.

²³⁶ Ibid., p. 124.

²³⁷ Ibid., p. 135.

²³⁸ Ibid., p. 134.

²³⁹ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, (Cambridge, Ma.: Harvard University Press), 1982.

²⁴⁰ Greschner, p. 134.

²⁴¹ Ibid., P. 135.

²⁴² Ibid., p. 135.

²⁴³ Greschner, p. 135 and MacIntyre, p. 220. See MacIntyre pp. 216-20 for a fuller discussion.

²⁴⁴ Greschner, p. 135.

²⁴⁵ Ibid., p. 136.

²⁴⁶ Ibid., pp. 137-8.

²⁴⁷ Ibid., pp. 138-9.

²⁴⁸ Ibid., p. 139.

²⁴⁹ Ibid., p. 141.

²⁵⁰ Ibid., p. 141.

²⁵¹ Ibid., p. 141.

²⁵² Ibid., p. 143. She cites Kymlicka's work as an example of liberal individualism, and Sandel's comment that identities are "defined to some extent by the community of which they are a part" as one example of a revised communitarianism. See Sandel, *Liberalism and the Limits of Justice*, p. 150.

²⁵³ Ibid., p. 143.

²⁵⁴ Unikel, pp. 349-50.

²⁵⁵ Ibid., p. 351, fn. 161.

²⁵⁶ Ibid., p. 350. She is explicitly cited in footnote 158.

²⁵⁷ Greschner, p. 139.

²⁵⁸ MacIntyre, p. 220.

²⁵⁹ Kymlicka, p. 188-9.

²⁶⁰ Greschner, p. 137-8.

²⁶¹ MacIntyre, p. 205.

²⁶² Kymlicka, p. 189.

²⁶³ Greschner, p. 136.

²⁶⁴ Ibid., p. 143.

²⁶⁵ Forell, p. 775.

²⁶⁶ Wolgast, p. 12.

²⁶⁷ Hobbes, of course, does not argue that we are all naturally equal, but instead argues that these differences tend to be compensated for by other factors, such as education and forming alliances with others. Therefore, the state should treat us as though we are equal. See *Leviathan*, pt 1, ch. 13.

- ²⁶⁸ Descartes, *Discourse on Method*, p.134.
- ²⁶⁹ Locke, *Conduct of the Understanding*, pp. 231-2.
- ²⁷⁰ Kymlicka, p. 188.
- ²⁷¹ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
- ²⁷² Unikel, p. 351.
- ²⁷³ Unikel., p. 340.
- ²⁷⁴ Ibid.
- ²⁷⁵ Ibid., p. 372.
- ²⁷⁶ Ibid.
- ²⁷⁷ Ibid., p. 373.
- ²⁷⁸ Ibid., p. 349-50.
- ²⁷⁹ Ibid., p. 351.
- ²⁸⁰ *Rabidue*, (Keith, J., dissenting), p. 626.
- ²⁸¹ Ibid., p. 372.
- ²⁸² Ibid.,p. 620.
- ²⁸³ Ibid.
- ²⁸⁴ Unikel, p. 335.
- ²⁸⁵ Locke, *Conduct of the Understanding*, p. 232
- ²⁸⁶ *Rabidue*, (Keith J., dissenting), p. 627.
- ²⁸⁷ Ibid..
- ²⁸⁸ I completely owe the idea behind and the details of this objection to correspondences with Caroline Forell.
- ²⁸⁹ *Rabidue*, p. 622.

²⁹⁰ Unikel, p. 374.

²⁹¹ *Robinson*, p. 1506.

²⁹² Unikel, p. 372.

²⁹³ *Ibid.*, p. 335.

²⁹⁴ *Ibid.*, p. 335.

²⁹⁵ Ehrenreich, p. 1192.

²⁹⁶ Unikel, p. 335.

²⁹⁷ Kymlicka, p. 182.

²⁹⁸ Rabidue did claim that she was denied tangible employment benefits. For a fuller discussion see *Rabidue*, (Keith J., dissenting), p. 624.

²⁹⁹ *Ibid.*, p. 620-1.

³⁰⁰ Ehrenreich, p. 1187.

³⁰¹ Ehrenreich, p. 1197.

³⁰² Kennedy, p. 1685.

³⁰³ *Ibid.*, p. 1715.

³⁰⁴ *Ibid.*, p. 1713.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*, p. 1717.

³⁰⁷ Kymlicka, p. 195.

