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Articles

Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law

Nancy S. Ehrenreich†

This Article examines the role of the reasonableness standard in "hostile work environment" sexual harassment cases under title VII.[1] My primary purpose is to offer an explanation for how the reasonable person test

† Assistant Professor of Law, University of Denver College of Law. B.A. 1974, Yale University; J.D. 1979, University of Virginia; L.L.M. 1982, University of Virginia.

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1. 42 U.S.C. §§ 2000e-2, 2000e-16 (1982 & Supp. 1987). Two types of sexual harassment claims have been recognized under title VII. The first, termed a quid pro quo cause of action, alleges that the employer has explicitly conditioned a job benefit on acquiescence to sexual demands—or threatened a detriment if demands are rejected. The second, a hostile environment claim, alleges that being subjected to offensive treatment has been made an implicit condition of employment. *See generally* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32–47 (1979) (describing these two types of claims). Specifically, a plaintiff in a hostile work environment case must prove that the conditions of work to which she was subjected unreasonably interfered with her ability to work or rendered her environment unreasonably offensive. 29 C.F.R. § 1604.11(a)(3) (1989).

retains its legitimacy in the face of numerous analytical weaknesses. Why, for example, in the context of antidiscrimination statutes designed to reform society, is a standard that is explicitly tied to the status quo[2] thought to be a proper vehicle for identifying discriminatory behavior? Why, despite recent scholarship revealing that judicial definitions of reasonableness often reflect the values and assumptions of a narrow elite,[3] is the "objective test" seen as an accurate reflection of societal norms at all? In short, why is it that the test is still seen as the prototypical expression of the law's fairness and objectivity[4] rather than, for example, as a mechanism for facilitating the coercive exercise of social power?

Examining the ideological content of the role of reasonableness in antidiscrimination law,[5] this Article concludes that (unfounded) pluralist assumptions support the courts' use of the reasonable person concept to define discrimination in the sexual harassment setting. Such assumptions allow reasonableness to be seen as mediating a fundamental contradiction between liberty and security in liberal legal thought—a contradiction expressed in this context as the conflict between our desire to promote social diversity by providing autonomy to individual groups and our need to protect vulnerable groups from discrimination by coercing a certain amount

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2. *See, e.g.*, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 175 (5th ed. 1984) (describing reasonable person of negligence law as "a personification of a community ideal of reasonable behavior").

3. *See* Estrich, *Rape*, 95 YALE L.J. 1087, 1105-21 (1986) ("reasonable resistance" necessary to establish rape is often defined as requiring physical forcefulness that would be more typical of—and effective for—a man than a woman); Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A.L. REV. 435, 462-67 (1981) (legal abstractions like reasonable man standard both hide and perpetuate existing social inequities by ignoring social reality of individual judged); Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 631-32 (1980) (reasonableness standard in self-defense law under which use of deadly weapon is barred unless attacker is armed ignores that many women are, or perceive themselves to be, unable to defend themselves without weapons against men). For a general discussion of the danger that the reasonableness standard might exclude the viewpoints of powerless groups, see G. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 21-44 (1985).

4. As a broad standard, rather than a narrow rule, the reasonableness test is thought both to allow contextualized judgments in individual cases and to be able to reflect changing societal mores. Despite its supposed flexibility, however, the test is also seen as an objective standard—as sufficiently determinate to impose the same constraints on everyone, and to prevent political decision-making by limiting the discretion of the judge. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 2, at 173-75. For general discussions of the reasonable person standard, see Collins, *Language, History and the Legal Process: A Profile of the 'Reasonable Man'*, 8 RUT.-CAM. L.J. 311 (1977), Reynolds, *The Reasonable Man of Negligence Law: A Health Report on the 'Odious Creature'*, 23 OKLA. L. REV. 410 (1970), and Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927).

5. In focusing on the ideological content of the reasonableness construct, I draw on a growing body of literature that explores how the ideological messages underlying legal doctrine both hide and justify the substantive content of judicial decisions and thereby contribute to the legitimacy of the legal system itself. *See, e.g.*, Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1189-90 (1985); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

of conformity to general standards of conduct.[6] Through a close reading of a hostile work environment case, the Article illustrates how the ideology of pluralism and the ideology of reasonableness reinforce each other in the sexual harassment context, thereby lending credence to both.

Part I describes the ways in which pluralist ideology informs the traditional "equal opportunity" model of discrimination,[7] making mediation of the contradiction between diversity (the autonomy of individual groups) and conformity (the security of the collective society) seem possible. For this discussion I draw heavily on existing analyses of the operation of liberal individualist assumptions in private law,[8] concluding that similar liberal pluralist assumptions can be found in the antidiscrimination context,[9] and that those assumptions reinforce the use of an "objective" test to define discrimination in sexual harassment cases.

Part II of the Article examines the reasonable person standard as it operates in *Rabidue v. Osceola Refining Company*,[10] a recent hostile work environment case in which the United States Court of Appeals for the Sixth Circuit held that the environment in the defendant's workplace was not unreasonably offensive and had not unreasonably interfered with the plaintiff's ability to work. I argue that the constructs relied upon by the majority in reaching this conclusion—the concept of societal consensus and the abstract principle of tolerance for diversity—fail to surmount the contradiction between the individual group and the collectivity that the reasonableness standard is supposed to mediate. Moreover, the court's pluralist discourse not only supports the use of those constructs but also conceals the fact that its opinion actually reflects and reinforces elitist, nonpluralist attitudes.

Part III explores the implications of this critique of reasonableness. In particular, I evaluate the argument proffered by the dissent in *Rabidue* that a reasonable woman standard, rather than the traditional reasonable person test, should be employed in hostile environment cases. At a more general level, this Part also addresses the efficacy of doctrinal change as a means of legal reform and the limits of pluralism as a normative ideal. I argue that our vision of pluralism needs to be transformed in order to

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6. In focusing on the mediation of contradictions in legal ideology, I am employing a structuralist methodology developed in the legal context by writers such as Duncan Kennedy, who was the first to identify the core contradiction between liberty and security that recurs throughout liberal legal thought. Kennedy, *supra* note 5, at 205–21, 257–65, 294–98; *see also* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). For Kennedy's subsequent critique of his own analysis, see Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 14–18 (1984).

7. The equal opportunity model is the familiar model of formal equality, which dictates that the law should be color-blind, sex-blind, etc., neither imposing burdens on nor providing benefits to an individual on the basis of race, sex, or other illegitimate grounds. *See, e.g.*, Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1, 21 (1976).

8. *See* Kennedy, *supra* note 5, at 205–21, 257–65, 294–98; Singer, *supra* note 5, at 40–45.

9. *See infra* notes 49–56 and accompanying text.

10. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

acknowledge the existence of conflict among groups and the unavoidability of choices among them.

I. Individualism, Pluralism, and Reasonableness

This Part examines the role of reasonableness in liberal legal thought by comparing its role in a particular private law context—negligence—with its role in antidiscrimination law.[11] Identifying both an individualist and a group-based vision in each of these two areas of the law, I will argue that in both areas both of these visions are informed by a common conceptual framework. Because understanding how that framework operates in negligence law will help elucidate its operation in antidiscrimination law, I will discuss the negligence context first.

A. *Reasonableness in Negligence Law*

There are at least two different visions of the appropriate role of negligence law: a corrective justice vision that sees the law as a mechanism for protecting individual choice and restricting culpable conduct, and an instrumentalist vision that sees the law as a means of implementing general social policies through the resolution of legal disputes.[12] The first approach, of course, focuses on individuals, while the second is more concerned with fairness to different status groups and with the well-being of society as a whole. While both visions find expression in current negligence case law and scholarship, the individualist approach to negligence was at its height in the nineteenth century, while the instrumentalist approach has dominated since the time of the Legal Realists. In the description that follows, I will briefly outline two underlying similarities in the ways that both of these approaches conceptualize negligence law: (1) they both rely upon a dichotomy between public and private, and (2) they both treat negligence law in general and the reasonable person construct in particular as mediating a central contradiction between the individual and the group.

1. *The Individualist Vision of Negligence*

a. *The Public/Private Dichotomy*

The traditional, nineteenth-century view of negligence relies upon a vision of the world as divided into two separate spheres, a private sphere of freely-willed interpersonal interactions, and a public sphere of regulation

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11. The comparison is summarized in three charts on page 1193.

12. *See generally* H. Steiner, Moral Argument and Social Vision in the Courts: A Study of Tort Accident Law 8, 108–24 (1987) (describing several aspects of shift from first vision to second).

designed to preserve and protect such interactions.[13] Freedom of contract and unfettered competition are considered the norm; governmental interference with private orderings through tort law is justified only when someone has engaged in anti-competitive behavior that distorts the "natural" operation of the market or faulty conduct from which courts can infer consent to be held liable if harm results. Because negligent conduct harms an individual without her consent, its regulation does not constitute interference with the actor's freedom, for the right to liberty extends only to conduct that does not harm others.[14] In regulating such behavior, however—that is, in distinguishing between protected liberty and regulable negligence—the government must not favor either side, for otherwise it will be interfering with, rather than facilitating, the free operation of the private sphere.[15]

To avoid such favoritism (this approach contends), courts should rely upon prevailing social norms for their definition of reasonable behavior. Assuming that, as part of the social contract, individuals implicitly agree to conform their conduct to community standards (in return for others' doing the same), the individualist approach thus defines unreasonableness as a violation of those standards. So defined, the reasonable person test, by serving as a mechanism for importing a pre-existing societal consensus into the law, is thought to constrain judicial decision-making by providing determinate grounds from which to derive results.

b. *Reasonableness as Mediator*

Under the individualist view, to the extent that the reasonableness test is seen as enabling courts to draw a neutral line between the private and the public spheres, it seems to mediate a fundamental contradiction between our desire for freedom and our desire not to be harmed by others.[16] Singer describes this contradiction as follows:

> Liberalism is the invitation to act in a self-interested manner, without impediment from other people, as long as what we do does not harm them. This political theory is founded on a contradiction. We want freedom to engage in the pursuit of happiness. Yet we also want security from harm. The more freedom of action we allow, the

13. On the public/private dichotomy in private law, see Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982) (describing distinction in legal thought).

14. And, "[s]ince liberal citizens are motivated by self-interest, the only way to achieve security is to give power to the state to limit freedom of action." Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 980. Individuals are assumed to have implicitly agreed to that exercise of state power as part of the social contract. *See* Peller, *supra* note 5, at 1256.

15. If a court fails to act neutrally when it intervenes in the private sphere, it corrupts the operation of that sphere, in effect delegating the coercive power of the state to private individuals. *See* Peller, *supra* note 5, at 1202-03, 1222-23.

16. *See* Kennedy, *supra* note 5, at 211-13, 372-82; Peller, *supra* note 5, at 1201-04.

> more vulnerable we are to damage inflicted by others. Thus, the contradiction is between the principle that individuals may legitimately act in their own interest . . . and the principle that they have a duty to look out for others and to refrain from acts that hurt them. Since liberal citizens are motivated by self-interest, the only way to achieve security is to give power to the state to limit freedom of action. The contradiction between freedom . . . and security therefore translates into the contradiction between individual rights and state powers. We must determine the extent to which individual freedom of action may legitimately be limited by collective coercion over the individual in the name of security.[17]

By seemingly allowing individuals to pursue their self-interest unless and until they interfere with the interest of others, the reasonable person standard in negligence law seems to overcome this conflict between the individual and the group, protecting collective security without threatening individual freedom.

2. *The Instrumentalist Vision of Negligence*

a. *The Public/Private Dichotomy*

Like the individualist vision, modern instrumentalist analysis still sees negligence law as determining under what circumstances the state should intervene in the operation of the private sphere. However, this vision relies upon a different conception of the inadequacies of the private sphere that justify intervention. For example, rather than being concerned with coercion that overcomes the individual's will (violations of norms, involuntary assumption of risks, fraudulent misrepresentations, etc.), this approach is concerned with such things as "market failure"—imperfections in the functioning of the market that prevent it from producing results that would benefit all of society (such as the "efficient" allocation of resources).[18]

Thus, under this approach, the liberty interests at stake are more likely to be seen not as the free exercise of choice but rather as the ability to reach agreements through perfectly efficient bargaining.[19] Similarly, the threat to security interests that justifies governmental intervention is transformed from the overcoming of individual will to the existence of positive transaction costs that prevent people from reaching beneficial bargains.

Finally, while the same belief that regulation of the private sphere must

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17. Singer, *supra* note 14, at 980 (citations omitted).

18. While efficiency analysis is not the only form that an instrumentalist approach can take, it is the most prevalent instrumentalist theory in negligence law—and, for simplicity's sake, the one upon which I will focus in this discussion.

19. For example, bargaining conducted in a situation of zero transaction costs, in which nothing would prevent parties who might be benefitted by reaching bargains from doing so. A. M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 11-12 (1989).

be conducted neutrally characterizes this approach as well, that belief tends to be expressed in terms of neutrality towards groups. Thus, neutrality tends to be seen here as the refusal to take sides between different categories of individuals—employers and employees, landlords and tenants, producers and consumers—rather than as evenhandedness between individual litigants.[20] Moreover, the courts' efforts to use the reasonableness test to draw a neutral line between private freedom and public regulation are no longer thought to be grounded upon some amorphous concept of societal norms, but instead upon an approach that seemingly offers a much more concrete mechanism for identifying the community interest—efficiency analysis.[21] Because that analysis is an even more neutral and determinate indicator of social needs than the concept of societal consensus (so the argument goes), judges who employ it—as long as they do not exceed their proper institutional competency—are that much more certain not to have violated the stricture that the public must be neutral to the private.

b. *Reasonableness as Mediator*

As just described, while the instrumentalist vision still conceives of negligence rules in general and the reasonable person standard in particular as mechanisms for mediating the contradiction between individual liberty and collective security, it recasts those terms. Thus, reasonableness becomes a vehicle for importing a cost/benefit analysis into the law, a method for distinguishing risk-creating conduct that social groups are free to engage in from conduct that, because it threatens collective security, requires regulation through tort law. In the instrumentalist view, as in the individualist approach, the reasonable person test seems to allow courts to draw these distinctions without limiting either freedom or security. By facilitating the operation of the free market, it protects groups' rights to

20. *See* H. STEINER, *supra* note 12, at 115–18.

21. Recognizing that doctrinal analysis is inherently indeterminate, that doctrinal terms like "due care" and "reasonableness" do not "correlate to elements of the real world," Singer, *supra* note 14, at 1016, instrumentalist theory rejects the formalist faith in judges' abilities to categorize conduct as either consensual or coerced, generally accepted or deviant, that characterized the individualist approach. Thus, the instrumentalist sees the definition of reasonableness not as merely a question of logic (of placing behavior into analytically discrete and separate categories) but rather as one of politics (of weighing competing interests). Peller, *supra* note 5, at 1198–99.

Nevertheless, while seeing the choice between two interests in a case as a value choice, this view holds that the *impact* of a particular rule is susceptible to rational determination. Therefore, once the court knows the general policy that should be furthered, it can logically choose the appropriate rule to be used. Under this view, the role of the courts is to draw the line between due care and negligence to serve social needs, needs which the courts must neutrally derive, either from legislative enactments or from other social indicators.

Despite the prescription that social needs must be neutrally derived, however, instrumentalist analysts sometimes just assume that certain things—such as the promotion of economic development and growth, or the efficient use of resources—are generally accepted as being in the interest of society. *Cf.* R. POSNER, THE ECONOMICS OF JUSTICE 67–68 (1981) (arguing that it makes sense to assume general consent to wealth maximization as moral principle).

bargain with each other, while by regulating that market when it functions inadequately, it assures the collective interest in efficient results.

B. *Reasonableness in Antidiscrimination Law*

In the sexual harassment context—specifically, in hostile environment cases—the reasonable person standard serves a similar function of identifying regulable behavior. Under title VII, conduct that unreasonably interferes with the plaintiff's ability to work constitutes prohibited discrimination.[22] For this reason, a discussion of the role of the reasonableness test in sexual harassment law necessarily devolves into a discussion of the role of the concept of discrimination in antidiscrimination law more generally.[23] By examining that role, it can be seen that the concepts of discrimination in general, and the reasonable person standard in particular, perform the same function in antidiscrimination law as the reasonableness test does in negligence law. Before exploring the parallels between the two, however, it is necessary to describe in more detail the ideology underlying antidiscrimination law.

1. *Two Sides of the Traditional Model of Discrimination*

In the following sections, I will discuss the concept of discrimination as it is traditionally understood in American ideology.[24] As noted above,[25] that model, which has dominated judicial decisions for decades,[26] considers actions based on factors such as race or sex to be presumptively illegitimate. Although the model is primarily concerned with protecting the interests of the individual, I will argue here that it also expresses a commitment to group-based pluralism—to a society which preserves the diversity of social groups, and a government that gives no group preferential treat-

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

23. That is, since the act of creating (or allowing) a hostile work environment is considered to be discrimination, the way that the reasonable person standard is used to define unreasonable environments will be related to the way that discrimination is conceptualized.

24. While I realize that some subtleties inevitably will be lost as a result, in this Section I will draw on discussions of both race and sex discrimination to make my points. Although there are important differences between the life situations and legal treatment of women, on the one hand, and racial minorities on the other (not to mention the further differences in the experiences of minority women), the various conceptions of discrimination present in each area of thought are nevertheless sufficiently similar to be treated together for this brief description of antidiscrimination ideology.

In describing that ideology, I will focus primarily on examples from political and legal ideology, but it is part of my position—and, indeed, part of the problem I seek to address—that the assumptions I will be discussing are prevalent in the general culture (that is, are held, consciously or not, by many but not necessarily all Americans) as well.

25. *See supra* note 7 and accompanying text.

26. Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 363-64 (1988) (race discrimination); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984) (sex discrimination). For a description of an alternative model of discrimination that is frequently advocated in the literature and sometimes arises in case law and statutes as well, see *infra* notes 37-38 and accompanying text.

ment.[27] It is this latter, group-based dimension of the traditional concept of discrimination that will be the focus of my concern here.

a. *Protecting the Individual*

It has often been noted that the traditional model of discrimination, sometimes called the equality of opportunity model, focuses on the individual rather than the group.[28] Concerned with protecting the individual from treatment based on group stereotypes, it views the role of the law as assuring that all people are judged on their own merits, free from consideration of their group affiliations. The assumption is that once society is freed of group-based bias, each individual's progress in the world will reflect nothing more or less than her own abilities and effort.[29]

b. *Protecting the Group*

In contrast to the individual-oriented notion of rewarding personal merit is the other side of the traditional model—a concern with protecting groups and perpetuating cultural and political diversity. I will call this concern the pluralist view of discrimination.[30]

The fact that an allegation of membership in a protected group is a prerequisite to a successful discrimination claim under both title VII[31] and the equal protection clause[32] suggests that the preservation of groups has always been one concern underlying antidiscrimination efforts. If protecting individuals from irrational prejudice were the only purpose that such efforts were designed to serve, then someone fired because of the length of

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27. For discussions of the various ways in which concerns for individuals and groups have been expressed in the case law, see Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1.

28. *See, e.g.*, Fiss, *supra* note 27, at 118; Fallon & Weiler, *supra* note 27, at 13; Freeman, *supra* note 26, at 363.

29. Freeman, *supra* note 26, at 367–85. Because it draws a sharp distinction between the individual and the group, this view sees little or no connection between a person's group membership and his or her personal traits. *See* Fallon & Weiler, *supra* note 27, at 18 (describing this distinction and critiquing it on the grounds that "current talents and abilities correlate closely with educational and cultural background; the lone individual does not stand independent of history as he or she confronts the meritocratic world."); Freeman, *supra* note 26, at 380–85 (criticizing equality of opportunity theory's concept of "natural" talent).

30. As I will discuss more fully below, *see infra*, pp. 1188–89, this pluralist view of discrimination is based in part on the conviction that the success of a democratic system of government depends upon its ability to maintain a pluralist culture. In that respect, like the group-based negligence analysis, it reflects an instrumentalist view of law; it sees antidiscrimination law as a mechanism for attaining general social ends.

31. 42 U.S.C. § 2000e-2 (1982 & Supp. 1987).

32. This notion is basic in equal protection clause jurisprudence. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

his hair or the manner in which he dressed would have a viable claim of discrimination. The fact that such claims do not succeed[33] (unless the trait possessed can be proven to be a proxy for some forbidden category) suggests that American ideology sees something particularly pernicious about discrimination that affects certain groups.[34]

Of course, the concern with protecting groups could still reflect an ultimately individualist purpose. That is, it could reflect a desire to protect individual members of such groups from the loss of self-esteem produced by an awareness of both the discrimination experienced by others in the group (because of their group membership) and the general low status of the group itself. However, I would suggest that this concern also reflects a pluralist purpose of maintaining the diversity of American society, as well as a conviction that government, in attempting to accomplish that purpose, must avoid favoring one group over another.[35] As I will discuss in more detail below,[36] this principle of abstract neutrality towards groups—with its emphasis on keeping the private sphere free from illegitimate governmental intrusion—is analogous to the principle of abstract neutrality towards status groups that animates instrumentalist negligence law. (It is also, of course, parallel to the principle of neutral treatment of individuals that informs the individualist approach in each area.)

It should be apparent at this point that the concern with group protection represented in this pluralist view of discrimination is somewhat dif-

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33. *See* Fagan v. National Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973) (hair length is neither statutorily nor constitutionally protected); *see also* Kelley v. Johnson, 425 U.S. 238 (1976) (applying rational basis test to hold that hair length regulations do not violate due process clause); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (hair length rules applied only to men do not violate title VII because hair length is not immutable characteristic).

34. *See* Fiss, *supra* note 27, at 123-26 (describing "groupism" in traditional equal protection theory).

35. The importance of preventing the subjugation of groups and maintaining cultural and racial diversity is a recurrent theme in antidiscrimination law, starting with the famous *Carolene Products* footnote itself. *See supra* note 32; *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-21, 16-22 (2d ed. 1988) (citing cases to support contention that avoiding establishment of caste society and assuring diversity are important concerns in antidiscrimination ideology); Fiss, *supra* note 27, at 123-26 (describing elements of equal protection doctrine that are not individualistic); *cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-14 (1978) (Powell, J.) (race is legitimate consideration in medical school admissions if part of overall attempt to promote diversity within student body and medical profession); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 33 (1985) (noting that establishment of individual right against discrimination is one way to protect against factional domination of legislative process and thus preserve bargaining and compromise among groups that is essence of pluralism). *But see* Brest, *supra* note 7, at 48 ("[G]roup membership is always a proxy for the individual's right not to be discriminated against. Similarly, remedies for race-specific harms recognize the sociological consequences of group identification and affiliation only to assure justice for individual members . . . .").

In rejecting the defendant's argument in *Bakke* that "benign" discrimination against the majority should not be "suspect," Justice Powell emphasized the importance of judicial neutrality towards groups: "It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. . . . There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not." 438 U.S. at 295-96 (1978) (Powell, J.) (emphasis in original).

36. *See infra* notes 53-55 and accompanying text.

ferent from the group focus found in the "equality of result" model of discrimination that is often advocated in the scholarly literature.[37] Under the latter model, which has not been widely followed by the courts, the concern is neither with protecting individuals from specific acts of discrimination (although it would bar such acts) nor with assuring the neutral governmental treatment of groups themselves, but rather with eliminating the conditions of inequality under which groups exist. In contrast, the traditional ideology lacks this concern with assuring equality of results and does not conceive of discrimination as the perpetuation of structures of inequality.[38]

To better understand the pluralist view of discrimination—to understand why a positive value would attach to the idea of preserving groups per se, why judicial neutrality would seem to be required to attain such preservation, and how such neutrality could nevertheless still be thought of as an effective tool for the elimination of inequality—it will be helpful

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37. Terminology can be confusing here. In the race discrimination context, group-based and individual-based models have been variously described as the "equality as result" view and the "equality as process" view, Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341–42 (1988); the "victim perspective" and the "perpetrator perspective," Freeman, *supra* note 27, at 1052–53; and the "equal opportunity" and "equal treatment" approaches, Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531, 539–41 (1981); *see also* Fallon & Weiler, *supra* note 27, at 12–26 (describing difference as between model of group justice and model of individual justice); Fiss, *supra* note 27, at 108 (group-disadvantaging principle versus antidiscrimination principle). Although most of the group-based approaches in this literature define discrimination as the failure to eliminate conditions of subordination, there are important differences among them (for example, in the extent to which they believe in the possibility of judicial neutrality).

Within feminist theory, the model that is usually identified as focusing on groups is called the "special treatment" approach; the contrasting, individual-oriented position is called the "equal treatment" approach. *See generally* Williams, *supra* note 26 (describing both approaches and advocating latter); Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983) (advocating group focus); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1142–63 (1986) (critiquing both positions). However, the "inequality" analysis advocated by Catharine MacKinnon—which rejects the traditional framework within which both equal and special treatment arguments are articulated, defining discrimination as the perpetuation of conditions of inequality—also focuses on groups. C. MACKINNON, *supra* note 1, at 4–5. Thus, like the literature on racial discrimination, feminist writings advocating a group focus vary in the extent to which they reject the goal of abstract neutrality. *See generally* Finley, *supra* (discussing assumption of neutrality in equal and special treatment analyses).

It is not my concern here, however, to categorize existing approaches. Rather, I simply want to call attention to the fact that group-based concerns can and do arise under the narrower definition of discrimination as well as within the more transformative visions. *See also infra* note 38.

38. As the existence of these two different group-based conceptions of discrimination suggests, a concern for groups can lead to either a broad or a narrow definition of discrimination, depending upon which traits of an individual are associated with his or her group status and which ones are thought to be the product of individual choice, ability, and effort. Under the traditional, pluralist discrimination model, few individual traits are attributed to group membership; under equality-of-result models, things such as educational achievement, individual abilities, and even the meaning of the concept of merit itself are seen as the product of historical and structural factors. Some of the equality-of-result advocates recognize that the choice between these two conceptions of the individual is itself indeterminate, and is therefore a political question. *See, e.g.*, Freeman, *supra* note 26, at 381–85 (critiquing "intelligence" tests).

to describe briefly the ideology of political and cultural pluralism underlying that view.

2. *Pluralist Ideology*[39]

Pluralism is based on the assumption that the success of a democratic society depends upon its ability to sustain a relativistic culture—one "that denie[s] absolute truths, remain[s] intellectually flexible and critical, value[s] diversity, and [draws] strength from innumerable competing subgroups."[40] Under this view, pluralistic tolerance of diversity protects a nation from the absolutist ideas that lead to totalitarianism. Rather than being viewed as a dangerous, nihilistic belief system that prevents us from judging others,[41] cultural relativism is seen as a positive good, a guaranty of democracy.

Furthermore, in pluralist ideology, not only is tolerance of groups necessary to democracy, but diversity *itself* improves the success of a democratic society.[42] The existence of a variety of competing viewpoints works as a set of social checks and balances, preventing any one perspective from gaining dominance, and thereby curbing any tendencies toward absolutist thought and totalitarian government.[43] Just as the marketplace of ideas in the social arena and voluntary competition in the economic realm are equated with (and thought to guaranty) individual freedom in liberal individualist thought, so the unencumbered interplay of different perspectives and the competing demands of different interest groups are associated with democracy in pluralist thought.[44]

Finally, cultural relativism is not solely thought of as a prescriptive

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39. While I will be arguing that the group-based visions within negligence and antidiscrimination law are analogous, I do not mean to suggest that the pluralist ideology described in this Section underlies the instrumentalist approach to negligence as well. It would seem that the ideology underlying negligence, a private law field, is more closely related to economic analysis, while the ideology of antidiscrimination law, a public law field, has greater affinities with political theory. However, a detailed analysis of the ideological underpinnings of negligence law is beyond the scope of this paper.

40. E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 211 (1973).

41. During the first part of the twentieth century, ethical relativism was attacked as leading to totalitarianism, *id.* at 200, but by the mid-1940's that view had been replaced by an "equation between intellectual relativism and democracy." *Id.* at 209. In response to the rise of extremist ideologies like Nazism and, later, Stalinism, any kind of absolutist faith in a particular belief, whatever its content, came to be seen as dangerous to democracy. *Id.* at 210–11.

42. *Id.* at 214.

43. *See* R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 24 (1967).