³⁰⁸ Unikel, p. 356-7.

³⁰⁹ Ehrenreich, p. 1221.

³¹⁰ MacKinnon, p. 215.

³¹¹ Finley, p. 1144.

³¹² Forell, p. 772.

³¹³ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

³¹⁴ *Ibid.*, p. 265.

³¹⁵ *Robinson*, p. 1505

³¹⁶ See Forell, p. 805 and Unikel, pp. 356-7.

³¹⁷ *Rabidue*, p. 620.

³¹⁸ For example, see *Vance v. Southern Bell Telephone and Telegraph Company*, 863 F.2d 1503 (11th Cir. 1989), p. 511.

³¹⁹ *Rabidue*, p. 622.

³²⁰ *Robinson*, p. 1524.

³²¹ *Ibid.*, p. 1526.

³²² Susanne Kappeler, *The Pornography of Representation*, (Minneapolis: University of Minnesota Press), 1986, p. 61.

³²³ *Rabidue*, p. 611.

³²⁴ Kymlicka, pp. 188-9.

³²⁵ *Ibid.*, 197.

³²⁶ *Robinson*, p. 1524.

³²⁷ *Ibid.*, p. 1526.

³²⁸ Kymlicka, p. 197.

³²⁹ *Rabidue*, p. 627.

³³⁰ Jean-Paul Sartre, *Being and Nothingness: An Essay On Phenomenological Ontology*, trans. With an intro by Hazel E. Barnes, (New York: Philosophical Library), 1956.

³³¹ George Herbert Mead, *Mind, Self, and Society From the Standpoint of a Social Behaviorist*, ed. with an intro. by Charles W. Morris, (Chicago: University of Chicago Press), 1934.

³³² Robert Unikel, "Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence," *Northwestern University Law Review*, v. 87, no. 1 (1992), p. 326, 351.

³³³ Will Kymlicka, "Liberalism and Communitarianism," p. 197, and Bernard Williams, *Ethics and Limits of Philosophy*, p. 170.

³³⁴ Susan Gruenheck, Oreste F. Fucciani, and Michel Rybalka, "An interview with Jean-Paul Sartre," in *The Philosophy of Jean-Paul Sartre: Library of Living Philosophers*, vol. XVI, ed. by Paul Arthur Schilpp. (La Salle, IL: Open Court), 1981, p. 6.

³³⁵ *Ibid.*, p. 8.

³³⁶ Jean-Paul Sartre, *Being and Nothingness: An Essay on Phenomenological Ontology*, p. 59.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ Joseph Catalano, *A Commentary on Jean-Paul Sartre's "Being and Nothingness"*, (New York: Harper Torchbooks), 1974, p. 64.

³⁴⁰ Mitchell Aboulafia, *The Mediating Self: Mead, Sartre, and Self-Determination*, (New Haven and London: Yale University Press), 1986, p.31.

³⁴¹ Catalano, p. 64.

³⁴² Aboulafia, p. 32.

³⁴³ Catalano, p. 73.

³⁴⁴ Sartre, "Existentialism Is a Humanism, in *Existentialism From Dostoevsky to Sartre*, ed. by Walter Kaufmann, (New York: New American Library), 1975, p. 353.

³⁴⁵ *Rabidue v. Osceola Refining Co.*, 805 F2d (6th Cir. 1986), p. 611.

³⁴⁶ Joseph Catalano, p. 152.

³⁴⁷ Jean-Paul Sartre, *Being and Nothingness*, p. 252.

³⁴⁸ *Ibid.*, p. 255.

³⁴⁹ For more details see Sartre, *Being and Nothingness*, pp. 252-5.

³⁵⁰ Joseph Catalano, p. 160.

³⁵¹ Jean-Paul Sartre, *Being and Nothingness*, p. 221.

³⁵² Ibid, p. 222.

³⁵³ Joseph S. Catalano, p. 162.

³⁵⁴ Ibid, p. 165.

³⁵⁵ Sartre, *Being and Nothingness*, p. 289.

³⁵⁶ *Rabidue*, p. 624.

³⁵⁷ Ibid., p. 288.

³⁵⁸ Locke, *Conduct of the Understanding*, pp. 231-2.

³⁵⁹ The following description comes from George Herbert Mead's *Mind, Self, and Society from the Standpoint of a Social Behaviorist*, ed. by Charles W. Morris, (Chicago: The University of Chicago Press), 1934.