44. As Horwitz states:

> In reaction to the spread of totalitarianism after World War II, progressivism capitulated to the argument that any substantive conception of the public interest was simply the first step on the road to totalitarianism. The idea of a public interest thus came to be formulated in the purely proceduralist terms of interest-group pluralism—simply as whatever was the outcome of competition among interest groups. This was, it should be emphasized, a twentieth-century return to a market theory of the public interest—but this time the competitors were groups and the market was the political process.

Horwitz, *supra* note 13, at 1427 (citations omitted).

ideal; it is also seen as a descriptive reality—as an accurate depiction of existing American society. What holds the widely diverse American populace together, it is thought, is a universally held pluralism, a spirit of open-minded debate and tolerance for diversity that crosses all ethnic boundaries.[45] Thus, pluralism functions as a solution to the group/individual contradiction, now expressed at the group level. The heterogeneity of the population poses the possibility of conflict among groups (just as self-interestedness potentially produces conflict among individuals in the individualist vision), but an overarching culture (and practice) of pluralism mediates that conflict within the private sphere (just as economic competition and growth do in the other model).[46]

The role of government, therefore, is to refrain from interfering in the private world of interest-group politics, unless someone uses illegitimate tactics to undermine a group's ability to participate, thereby threatening the public interest.[47] Instances justifying intervention are thought to be the exception rather than the rule, not only because the democratic culture makes intolerant conduct rare, but also because the potential of state power to transform a particular viewpoint into a totalitarian creed means that government itself probably poses the greatest threat to democracy. Thus, it is seen as essential that the government take a relativistic stance to different groups in society, in order to preserve the heterogeneous private sphere that is needed to curb dangerous state power.[48]

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45. E. PURCELL, *supra* note 40, at 210–11; *see also* Kennedy, *supra* note 5, at 356–57.

46. It is interesting to note that pluralism as a concept thus both affirms and denies diversity, describing our society as heterogeneous while simultaneously claiming that it is united by a common overarching culture.

47.

> Under the pluralist conception, the problem of faction arises from the possibility that one group, or an alliance of groups, will dominate the legislative or executive process and subvert the bargaining and compromise on which the model is based. Factional domination effectively deprives other groups of the opportunity to assert their views. If it were permitted to occur, the political process would be undermined and freedom would be at risk.

Sunstein, *supra* note 35, at 33. While Sunstein talks of the legislative process, I would argue that the concept of pluralism extends beyond that to the notion of a multiplicity of groups participating in intellectual and ethical dialogue within the society as a whole. *See* E. PURCELL, *supra* note 40, at 238.

48. *Cf.* Sunstein, *supra* note 35, at 50–51: "[M]uch of modern constitutional doctrine reflects a single perception of the underlying evil: the distribution of resources or opportunities to one group rather than another solely because those benefitted have exercised the raw power to obtain governmental assistance." Sunstein describes this attitude as a repudiation of pluralism—a rejection of the idea that whatever results from pluralist compromise in the legislative process is legitimate. However, that conclusion is necessary only if one defines pluralism very narrowly—as the belief that interest group struggle inevitably promotes the social welfare and poses no problem of factionalism. Sunstein himself seems simultaneously to adopt that view, *id.* at 33–35, and to reject it. *Id.* at 33 (discussing how problem of faction arises under pluralism and possible responses to it).

I would suggest that it is more accurate to describe contemporary pluralist ideology as including a recognition of the (rare) possibility that interest-group interactions could be subverted by private power, and a belief that, when such subversion occurs, it justifies intervention by the state. Such regulable behavior may be defined in quasi-procedural terms, as the refusal to follow the rules of pragmatic compromise that protect against domination of democratic processes by any one interest. *Cf.* E. PURCELL, *supra* note 40, at 255 (noting that, during heyday of cultural relativism in 1950's, "[b]elief in the primacy of toleration and compromise readily led to the assumption . . . that broad demands for political and economic change were actually irresponsible. The assumption that a 'rea-

For the courts, this relativism translates into neutrality, a refusal to ground judicial decisions on personal preferences for particular perspectives or political judgments about the importance of certain group interests. Only by remaining neutral in the struggle among interest groups can the courts preserve the cultural and political pluralism that is the essence of democracy.

3. *Reasonableness in the Pluralist Vision of Antidiscrimination Law*

Whether its focus is on individuals or on groups, the traditional, equal opportunity model of discrimination sees antidiscrimination law, like negligence law, as an exercise of governmental power to regulate the private sphere in the interest of the collectivity.[49] It poses the same conflict between the individual and the group, and employs the same public/private dichotomy, as does negligence law. It also, at least in the context of sex discrimination, purports to resolve that conflict by using a reasonableness standard grounded in societal consensus.[50]

Since the traditional model focuses alternately on individuals and on groups, the freedom it seeks to protect in the private sphere can be conceived of as both liberal individualism and interest group pluralism. Thus, when discrimination is characterized as preventing a person from accomplishing whatever she is capable of accomplishing, the liberty of the individual is at stake. On the other hand, when discrimination is thought to threaten society's interest in group diversity and equality—as, for example, in the frequently expressed sentiment that America should not be a caste society[51]—pluralism is the private-sphere freedom that needs to be protected. In both cases, however, the government's role is perceived to be limited to the elimination of minor wrinkles in the otherwise egalitarian operation of that private sphere.

Because the individualist dimension of the traditional model of discrimination has been so thoroughly examined elsewhere,[52] the following discussion will focus on the role of the reasonable person standard within the pluralist view of discrimination.

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sonable' compromise was always possible . . . made an opposition to established institutions appear politically illegitimate."). Of course, to the extent that pluralism simultaneously recognizes the possibility of factionalism and equates the common good with the results of the political process, it is internally incoherent, in the same way that liberal individualism is incoherent when it conceives of individual freedom as both social good and social threat. *See supra* note 17 and accompanying text.

49. That is, the collective society's interest in preserving private freedom by regulating conduct that threatens such freedom is implicated in both contexts.

50. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (defining sexual harassment as conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment") (citing 29 C.F.R. § 1604.11(a)(3) (1985)); *see also* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622 (6th Cir. 1986) (evaluating sexual harassment charge in context of depictions of women "condone[d]" and "publicly feature[d]" in society), *cert. denied*, 481 U.S. 1041 (1987).

51. *See, e.g.*, Fiss, *supra* note 27, at 151.

52. *See, e.g.*, articles cited *supra* note 27 and sources discussed therein.

a. *The Public/Private Dichotomy*

Antidiscrimination law can be seen as (at least in part) an exercise of government power to regulate the world of interest group pluralism, eliminating both the coercive use of group power and the illegitimate reliance upon group stereotypes that, by disadvantaging the members of the stereotyped groups, impair those groups' abilities to engage in the open dialogue and competitive pursuit of self interest necessary to democracy. Title VII, for example, is designed to secure equal employment opportunity for women and other groups by prohibiting discrimination against them by private employers. In so doing, it assures their effective participation in both the economic and the political realms, thereby furthering not only their interest in equality but the general societal interest in pluralistic democracy (not to mention productivity) as well.

b. *Reasonableness as Mediator*

The role of the courts in this scheme, again comparable to their role in the negligence context, is to determine when conduct has gone beyond the exercise of private freedom and thus imperils the public interest in democratic pluralism. By exerting a countermajoritarian influence, the judiciary is supposed to prevent the tyranny of the majority (or of a minority) that would ultimately threaten the liberty interests of all.[53] But again, in regulating the private sphere it must act neutrally, so that its decisions will not represent merely a delegation of state power to one group or another. Thus, courts should base their decisions on the principle of tolerance for diversity and a concern for the protection of minorities, rather than on the substantive content of the views or needs of different groups.

Here, as in the policy-based negligence vision, the central contradiction between individual liberty and collective security that the courts are supposed to resolve is articulated through groups, not individuals. Thus, in the pluralist view of discrimination, the individual's interests are not of particular concern; rather, it is the contradiction between the liberty and security interests of groups that the legal doctrine must mediate.

And, as in the negligence context, so here doctrinal terms like reasonableness and discrimination are recognized to be indeterminate.[54] Given that indeterminacy, they should be defined (so the argument goes) to implement policy decisions about what types of group-based interests should be protected. The role of the courts, then, is again seen as one of linedrawing—identifying a point along a continuum of conduct that separates (prohibited) discrimination from (protected) freedom—and judges

53. *See* L. TRIBE, *supra* note 35, at § 16-12.
54. *See supra* note 21.

are again supposed to perform this task neutrally, deriving the policies that they implement from other, politically legitimate sources.[55]

It is for these reasons that the test for hostile environment sexual harassment can be phrased as that which violates societal norms about how people should be treated in the workplace (and, implicitly, how groups should be treated in society). Here, as in the negligence law context, the private world of free cultural expression by groups that the courts are seeking to protect is itself seen as providing the solution to the problem of government neutrality. After all, if pluralism both relies upon and reproduces a culture of democracy—a moral consensus voluntarily arrived at and untainted by governmental power—then that culture can provide the neutral standard with which the government can determine when intervention is necessary.[56]

Just as in negligence law, what constitutes reasonable behavior is recognized to be a political question of where to draw the line between group and societal interests—that is, between diversity and conformity—and it is society, not the court, that makes that judgment. Thus, 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 (and legitimate) political solution into the law.

In summary (see the chart below), the reasonableness standard, in negligence law and in sexual harassment law, supposedly serves as a mechanism with which courts can distinguish protected exercises of freedom from regulable interferences with collective security. Furthermore, it is thought to allow courts to draw that line neutrally, by basing their decisions on a neutral principle (efficiency, tolerance for diversity) or on a pre-existing policy preference arrived at through freely-willed interactions in the private sphere (societal consensus). However, as my discussion of the *Rabidue* case will illustrate, the reasonable person standard in operation merely contains and suppresses the contradiction between diversity and conformity, rather than overcoming it.

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55. Pluralism rejects the notion that courts should derive the normative grounds of their opinions from their own ethical reasoning or from some abstract conception of societal welfare. It "treats the republican notion of a separate common good as incoherent, potentially totalitarian, or both. The common good consists of uninhibited bargaining among the various participants . . . ." Sunstein, *supra* note 35, at 32 (footnote omitted).

56. Anecdotal evidence of this reliance upon the private sphere for normative judgments can be seen in a recent incident at a medical school with which I am familiar. When a professor was charged with having made racist comments in the classroom, his defenders argued that the comments could not have been racist since the majority of the (mostly white) class had not found them offensive.

Liberal Individualism in Negligence Law[a] and Sexual Harassment Law[b]

	Political Ideology	Legal Ideology	Negligence Law	Sexual Harassment Law
Private	competiton	free will	due care	merit
Public	anticompetitive behavior	coercion	negligence	discrimination
Mediator	"natural" market	consent/societal consensus	reasonableness	reasonableness

Liberal Instrumentalism in Negligence Law: Efficiency Analysis[c]

	Political Ideology	Legal Ideology	Negligence Law
Private	competition	zero transaction costs	reasonable risk
Public	"market failure"	"positive" transaction costs	unreasonable risk
Mediator	social needs	efficiency	cost/benefit analysis

Liberal Instrumentalism in Sexual Harassment Law: Interest Group Pluralism[d]

	Political Ideology	Legal Ideology	Sexual Harassment Law
Private	pluralist democracy	group freedom (diversity)	cultural expression
Public	absolutism/ intolerance	tyranny of the majority or minority (coerced conformity)	discrimination
Mediator	democratic culture	tolerance/societal consensus	reasonableness

[a]*See supra* pp. 1180–82.
[b]*See supra* p. 1185.
[c]*See supra* pp. 1182–84.
[d]*See supra* pp. 1184–92.

II. *RABIDUE V. OSCEOLA REFINING COMPANY*: REASONABLENESS IN THE SEXUAL HARASSMENT CONTEXT

This Part examines the role that the reasonable person standard plays in the specific doctrinal context of sexual harassment law. It does so through a close reading of a recent sexual harassment case that applies the reasonable person standard. Before turning to that discussion, however, two points deserve mention. First, in focusing my analysis on one case, I am treating the judicial opinions that comprise that case as a cultural text. That is, I am assuming that the analyses engaged in by the judges were informed by culturally-based notions that can be discovered through a careful reading of those opinions.[57] In addition, I am assuming that an

57. In that respect, my approach is analogous to current efforts in many other intellectual fields to use textual analysis as a means of revealing central cultural constructs. *See, e.g.*, C. GEERTZ, LOCAL KNOWLEDGE (1983) (anthropology); C. GEERTZ, THE INTERPRETATION OF CULTURES (1973) (anthropology); J. SCOTT, GENDER AND THE POLITICS OF HISTORY (1988) (social history). On the

exploration of those notions in the context of a particular judicial decision can not only increase one's understanding of that decision but also contribute insights that might be more broadly applicable to other cases and legal contexts. In addition, such an exploration can yield an understanding of law's role in reproducing culture, for the subtle messages residing in a judicial opinion not only reflect existing ideology, but also reinforce, legitimate, and transform it.

Second, in the following discussion I take as given certain things that others might be inclined to debate. Thus, I assume not only that contemporary society is characterized by systematic and significant inequalities—between women and men, lower and upper classes, people of color and whites, etc.—but also that how one perceives a particular social situation or interaction, such as an alleged act of harassment, will be a function both of one's personal psychological makeup and of social factors, such as one's race, sex, class, etc. Thus, while I do not mean to suggest that all women or men think the same way,[58] I do believe that the formidable differences in the material conditions and socialization processes that women and men face will tend to produce broad commonalities of perspective within each sex. (Differences of class, race, sexual orientation and the like, as well as personality factors, will of course cut across and dilute the sex-based similarities.)

Given these assumptions, it should be clear that I would not want to suggest that I am approaching the issue of sexual harassment "objectively." Rather, I believe that anyone dealing with this (or any other) issue will bring to it a particularized perspective, so that a "neutral" assessment is simply not possible. I come to the issue of sexual harassment as a white, upper-middle class woman, and as a feminist—as one who believes both that women are subordinated to men in our society and that the law should be directed towards rectifying that imbalance. I also believe that some men who engage in (what I would call) harassing behavior do so with neither conscious hostility towards women nor an awareness of the effect of their conduct, and I have no doubt that such men would feel personally wronged by judgments declaring their conduct harassment. (Other men, of course, are perfectly aware of what they are doing.)[59]

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lessons that textual analysis and the resulting recognition that language is indeterminate and relational can provide to legal scholars, see White, *Law & Literature: "No Manifesto"*, 39 MERCER L. REV. 739 (1988).

58. The thought-provoking work of Carol Gilligan, *see, e.g.*, C. GILLIGAN, IN A DIFFERENT VOICE (1982), has greatly improved our understanding of women's situation. It has also, unfortunately, generated much reductionist and essentialist discussion of women's differences from men. Nevertheless, the presence of such crude overgeneralizations about the sexes should not produce the equally crude reaction of totally ignoring the ways in which many women's social and epistemological world—partly because it is *itself* a product of patriarchy—is genuinely different from that of many men.

59. For discussion of some of the possible reasons why men engage in sexual harassment, see *infra* notes 179-92 and accompanying text.

Nevertheless, I am convinced, as will become clear below, that while the elimination of inequality in society inevitably makes some people feel wronged—entailing, as it does, a reduction in the social status and privilege of those on the top of the hierarchy, regardless of whether they harbor personal hostility toward those beneath them—that fact does not justify its perpetuation.

A. *The Case in Brief*

Vivienne Rabidue was an administrative assistant at Osceola Refining Company—the sole woman in a salaried management position in the company.[60] After her discharge in 1977, she filed a sexual harassment claim against her employer,[61] charging 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,[62] constituted sex discrimination in violation of title VII. She also introduced evidence that she had been denied various managerial privileges accorded to male employees (free lunches and gasoline, entertainment privileges, etc.) and in other ways had been given secondary status in the company.[63]

The conduct of which Rabidue complained was hardly mild or ambiguous. One of the posters displayed at the plant depicted a prone woman with a golf ball on her breasts, straddled by a man holding a golf club and yelling, "Fore."[64] The comments that her co-worker, Douglas Henry, directed at her and her fellow female workers included such epithets as "whores," "cunt," "pussy," "tits," and "fat ass."[65] Henry once remarked of the plaintiff: "All that bitch needs is a good lay."[66] He also engaged in generally uncooperative behavior that impaired Rabidue's ability to perform her job effectively.[67]

Judge Krupansky, writing for the majority of the court and applying the reasonableness standard traditionally used in hostile work environ-

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60. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987).

61. She also filed a discriminatory discharge claim. At the time the claims were filed, Osceola was a division of Texas-American Petrochemicals, Inc., which had acquired Osceola on September 1, 1976. The Sixth Circuit affirmed the district court's ruling that Texas-American could not be held liable for any alleged discriminatory acts that occurred prior to that date, because, given that charges had not been filed with the Equal Employment Opportunity Commission at or before the time of acquisition, Texas-American, as successor, had no notice of contingent charges when it acquired the company. 805 F.2d at 616 (citations omitted). Apparently because at least some of the conduct complained of had occurred after September 1, 1976, the court went on to address the substantive merits of plaintiff's claims. *Id.* at 615, 618.

62. *Id.* at 615.

63. *Id.* at 624 (Keith, J., dissenting).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 625.

ment cases,[68] held that the conduct complained of had not unreasonably interfered with Rabidue's ability to work. The court characterized that conduct as a legitimate expression of the cultural norms of workers at the employer's plant and suggested that the prevailing depictions of women in the media indicated that such conduct was not unreasonably offensive in any case. In so doing, the majority treated its solution as promoting pluralism and neutrally reflecting pre-existing norms.[69] In dissent, Judge Keith advocated the use of a reasonable woman (or reasonable victim) standard, rejecting the majority's approach as enforcing an essentially male viewpoint under the guise of universality.[70]

The majority relied upon three distinct arguments in concluding that the conduct at Osceola had not been unreasonably offensive: (1) the plaintiff had "voluntarily" and knowingly entered the Osceola workplace and therefore could not complain about the conditions she encountered there;[71] (2) the court should not interpret title VII as mandating that it transform working class culture, and therefore should not interfere with the Osceola environment (and, implicitly, such noninterference did not constitute discrimination against women because the plaintiff was merely an overly sensitive, aberrational individual);[72] and (3) the Osceola environment was not unreasonably offensive in any case because it was no different from the rest of society.[73] The court presented each of these arguments as a neutral ground for its decision—as a vehicle for distinguishing between legitimate individual or group freedom and illegitimate discrimination. However, as the discussion below will demonstrate, each argument ultimately fails at this enterprise, for each ignores or minimizes the conflict between men's and women's viewpoints that the case presented and thus only "solves" the problem by avoiding it.

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68. "[A] plaintiff . . . must assert and prove that . . . the charged sexual harassment had the effect of *unreasonably* interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment . . . ." 805 F.2d at 619 (emphasis added).

69. *See infra* pp. 1201-07.

70. The majority and dissenting opinions in *Rabidue* are analogous to the "equal treatment" and "special treatment" positions, respectively, over which feminist scholars have been debating for years. *See* articles cited *supra* note 37. Thus, the majority seems to assume that applying the same standard to women and men is not problematic, just as equal treatment advocates define justice as the application of completely sex-blind rules. In contrast, the dissent, like special treatment advocates, seems more concerned about validating women's perceptions and achieving concrete gains for women than about complying with a sex-blind ideal of abstract equality.

I do not mean to suggest, however, that equal treatment advocates would have reached the same conclusion as did Judge Krupansky. Indeed, as has been pointed out, one of the problems with the equal treatment approach is that it seems to provide a determinate, neutral principle with which to decide cases but is in fact indeterminate. *See* Finley, *supra* note 37, at 1149-52.

71. *Rabidue*, 805 F.2d at 620 ("the reasonable expectation of the plaintiff upon voluntarily entering [an] environment" pervaded by "a lexicon of obscenity" is relevant factor for court to consider).

72. *Id.* at 620-22.

73. *Id.* at 622.

B. *Reasonableness as Mediator: The Messages Conveyed by the Majority Opinion*

This Section argues that the court's analysis in *Rabidue* draws upon a fundamental set of oppositions that characterizes liberal thought, consistently associating the Osceola situation with freedom, choice, and deference to the private realm, instead of security, coercion, and regulation by the public realm. Moreover, each of the court's three main arguments relies upon one of the traditional mediating constructs used in liberal legal thought to attempt to overcome the contradiction between the poles of these sets of opposition. Thus, the "voluntary entry" point is a classical individualist "free choice" argument; the "working class culture" point invokes the pluralist principle of tolerance for diversity; and the third point, which essentially argues for following societal norms, constitutes a reliance upon consensus as mediator typical of both individualist and instrumentalist discourse.[74] By thus seeming to be the result of the application of neutral abstract principles (choice, tolerance) and independently existing social norms (consensus), the court's conclusions depoliticize what is essentially a political conflict, obscuring the value choices upon which its decision relies.

There are at least two ways to understand the social interaction with which the court grappled in the *Rabidue* case. One way is to see it as posing a fundamental conflict between two unequal groups—men and women—about how they should relate to each other in the workplace, with women saying they should be allowed to be free from (and define) demeaning treatment and men saying they should not.[75] Under such a reading, the court would seem to be faced with no choice but to make a value-laden decision about which group's approach was preferable.[76] Moreover, its rejection of the plaintiff's claim could seem to be nothing

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74. *See* charts *supra* p. 1193.

75. The posters displayed and conduct engaged in at Osceola can be seen as symptomatic of a more general and "pervasive degradation and exploitation of female sexuality perpetuated in American culture." *Rabidue*, 805 F.2d at 627 (Keith, J., dissenting). Pornography is simply the most obvious example of a whole range of mechanisms through which women are socially constructed as sexual objects. *See, e.g.*, K. MILLETT, SEXUAL POLITICS (1970) (on objectification and degradation of women in works of Henry Miller, Norman Mailer, and others); Cling, *On-Camera Sex Discrimination: A Disparate Impact Suit Against the Television Networks and Major Studios*, 4 LAW & INEQUALITY 509 (1986) (on sex stereotyping of women on television, including their depiction as primarily concerned with their physical attractiveness to men, and negative effects thereof). And the workplace is only one of many contexts in which that construction of women negatively affects their treatment. *See, e.g.*, MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 646–55 (1983) (effect of objectification of women on rape law).

76. Once the co-worker's behavior is seen as part and parcel of a general pattern of treatment of women in American society, the question in the case then becomes whether the existing relationship between men and women, in which women are routinely treated as objects to be used for male sexual gratification, should be allowed to persist. In short, should women be allowed to challenge the way sexual relationships are currently constructed (on the grounds that it demeans them and limits their economic opportunities), or should the law reinforce such constructions?

more than judicial enforcement of a powerful group's subordination of the less powerful.

It is also possible, however, to see the case as not involving a conflict between men and women at all. This second vision is the vision that Judge Krupansky's opinion relies upon (and creates). In this section, I examine the rhetorical messages through which such a vision of the case is conveyed. As the discussion will demonstrate, the combined effect of the three aspects of the majority opinion addressed here—its "privatization" of the plaintiff, its recasting of the group conflict in the case, and its equation of reasonableness with consensus—is to make it seem as if Vivienne Rabidue, not Douglas Henry or Osceola Refining Company, was attempting to engage in discrimination, and as if workers and their employers, not women, need the protection of the court.

1. *"Privatization" of the Plaintiff: Erasing Group Conflict*

Both by describing the plaintiff as an atypical woman and by suggesting that her situation was the product of her own personal choice, the majority opinion conveyed the impression that Vivienne Rabidue's complaint represented a personal, individual claim. Because such a depiction effectively eliminated the plaintiff's group identity (she became an unreasonable, idiosyncratic woman, not a reasonable, typical one), I call it "privatization." This erasing of Rabidue's group membership both allowed the court to avoid visualizing the case as a conflict between men and women, and undermined the legitimacy of the plaintiff's claim by making it seem not to implicate pluralism concerns (since she did not represent the interests of women as a group). Moreover, it legitimated the role of the court in the case, obscuring the value judgments inherent in its application of the "voluntariness" label by making that application seem to be an objective determination of fact.

a. *The "Abrasiveness" and Oversensitivity of the Plaintiff*

The majority's description of the *Rabidue* situation presented the plaintiff as an overly sensitive, obnoxious woman,[77] incapable of getting along with others,[78] and trivialized the conduct to which she was subjected.[79]

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77. The court's description of her as "a capable, independent, ambitious, aggressive, intractable and opinionated individual" with "an abrasive, rude, antagonistic, extremely willful, uncooperative, and irascible personality," *Rabidue*, 805 F.2d at 615, effectively obscured the possibility that Rabidue's complaint represented the viewpoint of women in general.

78. Noting that the plaintiff's claim arose primarily out of the "acrimonious working relationship" between her and another employee and concluding that she was fired, in part, because of her "inability to work harmoniously with co-workers and customers," *id.*, the court conveyed the distinct impression that the dispute in the case was primarily attributable to Rabidue's difficult personality.

79. Calling the Osceola posters "calendar type office wall displays," *id.* at 622 n.7, comparing them to "erotica," *id.* at 622, and describing Henry's epithets as "off-color language," *id.* at 622 n.7, Judge Krupansky's opinion trivialized the injury that Rabidue alleged, and thereby suggested that

Through emphasizing the plaintiff's "abrasiveness" and minimizing the harmfulness of the harasser's conduct, the court subtly suggested that something was wrong with Rabidue for having been offended by Henry's behavior.[80] Depicting the case as a situation in which an abnormally sensitive and difficult individual sought to label as sexist what was merely harmless joking,[81] the court reduced Rabidue's complaint from a serious charge of sex discrimination that raised questions of public power[82] and group hierarchy to merely the peevish protest of an unreasonably oversensitive woman.

b. *Her Private "Choice" to Enter the Workplace*

The majority opinion further privatized Rabidue's claim through emphasizing her "voluntary" entry into the workplace. Stating that the factors to be considered in a hostile environment case include "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, [and] the reasonable expectation of the plaintiff upon voluntarily entering that environment,"[83] Judge Krupansky seemed to suggest that the plaintiff could have avoided the situation had she so desired. In concluding that Vivienne Rabidue essentially had assumed the risk of harassment,[84] the court ignored the possibility that her situation was the product of structural inequities in society that she was powerless to overcome.[85] Treating her situation as the product of individual choice, rather than an instance of group-based discrimination, the court effectively erased Rabidue's group identity, making her seem to be responsible for her own mistreatment.[86]

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only an unusually sensitive woman would find the conduct at Osceola offensive. His comment that the plaintiff and others were merely "annoyed" by Henry's behavior, *id.* at 615, further suggested that such behavior did not justify Rabidue's supposedly irascible reaction.

80. *See* Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 60 n.65 (1989). Of course, as the dissent pointed out, the plaintiff's "negative personal traits" were technically irrelevant, for even the possession of such traits would not justify "sex-based disparate treatment" of the sort that she received. *Rabidue*, 805 F.2d at 625 (Keith, J., dissenting). Thus, the majority's apparent conclusion that Vivienne Rabidue's "abrasiveness" was relevant strongly suggests that it saw such abrasiveness as evidence that the plaintiff was not a typical woman—that her reactions to the behavior at Osceola were unreasonable.

81. Sexual harassment is often characterized as harmless joking, but this is not how it feels to women. *See, e.g.*, Collins & Blodgett, *Sexual Harassment . . . Some See It . . . Some Won't*, HARV. BUS. REV., Mar.-Apr. 1981, at 76, 78-80. Several studies confirm that most women find sexual harassment (whether in the form of physical touchings or verbal abuse) an unpleasant, intimidating, and humiliating experience. *See* C. MACKINNON, *supra* note 1, at 47-48 (citing studies by *Redbook Magazine* and Working Women Institute); Collins & Blodgett, *supra*, at 82.

82. It raised questions of public power because, to the extent that the court's decision gave Henry the "right" to engage in his harassing conduct, it constituted government enforcement of such conduct.

83. *Rabidue*, 805 F.2d at 620.

84. I have taken this "assumption of risk" paraphrasing from the dissent. *Id.* at 626 (Keith, J., dissenting); *see also* Finley, *supra* note 80, at 60-61 n.65.

85. *See infra* pp. 1200-01.