³⁶⁰ Mead, p. 43.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ David L. Miller, "George Herbert Mead, in *Classical American Philosophy: Essential Readings and Interpretive Essays*, ed. by John J. Stuhr, (New York: Oxford University Press), 1987, p. 419.

³⁶⁵ For a fuller description see Mead's *Mind, Self, and Society*, pp. 61-75.

³⁶⁶ Ibid., p. 150.

³⁶⁷ Ibid., p. 151.

³⁶⁸ Karen Hanson, *The Self Imagined: Philosophical Reflections on the Social Character of the Psyche*, (New York and London: Routledge and Kegan Paul), 1986, p. 23.

³⁶⁹ Ibid.

³⁷⁰ For a fuller description of the play and game stages of social development see *Mind, Self, and Society*, pp. 144–152.

³⁷¹ Ibid., p. 154.

³⁷² Aboulafia, p. 11.

³⁷³ For a more detailed description see Mead's *Mind, Self, and Society*, pp. 152–164.

³⁷⁴ Lewis Coser, *Masters of Sociological Thought*, 2nd edition, (New York: Harcourt, Brace, and Jovanovich, Inc.), 1977, p. 334.

³⁷⁵ For a more detailed description see Mead's *Mind, Self, and Society*, pp. 173–178.

³⁷⁶ Aboulafia, p. 12–3.

³⁷⁷ David L. Miller, *George Herbert Mead: Self, Language, and the World*. (Austin, Tx: University of Texas Press) 1973. Reprint, (Chicago: University of Chicago Press, Phoenix Edition) 1980, p. 216.

³⁷⁸ MacIntyre, p. 205

³⁷⁹ Aboulafia, p. 11.

³⁸⁰ Mead, *Mind, Self, and Society*, p. 177

³⁸¹ Gila Hayim, *the Existential Sociology of Jean-Paul Sartre*, (Amherst, Ma.: University of Massachusetts Press), 1980, p. 39.

³⁸² Sartre, p. 259.

³⁸³ Ibid, p. 260.

³⁸⁴ Catalano, p. 64.

³⁸⁵ Kymlicka, p. 197.

³⁸⁶ Sartre, p. 252.

³⁸⁷ Ibid, p. 222.

³⁸⁸ Sartre, p. 255.

³⁸⁹ During the process of researching this I was sitting in a coffer shop reading an article by Iris Young with the word "breast" (I think it was actually "breasted experience") in the title. At one point I suddenly realized that a woman was looking over my shoulder at me at what I was reading. I would like to think that my motives for reading this were quite innocent, but I nonetheless felt pretty embarrassed and actually started to blush.

³⁹⁰ Will Kymlicka, p. 170.

³⁹¹ Robinson, p. 1524.

³⁹² Ibid.

³⁹³ Ibid, p. 1526.

³⁹⁴ Summaries of their qualifications and testimony can be found between pages 1502 and 1507.

³⁹⁵ Sartre, *Being and Nothingness*, p. 222.

³⁹⁶ Robinson, p. 1497.

³⁹⁷ Ibid, p. 1495.

³⁹⁸ Sartre, p. 259.

³⁹⁹ Robinson, p. 1505.

⁴⁰⁰ Ibid, p. 1506.

⁴⁰¹ Ibid, p. 1502.

⁴⁰² Ibid, p. 1506.

⁴⁰³ Ibid.

⁴⁰⁴ Kymlicka, p. 195.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid., p. 196.

⁴⁰⁹ Ibid., p. 197.

⁴¹⁰ Locke, *Conduct of the Understanding*, pp. 231-2.

⁴¹¹ Schouls, p. 8.

⁴¹² Sartre, *Being and Nothingness*, p. 222.

⁴¹³ Ibid., 289.

⁴¹⁴ Hanson, p. 23.

⁴¹⁵ Robinson, p. 1497.

⁴¹⁶ Morgenson, p. 36.

⁴¹⁷ Ibid., p. 40.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Ibid., p. 141.

⁴²¹ I think that the phenomonological fact that he would experience shame in this social context illustrates that the problem with sexual harassment in the overwhelming majority of instances is not that "men simply don't get it." Such a man would not experience shame if he was not well aware of the fact that he is behaving inappropriately. Further, most men would vehemently object to another man treating his wife, sister, or daughter that way. If this is correct, we need to examine the construction of gender relations in order to determine why a substantial percentage of men want to treat most women differently than they would want others to treat their closest female relations.