86. That is, having already reduced Henry's conduct to trivial proportions, the court transforms Rabidue's objections into matters of personal taste, thereby imposing on her the obligation either to avoid the offensive behavior or to accept it. Moreover, because the court conceptualized discrimination

Moreover, by accepting the trial court's reliance on the "fact" that Rabidue had voluntarily entered the workplace, the court obscured the value choices that such a conclusion required. The idea that individual choice can be used to mark the boundary between protectible exercises of freedom and unprotectible threats to the interests of others, a common refrain in liberal legal analysis,[87] has been widely criticized as circular and incoherent.[88] Judge Krupansky's conclusion that Rabidue "voluntarily" submitted to Henry's verbal abuse is subject to the same criticism. The judge's effort to use private, individual "choice" as his neutral benchmark necessarily assumes that all such choices are themselves freely arrived at—that is, that they are the product of (protected) freedom rather than of (regulable) coercion.

But to decide whether Rabidue's choice was "voluntary," one must decide whether to consider the impact on that choice of current social arrangements—arrangements that severely limit the number and nature of economic opportunities open to women as well as constrain their ability to affect the conditions under which they work.[89] Given current economic realities, Judge Krupansky's conclusion that women can choose between, on the one hand, accepting workplaces where the derogation of women is taken to be humor (my characterization, not his) and, on the other hand, working elsewhere constitutes a decision that women must accept domination by men in order to achieve equal economic opportunity. It "locks the vast majority of working women into workplaces which tolerate anti-female behavior."[90]

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as bad acts by individuals, *see infra* pp. 1204–05, the privatization of Rabidue also raises the possibility that it is *she* who engaged in discrimination against *Henry*.

87. Thus, for example, consent is said to draw the line between sexual intercourse and rape, *see* Estrich, *supra* note 3, at 1121–32; willing acceptance is thought to distinguish a legal contract from one made under duress. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 9-2 (3d ed. 1987).

88. To say that the presence or absence of consent determines a judicial result is circular because consent has no meaning separate and apart from what courts say it means. In other words, it is incoherent to argue that consent can help to distinguish between the private and the public, since the act of defining consent itself requires such a distinction. Peller, *supra* note 5, at 1187–91 (critiquing concept of consent in rape law). On the social construction of consent and the indeterminacy of consent-based analysis, see also MacKinnon, *supra* note 75, at 648–55; Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 406–07 (1984) (critiquing concept of autonomy that underlies consent construct).

89. Traditionally, of course, the workplace has been associated with and structured for men, with women's place being in the home. *See generally* Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 177–79 (1981–82), and sources cited therein (describing this "separate spheres" ideology). Those jobs open to women have been few in number, and have usually been accorded lower status and significantly lower pay; both of these problems persist today. *See, e.g.*, U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987, at 403 (107th ed. 1986) (median earnings of full-time women workers in 1985 were $15,624, as compared to $24,195 for men).

90. *Rabidue*, 805 F.2d at 627 (Keith, J., dissenting). Having to decide between submitting to sexual harassment and quitting one's job hardly constitutes a choice. In fact, it is exactly this sort of tying of job benefits to sexual demands that the harassment cause of action was designed to prevent. *See* C. MACKINNON, *supra* note 1, at 40–47; *cf. Rabidue*, 805 F.2d at 626 (Keith, J., dissenting) ("In my view, Title VII's precise purpose is to prevent [vulgar] behavior and attitudes from poisoning

Thus, the court's reliance on choice is circular, for it assumes that choice is a pre-existing "thing" in the world that can simply be "identified" by a judge and thus ignores the fact that the definition of that term is itself a subject of controversy between groups. Given that conflict, the court's ruling necessarily reflects a political decision—a decision that the freedom of employers and male workers is more important than the security of women faced with unwelcome and demeaning treatment (or, if they leave work, unemployment). The voluntary entry argument merely reimports the individualism/communalism question into the doctrine at a different level. In relying on choice as a neutral indicator of when individual freedom threatens the collective interest in security, the court has merely restated the problem, not solved it.[91]

2. *Tolerance and Consensus as Neutral Grounds for Decision: Minimizing the Choice Between Groups*

Although at one level, as described above, the majority opinion in *Rabidue* seems to deny the plaintiff's group status altogether, at another level the court implicitly acknowledges that the case requires a choice between two groups, simultaneously minimizing its own role in making that choice. The act of choice is minimized through the court's reliance upon two seemingly neutral grounds for choosing between groups: the principle of tolerance for diversity and the concept of societal consensus.

a. *Tolerance for Diversity: Protecting Minorities as a Neutral Policy*

The *Rabidue* court grounded its conclusion about the reasonableness of the behavior at Osceola in the principle of tolerance for diversity, depicting its ruling as a prudent refusal to intrude into private sphere group relations on the side of a powerful group. In refusing to find the conduct engaged in at Osceola unreasonable, the court quoted with approval the following passage from the trial court's opinion:

> [I]t cannot seriously be disputed that in some work environments,

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the work environment of classes protected under the Act."). Since their subordinate position in an employment market that restricts their job opportunities and devalues their work is precisely what makes women vulnerable to harassment in the first place, C. MACKINNON, *supra* note 1, at 41-42, the view that Rabidue's position was voluntarily entered into can be seen as a virtual rejection of the very concept of sexual harassment itself. At a minimum, such a view certainly reflects value judgments about whether and under what circumstances women should be allowed to work in our society. In addition, the recent Supreme Court case of Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986), which held that unwelcome conduct constitutes harassment even if "consented" to, raises questions about the continued vitality of such reasoning.

91. This discussion illustrates the general problem with using a standard derived from the private sphere as the benchmark for determining when intervention in that sphere is necessary. Unless the private sphere is itself egalitarian and nonhierarchical, a standard derived from it will do nothing but perpetuate inequalities. But, if the private world were so equal that it could generate a standard fair to all, there would be little need for governmental intervention anyway.

> humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. 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 mores of American workers.[92]

The court thus portrayed the defendant's employees as members of a prototypically American social class ("American workers") with their own distinct "social mores" deserving of protection. In so doing, it presented its decision to allow Henry's conduct as a refusal to enter the private sphere in order to impose one group's views on another. By emphasizing Henry's group identity, the court precluded a conclusion that he was a deviant individual engaging in bad acts,[93] and transformed the case into one of group conflict in which the court could properly refuse to interfere.

In addition, the court's association of Henry's conduct with the working class (and its ignoring of his sex) conveyed the impression that its decision worked to the benefit of a low-status, relatively powerless group. Had the court presented the plaintiff's claim as challenging *men's* right to express their "mores," it would of course have highlighted the fact that those mores were being expressed to the disadvantage of women.[94] In short, it would have drawn attention to the plaintiff's membership in a less powerful group. In contrast, the majority's presentation of the case as one of socioeconomic rather than sex discrimination (a vision that was supported by its privatization of Vivienne Rabidue) made its decision seem to be a defense of the weak against the powerful, a refusal to delegate state power to private forces of domination. Thus, by redrawing the group lines in the case, Judge Krupansky's opinion reinforced the impression that the court's inaction served to preserve the pluralism of the private sphere, protecting a minority rather than enforcing one group's domination of the other.[95]

Moreover, the majority's redrawing of those group lines obscured the

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92. *Rabidue*, 805 F.2d at 620-21 (quoting Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984) (Newblatt, J.)).

93. Given that the court conceived of discrimination as bad acts by individuals, *see infra* pp. 1204-05, this depiction mediated against a finding that Henry had discriminated.

94. Of course, many members of the working class are women, but the majority's formulation renders those people invisible, projecting the image of a homogeneous worker culture consisting only of the views of working men.

95. On the other hand, one could also argue that, when the court's focus on Henry's economic class is combined with its privatization of Rabidue, the resulting impression is not that the case represented a judicial refusal to take sides between two groups, but rather that it constituted a judicial act of protection of a particular group from the hypersensitivities of a single individual. Treating the coworker's conduct as the expression of group mores, the judge elevated that conduct; simultaneously treating the plaintiff's claim as an idiosyncratic personal reaction (rather than a group-based assertion of right), he devalued it. Under either interpretation, however, the decision seems to be a defense of a powerless group.

choices that underlay its ruling. That ruling clearly entailed political judgments, not only about the relative importance of elite and worker values (assuming for the moment that the court's attribution of views to these two groups was accurate),[96] but also—given that the only workers whom the opinion's "class" analysis favored anyway were males—about the relative validity of men's and women's perspectives as well. The majority's reliance upon the principle of tolerance for diversity re-poses the contradiction between individual and group rather than mediating it, and simultaneously obscures the court's choice between the two.

b. *Consensus: The Private Sphere as Source of Neutral Grounds*

Besides invoking the principle of tolerance of diversity to ground his reasonableness determination, Judge Krupansky also relied upon the notion of societal consensus to provide him with a definition of reasonableness. Like his tolerance of diversity argument, the judge's equating of reasonableness with consensus simultaneously acknowledged the group conflict in the case and minimized the court's role in choosing between the groups.[97]

Concluding that the conduct engaged in at Osceola, "although annoying, [was] not so startling as to have affected seriously the psyches of the plaintiff or other female employees,"[98] Judge Krupansky stated further:

> The sexually oriented poster displays had a de minimis 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.[99]

In other words, Judge Krupansky seemed to view Rabidue's objections as unreasonable on the grounds that the prevailing consensus in American society is that conduct like Henry's is not offensive.[100] As with the voluntary entry argument, the question was treated as one of fact: either society accepts behavior such as Henry's or it does not. The judge treated societal consensus, like choice, as a pre-existing, neutral mediator, a mechanism for distinguishing between legitimate demands for protection of group interests and illegitimate demands for enforcement of group (or individual)

96. *See infra* pp. 1208-09.

97. The court's reliance on consensus also contributed to the privatization of the plaintiff, for it created the impression that Rabidue was just one of a few isolated individuals who did not follow the consensus. *See infra* p. 1204.

98. *Rabidue*, 805 F.2d at 622.

99. *Id.*

100. To give the court the benefit of the doubt, I have not given serious consideration to the other possible interpretation of this quote: that women simply could not be offended by any conduct to which they are frequently subjected.

prejudices. Consensus fails to fulfill that purpose, however, for both the selection and the application of that construct entail value choices.

i. *The Message of Consensus*

Consensus is a particularly powerful symbol of mediation, for it both acknowledges and minimizes difference, and thus both acknowledges and minimizes the coercive potential of a status quo standard. On the one hand, the concept of consensus would have no meaning if everyone were exactly the same. Conveying the idea of voluntarily arrived-at agreement reached after dialogue among diverging views, it implicitly acknowledges the existence of difference.

On the other hand, consensus also conveys the idea of fairly *widespread* agreement,[101] and thus simultaneously minimizes the existence of difference, marginalizing those who do not espouse the viewpoint that has been defined as the societal norm. (After all, if enough people are in sufficient agreement that a "consensus" is produced, then those who do not agree must certainly be few and unimportant, as well as aberrational and possibly even intransigent.)

The notion that the elevation of a particular viewpoint to the status of societal "consensus" results from the operation of individual will also obscures the possibility that the process by which something gets defined as the consensus view is itself characterized by group struggle and hierarchy. Reducing the judicial role in evaluating the reasonableness of conduct to little more than head-counting, the concept of consensus reinforces the message that a judge employing that standard acts objectively, rather than engaging in impermissible state intervention.

In summary, with its overtones of choice, universality, and neutrality, consensus privatizes and depoliticizes those who disagree. And, in so doing, it minimizes the coercive potential in a status quo standard, creating the impression that the government can ensure collective security without limiting individual autonomy, that it can allow all groups to exist yet still protect them from each other, that society can be tolerant of diversity without being destroyed by it. Upon closer examination, however, it can be seen that consensus cannot live up to the mediating message that it conveys.

ii. *Discrimination as Individual Bad Acts*

The court's choice of consensus to give content to the reasonableness standard reflects underlying political judgments about what discrimination itself—the very concept that "consensus" is supposed to be defin-

101. *See, e.g.*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 433 (2d ed. 1987) ("consensus . . . 1. majority of opinion . . . . 2. general agreement or concord; harmony").

ing—actually is, and about how discrimination should be eliminated. In equating "reasonableness" with societal consensus (that is, in defining discrimination as deviation from the status quo), the *Rabidue* court (like all courts using this definition of reasonableness) necessarily assumes that the status quo itself is egalitarian, pluralistic, and nondiscriminatory. This in turn shifts the focus to the individual, obscuring the possibility of structural inequalities and creating the impression that only a small number of deviant people fail to conform to society's pluralistic norms (that is, engage in discrimination). Thus, in focusing on whether the particular conduct engaged in by Douglas Henry was generally acceptable (that is, whether it violated social norms) rather than, for example, on whether it perpetuated conditions of inequality,[102] the *Rabidue* majority implicitly assumed that sexual discrimination is merely deviant behavior by individuals, rather than a structural problem inherent in American ideology and institutions. This narrow definition of discrimination favors liberty over security, diversity over conformity, the individual group to society at large (and the powerless groups society seeks to protect).[103]

iii. *The Indeterminacy of the Consensus Standard*

Even if the choice of consensus as a standard could be neutrally made, the construct itself would still not be susceptible of neutral application. Like choice and tolerance, consensus has no inherent meaning, and political decisions must therefore be made in applying it. If popular opinion polls indicate that a majority of Americans espouse a particular viewpoint, is that a consensus? What if only a plurality espouse it? If a majority of national legislators vote a certain way, does that reveal a societal consensus? How close do two opinions have to be to be counted together as part of a consensus? In short, what constitutes consensus on a particular norm

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102. This test is MacKinnon's, and she contrasts it with what she calls the "differences approach" of traditional equal protection jurisprudence, under which the question is whether the plaintiff is similarly situated to, yet treated differently than, members of other groups. C. MACKINNON, *supra* note 1, at 101-02. Like the differences approach, a focus on consensus fails to consider that the supposedly neutral criterion ("real" sex difference, consensus) might be exactly what sex discrimination law should be addressing—that is, might itself be discriminatory. *Id.* at 227 (focusing on sex difference "allow[s] the very factors the law against discrimination exists to prohibit to be the reason not to prohibit them").