⁴²² Kymlicka, p. 197.

⁴²³ Greschner, p. 141.

⁴²⁴ Kymlicka, p. 195.

⁴²⁵ Robinson, p. 1526.

⁴²⁶ Ibid., p. 1505.

⁴²⁷ Robinson, pp. 1502-7.

⁴²⁸ Gruenheck, Fucciani, and Rybalka, p. 6.

⁴²⁹ Robinson, p. 1507.

⁴³⁰ Rabidue, p. 622

⁴³¹ Robinson, p. 1503.

⁴³² Ibid., p. 1507.

⁴³³ Ibid, p. 1506.

⁴³⁴ Ibid.

⁴³⁵ Ibid., p. 1505.

⁴³⁶ The coping strategy of "denying the impact of the event, blocking it out" does not appear to be a calculated response, but it could equally well be accounted for by either theory of the self : it could be that a woman who so responds is being irrational or it could be that the experience of the look of the other which cannot be transcended in a virtually all male environment is so strong that she denies its impact or blocks it out.

⁴³⁷ Ibid., p. 1502.

⁴³⁸ Ibid., pp. 1502-5.

⁴³⁹ Locke, *An Essay Concerning Human Understanding*, Bk 4, Ch. 20, Paragraph 6.

⁴⁴⁰ Robinson, p. 1507.

⁴⁴¹ Sartre, *Being and Nothingness*, p. 59.

⁴⁴² Locke, 4.20.12.

⁴⁴³ Sartre, p. 221.

⁴⁴⁴ Kymlicka, p. 196.

BIBLIOGRAPHY

- Aboulafia, Mitchell. "From Domination to Recognition," In *Beyond Domination: New Perspectives On Women in Philosophy*. Edited by Carol Gould. Totowa, N.J.: Rowman and Allanheld (1984), p. 175.
- Aboulafia, Mitchell. *The Mediating Self: Mead, Sartre, and Self-Determination*. New Haven: Yale University Press (1986).
- Abrams, Kathryn. "Gender Discrimination and the Transformation of Workplace Norms," *Vanderbilt Law Review*, v. 42 (1989), p. 1183.
- Adler, Robert and Ellen Pierce. "The Legal, Ethical, and Social Implications of the 'Reasonable Woman' Standard In Sexual Harassment Cases," *Fordham Law Review*, v. 61 (1993), p. 773.
- Allen, Christine. "A New Theory of Sex Identity: Proposed Areas of Application," in *Philosophy and Culture*, v. 2 (1988). Edited by Cauchy, Venant.
- Almony, Patricia. "Ellison v. Brady: a Legal Compromise With Reality in Cases of Sexual Harassment," *Villanova Law Review*, v. 37 (1992), p. 195.
- Ames, Van Meter. "Mead and Sartre on Man," *Journal of Philosophy*, v. 53 (1956), p. 205.
- Bartky, Sandra Lee. *Femininity and Domination: Studies in the Phenomonology of Oppression*. New York: Routledge (1990).
- Beauvoir, Simone de. *The Second Sex*. Translated by H.M. Parshley. New York: Alfred A. Knopf (1953).
- Beck, Clive M.. "Female Identity and Difference," *Process of Philosophy Education*, v. 48 (1992), p. 286.
- Bell, Linda. "Love and the Perfect Coincidence in Sartrean Ethics," in *Writing the Politics of Difference*. Ed. by J. Hugh. Albany: S.U.N.Y. Press (1991).
- Bender, Leslie. "Feminist Theory and Tort," *Journal of Law Education*, v. 38 (1988), p. 3.

- Bennett-Alexander, Dawn. "Lower Court Interpretation of the Meritor Decision, Putting Flesh On the Supreme Court's Sexual Harassment Skeleton," *Wisconsin Women's Law Journal*, v. 6 (1991), p. 35.
- Bernick, Susan. "The Logic of the Development of Feminism; or is MacKinnon to Feminism as Parmenides is to Greek Philosophy," *Hypatia*, v. 7 (Winter 1992), p. 1.
- Beyond Equality and Difference*. Edited by Gisela Bock and Susan James. New York: Routledge (1992).
- Blackwood, Eileen. "The Reasonable Woman and Sexual Harassment Law and the Case For Subjectivity," *Vermont Law Review*, v. 16 (1992), p. 1005.
- Bourgeois, Patrick and Sandra Rosenthal. "Role-Taking, Corporeal Intersubjectivity, and Self: Mead and Merleau-Ponty," *Philosophy Today*, v. 34 (Summer 1990), p. 117.
- Brenneman, Deborah. "From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases," *Cincinnati Law Review*, v. 60 (1992), p. 1281.
- Browne, Kingsley. "Title VII as Censorship: Hostile-Environment Harassment and the First Amendment," *Ohio State Law Journal*, v. 52 (1991), p. 481.
- Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge (1989).
- Butler, Judith. *Bodies that Matter: On the Discursive Limits of Sex*. New York: Routledge (1993).
- Candia, Shuana. "The Hostile Work Environment: Are Federal Remedies Hostile, Too?," *University of Hawaii Law Review*, v. 13 (1991), p. 537.
- Catalano, Joseph. *A Commentary on Jean-Paul Sartre's "Being and Nothingness."* New York: Harper Torchbooks (1974).
- Chammallas, Martha and Linda Kerber, "Women, Mothers, and the Law of Fright," *Michigan Law Review*, v. 88 (1990), p. 814.
- Chammallas, Martha. "Feminist Constructions of Objectivity: Multiple Perspectives In Sexual and Racial Harassment Litigation," *Texas Journal of Women & the Law*, v. 1 (1992), p. 95.

- Childers, Jolynn. "Is There a Place For a Reasonable Woman In the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment," *Duke Law Journal*, v. 42 (1993), p. 854.
- Clarke, Bridgett. "Making the Woman's Experience Relevant To Rape: the Admissibility of Rape Trauma Syndrome in California," *UCLA Law Review*, v. 39 (1991), p. 251.
- Cohen, Cheryl. "The Feminist Sexuality Debate," *Hypatia*, v. 1 (Fall 1986), p. 71.
- Coser, Lewis. *Masters of Sociological Thought*, 2nd ed.. New York: Harcourt, Brace, and Jovanovich (1977).
- Collin, Ronald. "Language, History, and the Legal Process: A Profile of the Reasonable Man," *Rutgers Camden Law Review*, v. 8 (1977), p. 311.
- Coplestone, Frederick. *A History of Philosophy*, v. 5: *Modern Philosophy: the British Philosophers, pt 1: Hobber to Paley*. New York: Image Books (1964).
- Crenshaw, Kimberly. "Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policy," *University of Chicago Legal Forum* (1989), p. 139.
- Crenshaw, Kimberly. "Whose Story Is It Anyway?," In *Race-ing Justice, EnGendering Power*. Ed. by Toni Morrison. New York: Pantheon Books (1992).
- Davis, Karen. "I Love Myself When I Am Laughing: A New Paradigm For Sex," *Journal of Social and Political Philosophy*, v. 21 (Fall/Winter 1990), p. 5.
- Descartes, Rene. "Discourse on Method," in *The Philosophical Works of Descartes*, v. 1. Trans. by Elizabeth Haldane and G.R.T. Ross. Camebridge: Camebridge University Press (1967).
- Dixon, Beth. "Gender and the Problem of Personal Identity," *Personalist Forum*, v. 8. (1992), p. 259.
- Dodds, Susan and others. "Sexual Harassment," *Social Theory and Practice*, v. 14 (Summer 1988), p. 111.
- Dolkart, Jane L.. "Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards," *Emory Law Journal*, (1994), p. 151.