103. *Cf.* Freeman, *supra* note 27. Freeman describes two different ways of approaching the concept of racial discrimination. The first, which he identifies with traditional Supreme Court jurisprudence, is the "perpetrator perspective," which "sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator," *id.* at 1053, and thus views discrimination "not as a social phenomenon, but merely as the misguided conduct of particular actors." *Id.* at 1054. In contrast, the "victim perspective" sees discrimination as

> those conditions of actual social existence as a member of a perpetual underclass. This perspective includes both the objective conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual.

Id. at 1052-53 (footnotes omitted). It recognizes that discrimination will not be eliminated "until the conditions associated with it have been eliminated." *Id.* at 1053.

is no more susceptible of a determinate answer than what constitutes coerced acceptance of a contract offer.[104] Thus, judicial decisions grounded on consensus necessarily contain judgments about what should be taken to be consensus and why—judgments that are generated by a particular political vision of the world.[105]

Consider, for example, the method Judge Krupansky used in *Rabidue* to identify a societal consensus. Emphasizing that such widespread forums of public expression as prime-time television contain the same types of "erotica" as those displayed at Osceola, he essentially equated societal consensus with prevailing social practices.[106] That is, he seemed to conclude that the mere prevalence of pornography suggests general acceptance of the image of women contained within that pornography. There are several problems, however, with equating prevailing media depictions with the viewpoint of most Americans. First, this approach ignores the vast power inequalities between men and women in general, and between antipornography activists and the eight-billion-dollar-a-year pornography industry in particular (not to mention the vastly larger marketing and entertainment industries that also sell their products through the objectification of women). Given the importance of economic and political power to the success of any reform movement, this disparity in resources raises serious questions about the conclusion that the existing practice of depicting women in a degrading and objectifying manner is accepted by the majority of the population. This assumption is especially unwarranted in the context of media depictions, for attempts to reform such practices raise strongly held First Amendment concerns in many people's minds. That is, there are surely many people who, for First Amendment reasons, believe that the publishing and individual consumption of pornography should not be restricted (and would certainly say the same about daytime television) but still find the image of women it projects personally offensive.

In summary, the *Rabidue* majority sees reasonableness as successfully mediating the contradiction between diversity and conformity on the grounds that it merely reflects the working-out of the tension between the

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104. Or "consent" to intercourse. *See* MacKinnon, *supra* note 75; Peller, *supra* note 5, at 1187–91. For some examples of data courts have considered relevant in determining the content of a societal consensus, *see, e.g.*, Thompson v. Oklahoma, 108 S. Ct. 2687, 2691–97 (1988) (legislative enactments in 19 states, jury determinations, and views expressed by "respected professional organizations" and other Anglo-American nations support conclusion that execution of 15-year-old offender is "generally abhorrent to the conscience of the community"); Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986) (fact that sodomy was criminal offense at common law and was outlawed by all 50 states until 1961 constitutes sufficient evidence upon which to base conclusion that right to engage in consensual homosexual conduct is not " 'deeply rooted in this Nation's history and tradition' ").

105. It is of some relevance here that *Rabidue* was a bench trial, not a jury trial. For example, it is at least arguable that a jury, composed as it usually is of non-elite citizens, would be a better identifier of societal consensus than a judge. However, the problematic nature of the concept of consensus itself, especially the assumption of homogeneity upon which it is based, suggests that many of the shortcomings described here would persist in a case tried by a jury.

106. *Rabidue*, 805 F.2d at 622.

two that has already occurred in the private sphere. But this assumes that the working-out itself was a "free" process, untainted by coercion. For, if the very process by which societal consensus (assuming for the moment that is a meaningful term) is reached is itself characterized by coercion, then to base a finding of reasonableness upon the resulting norm is again merely to delegate the coercive power of the state to certain sectors of the private sphere. Furthermore, there is no way to decide the question of whether the working-out process was coercive without addressing the question of what societal and individual interests justify restricting individuals' freedom. Thus, the entire formulation collapses again, reintroducing rather than resolving the contradiction between diversity and conformity.

3. *Hidden Messages: Reinforcing the Status Quo*

Despite the fact that its decision superficially seems to be a pluralistic one, refusing to support dominant groups and neutrally enforcing existing societal norms, the *Rabidue* court's opinion is not pluralistic at all. While Judge Krupansky suggests that he disapproves of the harassment of women in the workplace, he nevertheless subtly rejects women's views about such conduct and denies them the means to resist it. And, while the articulated basis for his ruling is deference to worker culture, the rhetoric of the opinion actually derogates that culture. Rather than being pluralistic, the court's opinion privileges one narrow, elite viewpoint and silences others.

a. *Disavowing Sexism While Reinforcing Patriarchal Views of Women*

Despite the fact that Judge Krupansky seems to condemn Henry's sexist behavior[107] and to endorse equal employment opportunity for all,[108] his discussion reflects very patriarchal attitudes. At the most obvious level, the judge's trivializing of the sexual comments and visual displays at Osceola[109] is consistent with the attitude of many men, who tend to view "milder" forms of harassment, such as suggestive looks, repeated requests for dates, and sexist jokes, as harmless social interactions to which only overly-sensitive women would object.[110] It completely ignores the fact that

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107. *See infra* notes 119-22 and accompanying text.

108. For example, the judge quotes with approval the trial court's statement that "[i]t 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." *Rabidue*, 805 F.2d at 621.

109. *See supra* note 79 and accompanying text.

110. *See* Finley, *supra* note 80, at 60; *see also* A. ASTRACHAN, HOW MEN FEEL: THEIR RESPONSE TO WOMEN'S DEMANDS FOR EQUALITY AND POWER 88 (1988) (reporting that many men believe their sexual propositions are just jokes); Collins & Blodgett, *supra* note 81, at 81, 92-93 (noting that three times as many women as men think "eye[ing] the woman up and down" is harassment); Cohen, *What's Harassment? Ask the Woman*, Wash. Post, July 5, 1988, at A19, col. 1 (com-

persistent behavior of this "milder" sort is just as disturbing to many women as is overt quid pro quo harassment.[111]

The judge's assertion that a "proper assessment" of a hostile environment claim will include evidence on "the personality of the plaintiff"[112] suggests that he minimized the conduct involved in *Rabidue* because he shares a common male attitude that the victim of harassment is in some sense to blame for her mistreatment.[113] Many men believe, for example, that women can avoid harassment if they behave properly, and that the tactful registering of a complaint is usually an effective way of dealing with harassment when it occurs.[114] Women, in contrast, harbor no such illusions.[115]

These views about harassment are consistent, of course, with a general distrust of women that has been widely criticized by feminists. Thus, just as rapists' stories have been believed over their victims' on the grounds that women can be expected to "cry rape" in retaliation for the slightest rejection,[116] so too some men worry that female employees will use false harassment allegations as a "smoke screen" to hide poor job performance.[117] Judge Krupansky's focus on the character of the victim echoes these attitudes, belying the "neutrality" of his analysis. While seeming to criticize anti-female behavior, the judge actually expresses and reinforces the very attitudes that produce such behavior. It was these attitudes that led the dissent to criticize the majority for having taken the male viewpoint as the universal norm, and to conclude that "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."[118]

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menting on this tendency of men to trivialize certain forms of harassment).

111. *See* Collins & Blodgett, *supra* note 81, at 78, 80.

112. *Rabidue*, 805 F.2d at 620.

113. Collins and Blodgett, *supra* note 81, at 90.

114. *Id.* Thus, for example, I have heard a university official speaking to a group of women employees about how to prevent sexual harassment urge those women to help matters by making sure that they do not engage in "ambiguous" conduct. One wonders if he also met with male employees to tell them how *they* could help prevent harassment.

115. *Id.* (78% disagree with statement that woman who dresses and behaves properly will not be subjected to harassment). It is a testament to the strength of the male power of naming that even some women do, however, hold the woman responsible. *See, e.g., id.*; *see also* C. MACKINNON, *supra* note 1, at 47 (many victims of harassment feel guilty and somehow to blame for what happened).

116. *See generally* S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 348, 413 (1975); Estrich, *supra* note 3, at 1132 (describing and criticizing that view of rape victims).

117. Collins & Blodgett, *supra* note 81, at 92. Of course, I am not saying that this would never happen. But such occurrences would be so rare that their possibility simply does not justify failing to condemn the conduct, any more than the same possibility would justify rejecting any other type of discrimination complaint (or legal claim in general, for that matter).

118. *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting) (citation omitted).

b. *Disavowing Elitism while Criticizing Workers as Sexist*

The majority opinion not only reinforces existing male attitudes towards women but also reinforces existing elite attitudes towards the working class. While Judge Krupansky explicitly presents his finding that Douglas Henry's behavior was reasonable as a principled defense of worker culture, a tolerant and pluralistic decision, he simultaneously derogates that culture, devaluing workers' norms while claiming to protect them. Thus, for example, his opinion conveys an attitude of profound disrespect for the working class when it endorses the trial court's description of "some work environments" as the arena of "rough-hewn" "humor."[119] This language reveals a patronizing distaste for such humor, strongly suggesting that it is much inferior to Judge Krupansky's own, more refined variety.[120] Furthermore, as Judge Keith notes in dissent, there is a strong classist dimension to the majority's argument: "[A] disturbing implication of considering defendants' backgrounds [in deciding such cases] is the notion that workplaces with the least sophisticated employees are the most prone to anti-female environments."[121] The majority's implicit message is: "They might be sexist—unlike we civilized people—but boys will be boys!" Thus, Judge Krupansky's effort to be tolerant of workers nevertheless conveys a disparaging attitude towards those not of his own class.[122]

In short, while seeming to follow the neutral principle of tolerance for diversity, the court's opinion in fact reinforces an ideology that disempowers and devalues the very workers of whom it claims to be tolerant. It conveys a specific viewpoint, one that accepts a class hierarchy in which workers are devalued, while simultaneously seeming not to convey any viewpoint at all.

To summarize, by seeming to condemn the harasser's sexist conduct and views at the same time that it both protects and reproduces them, the opinion seems sympathetic to women while actually perpetuating sexist

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119. *Id.* at 620 (quoting *Rabidue*, 584 F. Supp. at 430 (Newblatt, J.)).

120. The judge also takes great pains to disassociate himself from the conduct he is protecting. Drawing a clear distinction between his positive characterization of Henry's class identity and interests and his own personal condemnation of Henry's viewpoint and conduct, the judge paints a negative picture of the harasser, calling him an "extremely vulgar and crude individual who customarily made obscene comments about women," *id.* at 615, and whose "offensive personality traits" the management had "been unsuccessful in curbing." *Id.*

Of course, this language does not convey a particularly strong indictment of Henry's behavior, reading more like fatherly disapproval of a somewhat frisky and bothersome puppy than like moral condemnation of discriminatory conduct. (The image conveyed also somewhat contradicts the other picture of Henry as not a deviant individual but rather a typical American worker.) Nevertheless, it could hardly be seen as admiring or laudatory treatment. Thus, it reinforces the impression that "worker culture" is not a particularly prestigious or admirable set of beliefs.

121. *Id.* at 627 (Keith, J., dissenting). That attitude is also conveyed in a remark that Henry's supervisor made to him, exhorting him to learn to become more of "an executive type person." *Id.* at 624 (Keith, J., dissenting).

122. Somewhat paradoxically, the judge's disdain might, in turn, reinforce the apparent neutrality of his decision, for it conveys the impression that, because he does not personally endorse Henry's conduct, he was clearly not implementing his own moral vision in reaching his decision.

attitudes and reducing women's power in the workplace.[123] Similarly, by seeming to defend the social class with which the harasser is identified while subtly derogating that class, the majority opinion seems to defend workers while actually reinforcing the existing class hierarchy that devalues and subordinates them.

Moreover, by relying on apparently objective concepts such as choice, consensus, and tolerance for diversity (as well as by disassociating his personal opinions from those of the class and gender groups involved in the case), Judge Krupansky conveys the distinct impression (and might even have believed himself) that he has been able to make the choice between diversity and conformity without resorting to personal political judgments. Transforming the case from one raising questions of gender roles and social hierarchy to one about pluralistic culture and societal consensus, the judge protects male power by treating it as worker powerlessness and reinforces class hierarchy by presenting it as tolerance for diversity. Relying on apparently neutral constructs to resolve the group conflict in the case, the majority's opinion obscures the fact that its ruling actually enforces (and reinforces) a particular, identifiable perspective—that of upperclass men.[124]

C. *A Brief Digression on the Reasonable Person Symbol*

The discussion thus far has described the liberal vision of reasonableness as a mediating construct and has demonstrated that, at least in the sexual harassment context, that vision is mistaken: the standard fails to mediate between diversity and conformity. This Section presents a brief symbolic analysis of the image often used in negligence literature to give concrete meaning to the idea of reasonableness: "the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves."[125] This image is in many senses itself a mediating figure, and,

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123. By making harassment unchallengeable, the court's decision significantly reduces women's power to control the conditions under which they work.

124. Interestingly, because his attempt not to impose an upperclass viewpoint on workers allows their sexist behavior to continue, the judge implicitly presents male workers' interests as contrary to those of female workers. Just as class-focused and sex-focused reform movements are often presented as being in conflict with each other in other contexts (economically, for example, by claims that women's entry into the workplace reduces employment opportunities for men; and theoretically, by arguments about whether class oppression or sex oppression is primary), so here they are also made to seem in conflict with each other, by a legal opinion that treats justice for women as inconsistent with the rights of the working class.

125. *See* G. CALABRESI, *supra* note 3, at 23 n.94 (citing Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224) (Greer, L.J., quoting unnamed "American author"). For brevity, I will refer to this image as the "man in his shirtsleeves." The English version is "the man on the Clapham omnibus," *id.* at 23; I have been told that Clapham is a small town, which would suggest that the English symbol conveys the idea of the average citizen, as does the American version. *See infra* notes 132–33 and accompanying text.

therefore, the messages that it conveys reinforce the reading of *Rabidue* given above.[126]

The symbol of "the man in his shirtsleeves" conveys a message of mediation in two ways. First, it presents the reasonable person standard as an inclusive and tolerant concept, which allows societal diversity without violating societal norms. Second, it (paradoxically) presents that standard as a universal one, expressing and enforcing general norms without threatening diversity. In short, each image conveyed by the symbol simultaneously emphasizes one side of the diversity/conformity dyad while seeming not to exclude the other.