- Donovan, Dolores and Stephanie Wildman. "Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation," *Loyola of Los Angeles Law Review*, v. 14 (1981), p. 435.
- Dowd, Maureen. "Anita Hill Was Right and Still Is," *The Register Guard*, Eugene, Oregon (October 2nd, 1997), p. 13A.
- Downes v. Federal Aviation Administration*, 775 F2d (1985), p. 288.
- Dragel, Cheryl. "Hostile Environment Sexual Harassment: Should the 9th Cir's Reasonable Woman Standard Be Adopted?," *Journal of Law and Commerce*, v. 11 (1992), p. 237.
- Dworkin, Andrea and Catherine MacKinnon. *Pornography and Civil Rights: A New Day for Women's Equality*. Minneapolis: University of Minnesota Press (1988).
- Ehrenreich, Nancy. "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law," *Yale Law Journal*, v. 99 (1990), p. 1177.
- Estrich, Susan. "Sex At Work," *Stanford Law Review*, v. 43 (1991), p. 813.
- Ethics: A Feminist Reader*. Ed. by Elizabeth Frazer, Jennifer Hornsby, and Sabina Lovibond. Cambridge: Blackwell (1992).
- Ferguson, Anne. *Sexual Democracy: Women, Oppression, and Revolution*. Boulder, Co: Westview Press (1991).
- Forell, Caroline. "Essentialism, Empathy, and the Reasonable Woman," *University of Illinois Law Review*, v. 1994, no. 4 (1995), p. 769.
- Gardner, Carol Brooks. "Street Remarks, Address Rights and the Urban Female," *Sociological Inquiry*, v. 50 (1980), p. 328.
- Gardner, Carol Brooks. "Analyzing Gender In Public Places: Rethinking Goffman's Vision of Everyday Life," *The American Sociologist*, Spring (1989), p. 42.
- Gates, Eugene. "The Female Voice: Sexual Aesthetics Revisited," *Journal of Aesthetics Education*, v. 22 (Winter 1988), p. 59.
- Gettle, Jeffrey. "Sexual Harassment and the Reasonable Woman Standard: Is It a Viable Solution?," *Duquense Law Review*, v. 41 (1993), p. 841.
- Gilbert, Paul. *Human Relationships: A Philosophical Introduction*. Cambridge: Blackwell (1991).

- Gilligan, Carol. *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, Massachusetts: Harvard University Press (1982).
- Glidden, Elizabeth. "The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment," *Iowa Law Review*, v. 77 (1992), p. 1825.
- Guattery, Peter. "Sexual Harassment, Hostile Environment Claims," *Maryland Bar Journal*, v. 25 (1992), p. 7.
- Greschner, Donna. "Feminist Concerns With the New Communitarianism: We Don't Need Another Hero," in *Law and the Community: The End of Individualism*. Ed. by Allan C. Hutchinson and Leslie J. M. Green. Toronto: Carswell (1989), p. 119.
- Gutek, Barbara. "Understanding Sexual Harassment at Work," *Notre Dame Journal of Law*, v. 6 (1992), p. 335.
- Habermas, Juergen. "An Intersubjective Concept of Individuality," *Journal of Chinese Philosophy*, v. 18 (June 1991), p. 133.
- Hahn, Sheryl. "Evolution of the Hostile Workplace Claim Under Title VII: Only Sensitive Men Need Apply," *Golden Gate Law Review*, v. 22 (1992), p. 69.
- Hanson, Karen. *The Self Imagined: Philosophical Reflections on the Social Character of the Psyche*. New York: Routledge and K. Paul (1987).
- Harris v. Forklift Systems, Inc.*, 114 S. Ct (1993), p. 367.
- Hart, Carroll. "Power In the Service of Love: John Dewey's Logic and the Dream of a Common Language," *Hypatia*, v. 8 (Spring 1993), p. 190.
- Hayim, Gila. *The Existential Sociology of Jean-Paul Sartre*. Amhesrt: University of Massachusetts Press (1980).
- Hegel, G. W. F.. *Phenomonology of Spirit*. Translated by A. V. Miller. Oxford: Oxford University Press (1977).
- Henson v. Dundee*, 682 F2d (1982), p. 897.
- Henken, Jill. "Hostile Environment Claims of Sexual Harassment: The Continuing Expansion of Sexual Harassment Law," *Villanova Law Review*, v. 44 (1989), p. 1243.
- Hobbes, Thomas. *Leviathan* (1651). Edited by N. Fuller. Chicago: Encyclopedia Britannica (1952).

- Holmes, Oliver. *The Common Law*. Boston: Little Brown (1881).
- Holmes, Richard and Mano, Daniel. "The Lover-Loved Relationship Reconsidered," *Auslegung*, v. 17 (Summer 1991), p. 101.
- Hooks, Bell. *Feminist Theory: From Margin To Center*. Boston: South End Press (1985).
- Horton, Amy. "Of Supervision, Centerfolds, and Censorship: Sexual harassment, the First Amendment, and the Contours of Title VII," *University of Miami Law Review*, v. 46 (1991), p. 403.
- Job, Mary. "Sexual Harassment—the Reasonable Woman Standard," *Michigan Bar Journal*, Feb (1993).
- Jordan, Emma Coleman. "Race, Gender & Social Class in the Thomas Sexual Harassment Hearings: The Hidden Fault Lines in Political Discourse," *Harvard Women's Law Journal*, v. 15 (1992), p. 1.
- Kennedy, Duncan. "Form and Substance in Private Law Adjudication," *Harvard Law Review*, v. 89 (1976), p. 1685.
- Kymlicka, Will. "Liberalism and Communitarianism," *Canadian Journal of Philosophy*, v. 18, no. 2 (June 1988), p. 181.
- Lester, Toni. "The Reasonable Woman Test In Sexual Harassment— Will It Really Make a Difference?," *Indiana Law Review*, v. 26 (1993), p. 227.
- Letwin, Shirley. "Law and the Unreasonable Woman," *National Review*, (Nov. 18, 1991), p. 34.
- Littleton, Kristi. "Feminist Jurisprudence: The Difference Method Makes," *Stanford Law Review*, v. 41 (1989), p. 751.
- Lcoke, John. *Conduct of the Understanding in the Works of John Locke*. London: Aalan (1963)
- Locke, John. *An Essay Concerning Human Understanding* (1690). Edited by A.C. Fraser. Chicago: Encyclopedia Britannica (1952).
- Locke, John. *Two Treatises of Government* (1690). Edited by C.B. Macpherson. Indianapolis: Hackett Publishing Company, Inc. (1980).
- MacIntyre, Alasdair. *After Virtue*, 2nd ed. South Bend, Indiana: Notre Dame University Press (1984).

- MacKinnon, Catherine. *The Sexual Harassment of Working Women*. New Haven, Ct: Yale University Press (1979).
- MacKinnon, Catherine. *Feminism Unmodified: Discourse on Life and Law*. Cambridge: Harvard University Press (1987).
- MacKinnon, Catherine. *Toward a Feminist Theory of the State*. Cambridge: Harvard University Press (1989).
- MacKinnon, Catherine. "From Practice to Theory, or What is a White Woman Anyway?", *Yale Journal of Law & Feminism*, v. 4 (1991), p. 13.
- MacKinnon, Catherine. *Only Words*. Cambridge: Harvard University Press (1993).
- Mead, G. H.. "The Mechanism of Social Consciousness," *Journal of Philosophy*, v. 9 (1912), p. 401.
- Mead, G. H.. "The Social Self," *Journal of Philosophy*, v. 10 (1913), p. 374.
- Mead, G. H.. "The Genesis of the Self and Social Control," *International Journal of Ethics*, v. 35 (1924), p. 251.
- Mead, G. H.. *The Philosophy of the Present* (1932). Edited by Arthur Murphy. Chicago: University of Chicago Press (1980).
- Mead, G. H.. *Mind, Self, and Society: From the Standpoint of a Social Behaviorist*. Edited by Charles Morris. Chicago: University of Chicago Press (1934).
- Mead, G. H.. *Philosophy of the Act*. Edited by Charles Morris. Chicago: University of Chicago Press (1938).
- Medlin, Nell. "Expanding the Law of Sexual Harassment To Include Workplace Pornography: Robinson v. Jacksonville Shipyards, Inc.," *Stetson Law Review*, v. 21 (1992), p. 655.
- Meritor Savings v. Vinson*, 477 U.S. 91 L. Ed 2d 49, (106 S. Ct 1986), p. 2399.
- Miller, David L.. *George Herbert Mead: Self, Language, and the World*. Austin: University of Texas Press (1973).
- Minow, Martha. *Making All the Difference: Inclusion, Exclusion & American Law*. Ithica: Cornaell University Press (1991).