1. *Reasonableness as Tolerance*

Locating the reasonable person in the middle of various continuums, the symbol creates the impression that the role of the objective standard is to mediate between opposing positions. That mediation seems simultaneously to *allow* and to *overcome* the existence of those positions.

In socioeconomic terms, the reasonable person depicted in this image is a member of neither the elite nor the underclass. The T-shirted, grass-smattered, sweaty condition of a man[127] mowing his lawn is not usually associated with a life of wealth and leisure. Nor, on the other hand, does the average service industry worker or welfare mother own a home with a lawn, or have an office at which to receive magazines (receiving them at home instead). The symbol's identification with the middle American thus conveys the idea of mediation and compromise between these two extremes.

A similar message is produced by its gender content. While the central figure of the image is male, it nevertheless carries both masculine and feminine associations. Located at home, in the domestic sphere usually associated with women, the figure is also situated outdoors, in the prototypically male realm of car repairs, sports, and barbecues. The action he is engaged in—lawnmowing—also conveys mixed messages that suggest a mediating role. On the one hand, physical labor is usually associated with male virility. On the other hand, lawnmowing itself is one of those baneful tasks often required (so the ideology goes) of "henpecked" husbands by their wives, and thus could be seen as evidence of emasculation.[128] In short, associating the "man in his shirtsleeves" with the "fe-

126. I should emphasize that the analysis presented in this Section is not intended to introduce a detailed examination of the operation of the reasonableness test in negligence law. Instead, it is offered as a speculative reading, the purpose of which is to suggest that the problems that plague the "objective" standard in the sexual harassment context are not unique to that setting, but rather have surfaced in the negligence context as well.

127. It is clearly a male image, in more than just pronouns. *See infra* notes 132–33 and accompanying text.

128. Of course, given that husbands' performance of chores for their wives is often seen as a trivial concession to women in their own sphere, one could argue that the lawnmowing suggests com-

male" world, the symbol feminizes him; associating him with the "male" world, it preserves his masculinity intact. It presents him as a compromise between the effeminized man (or femaleness) and the purely masculine one (or maleness), as a mediator between extremes.

This locating of the "man in his shirtsleeves" at a midpoint between extremes suggests mediation at a more general level as well. By not fully identifying the reasonable person with the high-status term on each continuum (the upper classes, "male" men), the symbol creates the impression that the reasonableness standard is tolerant, inclusive, and flexible, rather than rigidly requiring perfection. In short, it makes the standard seem to allow diversity and facilitate freedom. On the other hand, by not associating the reasonable person with the bottom of each hierarchy either, the symbol simultaneously suggests that the "objective" standard imposes limits on individual behavior, thus fulfilling the societal need for security and coerced conformity as well.

Similarly, the scholarly literature routinely describes the prototypical reasonable person as neither perfect nor wildly careless: While "always up to standard,"[129] he is nevertheless " 'not necessarily a supercautious individual devoid of human frailties' "[130] but rather has "those human shortcomings and weaknesses which the community will tolerate on the occasion."[131] Such imagery constructs the "objective" standard as a mediator of the contradiction between freedom and security, as able to accommodate our desire for careful behavior without unduly coercing human beings who are liable to lapses of care.

2. *Reasonableness as Consensus*

The "man in his shirtsleeves" symbol depicts the reasonable person standard not only as mediating among diverse positions but also as a neutral and impartial reflection of societal norms. By thus symbolizing societal consensus, the image obscures the existence of diversity and conflict among groups, and thereby emphasizes the security (conformity) side of the liberty/security contradiction.

Although the symbol's message of transcending oppositions conveys the idea of diversity, its message of consensus (paradoxically) conveys the idea of homogeneity. Through the particularized, concrete image that it projects, the symbol obscures the existence of those groups that do not fit that image. By ignoring the existence of people who have no lawn to mow and cannot read or afford to buy magazines—as well as the existence of those who hire someone else to mow the lawn for them—this image pro-

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passion (and/or appeasement) rather more than emasculation. Either way, however, the image would still be a mixed one.

129. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 2, § 32, at 175.

130. *Id.* § 32, at 175 n.10 (citation omitted).

131. *Id.* § 32, at 175.

motes the illusion that we are all the same, rendering invisible those who differ from the "average" person it creates. Similarly, by gendering its central figure, the symbol also excludes those whose role has never been defined in terms of lawn-mowing and magazine-reading, but rather in terms of cooking, nurturing, and cleaning.[132] In this way, it conceals the possibility that the reasonable person standard might actually exclude some groups' viewpoints, and thus reinforces the message that those who deviate from the norm are just that: deviants.[133]

Thus, this symbol of the reasonable person explicitly sets up middle-class, male values as the source of the "objective" standard, defining "reasonableness" as what a member of that particular group might think. Simultaneously, however, it treats those values as representative of American society, thus rendering other cultural viewpoints invisible. In this way, the symbol conveys the message that only a few discrete individuals are excluded through its use, not entire groups. And, just as Judge Krupansky's privatization of Vivienne Rabidue and reliance on consensus reflect and reinforce the assumption that we can neutrally overcome the contradiction between diversity and conformity, so the "man in his shirtsleeves" symbol suggests that it is possible to protect all without harming any.

3. *Hidden Messages Again*

However, like the majority opinion in *Rabidue*, the symbol of the reasonable person simultaneously undercuts its explicit messages, subtly reinforcing the very hierarchies it purports to reject. Thus, while the symbol seems to invoke average, middle-class norms, and norms that establish a compromise between (or combination of) male and female perspectives, it does so by relying upon class and gender hierarchies that derogate those very same norms. For example, the "man in his shirtsleeves" image conveys the idea of tolerance for diversity (that is, allowing fallibility) precisely because the middle-class American depicted by the symbol is traditionally thought to be of lower status than the upper-class American. At the same time, it simultaneously conveys the idea of requiring some con-

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132. *See* Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 22-23 (1988); Finley, *supra* note 80, at 57-59.

133. This message that those who fail to conform to the societal standard are a few isolated and deviant individuals arises in many scholarly treatments of the reasonable person standard as well. Thus, such people are called "moral defectives," Seavey, *supra* note 4, at 11-12, and their views and conduct are referred to as "individual peculiarities," Reynolds, *supra* note 4, at 425 (quoting O. HOLMES, THE COMMON LAW 108 (1881)), and "personal idiosyncracies," G. CALABRESI, *supra* note 3, at 21. The distinct impression that one gets in reading the literature is that those who fail to comply with a reasonableness standard are aberrational, eccentric, undisciplined, perhaps even selfish. Only Calabresi acknowledges (sometimes) that some failures to conform can be seen as indicative of cultural/normative differences, rather than moral weakness. *Id.* at 28-31 ("Equality, therefore, is based on the capacity of the newly arrived group to learn to behave like the previously dominant group.").

formity (that is, not allowing *total* freedom to be fallible) because that same middle-class American is nevertheless of higher status than the manual laborer.[134] (Thus, "fallibility" is to "perfection" what "lower class" is to "upper class;" and placement between upper and lower classes represents mediation between the extremes of tolerating all diversity and demanding complete conformity.) Only if one accepts the hierarchical relationship among these three classes (workers, middle classes, and upper classes) does one "get" the messages implicit in the symbol.

Similarly, the mixed gender messages associated with the symbol's lawnmowing image work to reinforce the impression that the reasonableness standard assures both freedom (diversity) and security (conformity), precisely because those messages implicitly invoke, and rely upon, the traditional view of the domestic sphere (and women) as less valued than the public sphere (and men), and of manual labor as valued less than nonphysical work. It is only through understanding those hierarchies that one can understand the mediating message conveyed by the gender imagery of the symbol.[135]

In short, while at one level the "man in his shirtsleeves" symbol presents the reasonable person standard as tolerant of societal diversity, at another level it treats that standard as enforcing the consensus of a homogeneous, conflict-free society. Moreover, while the imagery of the symbol suggests that it supports the viewpoint of the average citizen, it simultaneously devalues that viewpoint, validating (and reinforcing) the status (and views) of the elite. Like Judge Krupansky's opinion in *Rabidue*, which undercuts the working class while seeming to support it (and decries sexism while perpetuating it), the symbol is a mystification, subtly elevating men, the public domain, and the upper class.

III. Pluralism and the Appeal of Reasonableness

This Part argues that the *Rabidue* majority's belief in the reasonable person standard derives, at least in part, from certain pluralist assumptions that underlie its analysis. Moreover, to the extent that the dissent in the case also relied upon the notion of reasonableness, its analysis seems to

134. Placing its central figure at a midpoint between the high status term (the upper class) and the low status term (the lower class), the symbol conveys the message that the reasonable person standard requires middle-level conduct from individuals—something between absolute perfection (nonharmful conduct) and utter incompetence (extremely harmful or risky conduct). This makes it seem like a tolerant, flexible standard (and therefore one that allows freedom of conduct), but at the same time like a standard that imposes certain requirements on the citizenry (and therefore demands conformity in the interest of security). Thus, the upperclass-lowerclass dichotomy echoes the conformity-diversity dichotomy, making mediation between the extremes represented by the latter seem possible.

135. Of course, by associating diversity with the lower classes and conformity with the upper classes, the symbol also establishes a hierarchy between diversity and conformity. While I do not believe that hierarchy obtains throughout liberal legal ideology, it makes sense to find it here, in the representation of a legal standard that is thought to impose general societal norms on the individual.

depend upon a comparable belief in pluralist ideology. After briefly describing the dissenting opinion, it will be possible to compare the pluralist assumptions underlying both its and the majority's reasonableness analysis.

A. *The Dissenting Opinion's Reasonable Woman Standard*

Delivering a trenchant critique of the majority opinion, Judge Keith argued in dissent that the court's supposedly neutral analysis actually contained a hidden male perspective. Apparently attributing that problem to the use of the reasonable person test, he concluded that a reasonable woman standard should have been used instead. Because he justified the use of such a standard in terms of the concrete effect of sexual harassment on women, Judge Keith's position illustrates the value of a jurisprudence that directly addresses the intergroup conflicts raised by legal cases. Because of the reasonableness language in which he articulated his position, however, the judge's opinion also illustrates the tenacity of the idea that courts should not engage in explicitly political decision-making.

1. *The Reasonable Woman Standard as a Rejection of the Search for Neutrality*

To Judge Keith, *Rabidue* clearly represented a conflict between the sexes over how they should relate in the workplace, and the Osceola Refining Company was clearly the site of persistent and significant degradation of women by men.[136] Moreover, as far as the dissenter was concerned, all three of the means that Judge Krupansky used to give content to the reasonable person standard were unacceptable. First, the tolerance for diversity argument did not work because the defendant's class was simply irrelevant.[137] Furthermore, the court was wrong to suggest "that such work environments somehow have an innate right to perpetuation."[138] Second, the court's reliance upon plaintiff's "choice" to enter the workplace suggested "that a woman assumes the risk of working in an abusive, anti-female environment."[139] Third, the "society" whose views the majority claimed to be enforcing "must primarily refer to the unenlightened." Wrote Judge Keith, "I hardly believe reasonable women con-

136. Judge Keith repeatedly labeled behavior of the type that occurred at Osceola in gender terms—"anti-female obscenity," Rabidue v. Osceola Ref. Co., 805 F.2d 611, 624 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987), "misogynous language," *id.* at 625, "primitive views of working women," *id.*—and concluded that Rabidue had received "sex-based disparate treatment," *id.*

137. *Id.* at 627.

138. *Id.* at 626.

139. *Id.*

done the pervasive degradation and exploitation of female sexuality perpetuated in American culture."[140]

The dissenter's analysis implicitly rejects the role of courts as neutral arbiters of disputes. Challenging the idea of a homogeneous consensus in society, Judge Keith's opinion openly acknowledges that what constitutes appropriate behavior toward the opposite sex is a subject of dispute between women and men. Moreover, arguing that the reasonableness standard should be based on the viewpoint of the oppressed group, rather than on that of those doing the oppressing, he implicitly recognizes as well that the consensus view itself (to the extent that one exists) might simply be wrong.[141] This recognition implicitly criticizes the idea that discrimination should or can be defined in terms of an external referent derived from the private sphere. If societal views about concepts like discrimination, reasonableness, etc., are the product of a discriminatory status quo, then the private sphere cannot provide a neutral, external definition of those concepts to guide judicial decisions. Judge Keith thus quite explicitly bases his conclusion about *Rabidue* on a value judgment: "As I believe no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative, I dissent."[142]

2. *The Reasonable Woman Standard as a Neutral Mediator*

As the discussion above indicates, at one level Judge Keith's opinion can be read as rejecting the idea that the private sphere can provide a neutral basis for the definition of discrimination and as offering instead an explicitly political argument for choosing Rabidue's security over Henry's freedom. However, his depiction of the reasonable woman standard as itself a neutral construct seems to belie that position. In that respect, Judge Keith's formulation, like Judge Krupansky's, engages in a futile effort to overcome the contradiction between diversity and conformity.

In addition to using the traditional "reasonableness" terminology to describe his test, Judge Keith invokes the idea of neutrality in his statement

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140. *Id.* at 627.

141. "[T]he relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery." *Id.* Actually, Judge Keith does not make his position on the question of consensus completely clear. Different statements in his opinion provide support for each of the following positions: (a) the majority wrongly identified the societal consensus, which actually favors women (" '[s]ociety' in this scenario must primarily refer to the unenlightened," *id.*); (b) the existing consensus does favor men, but it is wrong ("pervasive societal approval" of "degradation and exploitation of female sexuality," *id.*); (c) the majority wrongly identified the consensus because there is no consensus; men and women disagree on what constitutes discrimination ("That some men would condone . . . such behavior is not surprising. However, the relevant inquiry . . . is what the reasonable woman would find offensive, not society . . . ." *Id.*). Either of the last two positions would be consistent with his advocacy of a reasonable woman standard. The first position, in contrast, would suggest that the reasonable person standard, if properly applied, is perfectly adequate.

142. *Id.* at 626-27.

that the reasonable woman standard "simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant."[143] In short, he seems to believe that the doctrinal construct itself will determine whether a particular woman's complaint is legitimate.[144] Just as the majority conceives of the reasonable person test as a vehicle for identifying where an individual group's right to freedom ends and society's interest in the security of other groups begins, so the dissenter views the reasonable woman test as distinguishing between regulable "neurotic" women and protected "reasonable" women. And just as the majority uses consensus as the neutral mediator between diversity and conformity, so the dissent uses consensus among women as a similar mediator.