- Mogan, Cathleen. "Current Hostile Environment Law: Time To Stop Defendants From Having Their Cake and Eating It Too," *Notre Dame Journal of Law*, v. 6 (1992), p. 543.
- Morgenson, Gretchen. "May I Have the Pleasure . . .," *National Review* (Nov. 18th, 1991), p. 36.
- Murphy, Julien. "The Look in Sartre and Rich," *Hypatia*, v. 2 (Summer 1987), p. 113.
- Nathan, Daniel. "Just Looking: Voyeurism and the Grounds of Privacy," *Public Affairs Quarterly*, v. 4 (Oct 1990), p. 365.
- Patterson, James. "Sexual Harassment in the Workplace: The Continuing Quest For the Reasonable Woman Standard," *American Journal of Trial Advocacy*, v. 15 (1991), p. 415.
- Perhach, Kristen. "Can a Single Act Create a Hostile Work Environment: Radtke V. Everett," *Thomas M. Cooley Law Review*, v. 9 (1992), p. 519.
- Peters, Cynthia and Karen Struening. "Out In the Street," *Z Magazine*, (Feb 1988), p. 79.
- Profio, Debra. "Ellison v. Brady: Finally, a Woman's Perspective," *UCLA Women's Law Journal*, v. 2 (1992), p. 249.
- Rabidue v. Osceola Refining Co.*, 805 F2d (6th Cir. 1986), p. 611.
- Radtke v. Everett*, 471 N.W. (Mich, Ct App. 1991, p. 664.
- Reinders, Lynne. "A Reasonable Woman Approach to Hostile Environment Sexual Harassment: Ellison v. Brady," *Journal of Urban & Contemporary Law*, v. 41 (1992), p. 227.
- Roberts, Dorothy. "Racism & Patriarchy and the Meaning of Motherhood," *Journal of Gender and the Law*, v. 1 (1993), p. 1.
- Robinson v. Jacksonville Shipyards, Inc.*, (760 F. Supp. 1991), p. 1486.
- Rogers v. EEOC*, 454 F2d 234 (Ca5), cert. denied, 406 U.S. 957, 32 L. Ed 2d 343, (92 S. Ct 1972), p 2058.
- Sandel, Michael. *Liberalism and the Limits of Justice*. London: Camebridge University Press (1982).
- Sartre, Jean-Paul. *Being and Nothingness: An Essay on Phenomonological Ontology*. Translated by Hazel Barnes. New York: Philosophical Library (1956).

- Scheppelle, Kim. "The Reasonable Woman," *The Responsive Community*, (Fall 1991), p. 36.
- Schneider, Elizabeth. "Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse," *New York University Law Review*, v. 67 (1992), p. 520.
- Scott, Joan Wallach. *Gender and the Politics of History*. New York: Columbia University Press (1988).
- Schouls, Peter A.. *Reasoned Freedom: John Locke and Enlightenment*. Ithaca, N.Y. and London: Cornell University Press (1992).
- Seitz, Brian. "The Identity of the Subject After Sartre: An Identity Marked by the Denial of Identity," *Philosophy Today*, v. 35 (Winter 1991), p. 362.
- Shear, Marie. "Free Meat Talks Back," *Journal of Communication*, v. 26 (1976), p. 38.
- Shelton, George. *Morality and Sovereignty in the Philosophy of Hobbes*. London: MacMillan (1992).
- Superson, Anita. "A Feminist Definition of Sexual Harassment," *Journal of Social Philosophy*, v. 24 (Spring 1993), p. 46.
- Swanton, Chistine, Viviane Robinson and Jan Crosthait. "Treating Women as Sex Objects," *Journal of Social Philosophy*, v. 20 (Winter 1989), p. 5.
- Taylor, Charles. *Sources of the Self: The Making of Modern Identity*. Cambridge: Harvard University Press (1992).
- Thorpe, Joshua. "Gender-Based Harassment and the Hostile Work Environment," *Duke Law Journal*, (1990), p. 1361.
- Unikel, Robert. "Reasonable Doubts: a Critique of the Reasonable Woman Standard in American Jurisprudence," *Northwestern Law Review*, v. 87 (1992), p. 326.
- Van Gelder, Lindsay. "The International Language of Street Hassling," *Ms. Magazine*, May (1981), p. 15.
- Vinciguerra, Marlisa. "The Aftermath of Meritor: A Search For Standards in the Law of Sexual Harassment," *Yale Law Journal*, v. 98 (1989), p. 1717.
- Wells, Deborah and Beverly Kracher. "Justice, Sexual Harassment, and the Reasonable Victim Standard," *Journal of Business Ethics*, v. 12 (June 1993), p. 423.

- Westman, Bonnie. "The Reasonable Woman Standard: Preventing Sexual Harassment In the Workplace," *William Mitchell Law Review*, v. 18 (1993), p. 795.
- Williams, Robert R.. "Sartre's Strange Appropriation of Hegel," *Owl Minerva*, v. 23 (Fall 1991), p. 5.
- Williamson, Timothy. *Identity and Discrimination*. Cambridge: Blackwell (1990).
- Wise, Sue and Liz Stanley. *Georgie Porgie: Sexual Harassment in Everyday Life*. New York: Pandora (1987).
- Wolgast, Elizabeth. *The Grammar of Justice*. Ithica N.Y.: Cornell University Press (1967).