This position is subject to a critique similar to that directed at the majority's reasonable person test: Both in deciding to use the reasonable woman standard to begin with[145] and in identifying the consensus view among women that will give it content,[146] a court must necessarily make choices between freedom and security, the individual (or individual group) and the collectivity. The reasonable woman construct itself does not constrain judges' discretion in making these choices.[147] Thus, Judge Keith's

143. *Id.* at 626.

144. Of course, it is possible that Judge Keith did not, in fact, believe in the determinacy and neutrality of the reasonable woman construct, but rather packaged his analysis in the discourse of reasonableness because that is the language traditionally used in title VII sexual harassment actions. Neither reformers nor judges can avoid making strategic decisions about how to present their arguments, and the wisdom of retaining traditional terms is hotly disputed. *See infra* notes 195–199 and accompanying text. By criticizing Judge Keith's approach, I do not mean to ignore or minimize the complex and difficult decisions that may have motivated it.

145. A ruling dictating that male/female interactions in the workplace be viewed from the woman's point of view is not merely a pluralistic decision giving women an equal right to be heard and thereby allowing both groups' viewpoints to be accommodated. Because male and female views of acceptable workplace behavior are often diametrically opposed, to enforce those of women is inevitably to reject and/or threaten those of many men. It is an empowering of women and a disempowering of men.

146. For example, imagine a title VII action charging that a lawyer's practice of calling his secretary by her first name while expecting her to call him by his last name constitutes sexual harassment. The secretary alleges that this treatment is degrading and offensive, for it implies that she is inferior to her employer. Furthermore, it has overtones of personal possession and familiarity that stem from a long history of male treatment of women in general, and of secretaries in particular, as sexual property, and it reflects a demeaning view of women as child-like and dependent. Is the plaintiff secretary a reasonable woman, or is she overreacting to what is merely a traditional and nongendered office hierarchy (in which male mailroom workers, for example, are also called by their first names)? Is she a neurotic individual whose complaint should be rejected or a crusader for equal rights for her sex? Should the viewpoint of most secretaries affect the outcome? Of women in general? Should the fact that few secretaries have publicly objected to such practices be relevant?

147. Just as Judge Krupansky concluded that the Osceola workplace is not offensive to the reasonable person, so another judge might easily conclude that the name-use practice described *supra* note 146 is not offensive to the reasonable woman. My point is not that such a decision would be incorrect, although I think it would be, but rather that it would not have been dictated by the doctrinal construct. In fact, the singular failure of the reasonable person standard, itself introduced as a nonsexist alternative to the reasonable man test, to protect women's interests is a striking example of doctrine's inability to constrain judicial decision-making. On the benefits of "reasonable woman" over "reasonable person," however, see *infra* note 153 and accompanying text.

apparent conclusion that substituting his standard for the reasonable person test would assure fairer results for women seems unjustified.[148]

Moreover, in treating the resolution of sexual harassment cases as a matter of neutral decision-making, Judge Keith's approach obscures the fact that his standard, like Judge Krupansky's (or any other standard, for that matter), necessarily requires a court to make substantive judgments about what kind of conduct should be allowed in the workplace. Encouraging a formalistic reliance on doctrine, his reasonable woman test obscures the fact that doctrinal constructs like consensus are merely vehicles for articulating value choices, not determinants of results.

In short, the discourse of reasonableness can create a false sense of security, lulling one into believing that a result is inherently fair regardless of its specific content, and reinforcing the idea that legal analysis can be neutral and objective. For example, to the extent that a reasonable woman standard fails to draw the court's attention to issues of race and class, it may perpetuate existing inequities based on those factors in the same way that the reasonable person standard does when it fails to consider women's point of view.[149]

Of course, one might argue that the result of this critique is an infinite regress, for a "reasonable black woman" standard would still ignore differences of class, a "reasonable lower class black woman" standard would ignore differences of sexual orientation, etc. But that both misses the point and is the point. As one analysis of the use of the reasonableness test in criminal law concluded, "It is the reasonableness part of the standard that is faulty, not merely the sex or class of the mythical person. . . . By emphasizing individual responsibility in the abstract form, the reasonable man standard . . . ignores the social reality of the individual. . . ."[150] As a result, any unequal social conditions that affect an individual's situation are both perpetuated and condoned by such a standard.[151] In short, the goal of employing an "objective" test that is unaffected by the judge's (or any other) world-view and that is sufficiently general to apply to all people is simply an illusory one.[152]

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148. In fact, Judge Keith's unfortunate choice of terms in which to articulate the role of his standard—that is, his comment that it allows courts to distinguish between "reasonable" and "neurotic" women—suggests that even in his own hands that standard might not always produce desirable results, for women's efforts to articulate their views and object to their disempowerment have often been dismissed as mere neurotic worrying.

149. As Lucinda Finley points out, because the reasonable woman standard merely replaces one stereotype with another, it would still be unfair to any woman who failed to conform to traditionally female standards of conduct, as would be the reasonable person standard to untraditional men. Finley, *supra* note 80, at 63–64. In addition, "substituting a reasonable woman standard to judge the conduct of women, but not going further to question the inclusiveness of the norms informing the reasonable person standard, implies that women's experiences and reactions are something for women only, rather than normal human responses." *Id.* at 64.

150. Donovan & Wildman, *supra* note 3, at 437, 465.

151. *See id.* at 466.

152. Therefore, as I discuss briefly below, *infra* note 201 and accompanying text, it is important

So will you never be satisfied? a reader might ask at this point. Surely the reasonable woman standard is a step in the right direction, for it draws attention to the hidden bias in the reasonable person test and directs the decision-maker to consider the viewpoint of the woman, thus allowing the oppressed to define their own oppression (or at least endorsing the idea that they should be allowed to do so). Moreover, Judge Keith employs a very political tone, justifying his resolution in terms of the concrete effect that it would have on people's daily lives. What more, one might ask, could he have done?

Such objections are not without merit; Judge Keith's formulation is certainly a distinct improvement over the traditional one.[153] However, as I will discuss in the next Section, I am still troubled by the messages that his formulation conveys, and by the assumptions that underlie it.

B. *Pluralism and the Problem of Conflicting Liberties*

How, one might ask, did Judge Keith apparently fall into the same traps that he recognized in the majority opinion? How did he find it so easy to accept (and endorse) Vivienne Rabidue's characterization of the Osceola environment and yet simultaneously believe that he was acting neutrally? Why did he fail to address the impact his ruling might have on the sense of dignity and validity that the men at Osceola might feel? In short, why did he seem not to be concerned with the fact that he was ruling not only for women but against men—that he was making a political choice between groups? The answer, I believe, lies in his implicit acceptance of the ideology of pluralism, in both its descriptive and its normative manifestations. It is to the role of that ideology, and its implications for antidiscrimination law, that I now turn.

1. *Descriptive Pluralism*

Both the majority and dissenting opinions in *Rabidue* reveal a belief, varying considerably in strength between the two opinions, that current American society is pluralistic and egalitarian. Judge Krupansky's belief in a broadly pluralistic society is easy to see; Judge Keith's pluralistic assumptions are narrower and more subtle.

As the above discussion of *Rabidue* illustrates, Judge Krupansky's

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that judges engage in an analysis that is self-consciously aware both of their own perspectives and of the concrete circumstances and varying viewpoints involved in any dispute. While no judge will be able to completely escape his or her own cultural blinders, such an effort would still be a vast improvement over a purportedly neutral reasonableness analysis that unquestioningly (and often unknowingly) replicates the views of a powerful elite.

153. A facially neutral standard simply makes it too easy for courts to overlook women's viewpoint, creating the false impression that that viewpoint is already subsumed within the general test. In that sense, the switch from reasonable man to reasonable person might have been ill-advised to begin with. *See* Bender, *supra* note 132, at 23.

presentation of his opinion as neutral and apolitical is only convincing if one accepts a pluralistic vision of the world. Equating reasonableness with the status quo, the majority opinion necessarily assumes that American society is not fundamentally hierarchical, and that what gets called the societal consensus represents a truly general view, rather than the viewpoint of a single, powerful group. Relying upon the private sphere for the normative content of his decision, Judge Krupansky must assume that sphere is not itself tainted by illegitimate inequality.[154] Only by believing in the descriptive accuracy of pluralist ideology can he believe in his ability to reach neutral decisions through use of the reasonable person construct.

In contrast, Judge Keith clearly does not conceive of society as a whole as pluralistic, rejecting the reasonable person standard as merely governmental enforcement of the male point of view.[155] However, his reliance upon a reasonable woman test suggests that, at least among women, he assumes equal ability to contribute to the formation of a consensus, ignoring differences of power due to class, race, etc.[156] Indeed, only by ascribing to this partial descriptive pluralism could Judge Keith logically conclude, as he apparently does,[157] that a reasonable woman test would allow courts to reach nonpolitical decisions unaffected by either the judges' own values or existing power differences among women.[158]

2. *Normative Pluralism*

The judges' shared belief that the reasonableness test can provide an apolitical ground for decision—as well as their apparent conviction that judges should strive for such apolitical grounds—stems also from their acceptance of pluralism as a normative ideal. To reiterate, pluralism basically means diversity, having a culture in which many different groups can peacefully coexist. Implicit in this idea, however, is the need to prohibit conduct that so harms other groups as to destroy pluralism itself—that is, a commitment to protecting minorities. In short, the ideology of pluralism defines group freedom as the freedom to act self-interestedly,

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154. *Cf.* Crenshaw, *supra* note 37, at 1334 (to believe that color-blind policies can ensure "a racially equitable society, one would have to assume . . . that such a racially equitable society already exists"). In contrast, if one views society as an arena of hierarchy and struggle, then the judge's supposedly neutral analysis will seem instead to be value-laden and perspective bound.

155. *See supra* note 118 and accompanying text.

156. *See supra* note 149 accompanying text.

157. Although it is possible, as I noted *supra* note 144, that Judge Keith's reasonable woman standard was merely strategic packaging of his substantive result, in this discussion I will assume that he meant what he said in his opinion.

158. Judge Keith's position also assumes that women exist in a hermetically sealed environment unaffected by male power. That is, his advocacy of a reasonable woman standard ignores the extent to which women's views are themselves constructed by patriarchy. The extent to which "false consciousness" can or should be identified as such is, of course, a huge and difficult issue in feminist thought, but further discussion of it is beyond the scope of this essay.

but only as long as such conduct does not unduly harm other groups (and, implicitly, the societal interest in pluralism).[159] Thus, it implies that it is possible to be tolerant of group diversity and still prohibit discrimination.[160]

Applying this concept to the *Rabidue* case, it can be seen that the majority's emphasis on the need to be tolerant of worker culture and to protect workers against the elite's efforts to impose its own values invokes the ideal of a pluralistic society in which all groups can coexist. Similarly, the dissenter's failure to address the possibility that his desired ruling would have harmed the men at Osceola suggests that he ascribes to the view that women can be accommodated without injuring men—that is, that pluralism is a viable ideal.

This Section argues that the notion that pluralism is an unproblematic goal is logically incoherent and disconsonant with the reality of irresolvable conflicts between groups. As such, that notion discourages courts from recognizing the existence of such conflicts and encourages them to articulate their decisions in the mystifying discourse of neutrality.

a. *Conflicting Liberties*

It is logically incoherent to say that a group is free to pursue its own interest and express its own norms unless that conduct harms other groups. This is so because *all* acts by any one group (or individual) are inevitably harmful to others. One side's freedom can always be seen as the other side's loss of security,[161] 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. In the *Rabidue* situation, for example, either side's conduct can be characterized as discrimination, and, as a result, a ruling either way could be called either governmental regulation *of* discrimination or government engaging *in* discrimination.

Let me expand to illustrate. Assuming for the moment that sexism actually is an important norm among American (male) workers—an important source of their identity and component of their world-view—Douglas Henry's conduct can be seen as an exercise of his group's freedom to fol-

159. Individual freedom was similarly defined in classical liberal legal and political ideology. *See* Singer, *supra* note 14; *supra* text accompanying note 14.

160. Thus, the ideal of pluralism assumes an ever-expanding political/legal pie; minorities can get more "rights" without whites losing theirs. This assumption is what animates the "equal opportunity" model's view that "special" treatment of minorities (and women) is both unnecessary and illegitimate. It also at least partially accounts for the ambivalence with which Congress and the courts have often approached the alternative, "equal results" theory of discrimination; to the extent that such a theory seems to require the progress of minorities to be at the expense of whites, courts have been reluctant to endorse it. *See, e.g.*, Crenshaw, *supra* note 37, at 1342 n.52 (describing history of courts' treatment of tension between 1964 Civil Rights Act's goals of eliminating effects of unlawful discrimination and protecting "bona fide" seniority systems).

161. *See generally* Singer, *supra* note 14, at 1050 (discussing this conflict-of-liberties problem).

low its own norms. One way to assess that freedom would be to argue that, since it also harmed Vivienne Rabidue, limiting her freedom to work and subjecting her to public humiliation, it had to be constrained. Under this analysis, Henry's conduct constituted discrimination and can be prohibited by the state.

It makes just as much *logical* sense, however, to say that Rabidue's claim is an attempt to exercise *her* freedom to engage in remunerative employment under conditions she finds acceptable, and that the exercise of her right to freedom harmed Douglas Henry. Under this view, Rabidue's insistence that Henry refrain from displaying pornography would have prevented him from following a fundamental tenet of his group's philosophy and undermined the sense of identity, of maleness, that the act of displaying pornography affirms.[162] Therefore, the argument would go, it was actually Rabidue who tried to discriminate against Henry, not he who discriminated against her.

In other words, although Henry's freedom impinges upon Rabidue's security (and freedom), Rabidue's freedom also reduces Henry's security (and freedom). Each side's liberty is in conflict with the other's. It is impossible for either to act without discriminating, and no matter which side the court rules for, it will be subject to the accusation that it has allowed discrimination against the other side.[163]

One more example might help illustrate the point. Pornographers (and others) attacking the Indianapolis anti-pornography ordinance argued that it violated their right to freedom of expression.[164] Those in favor of the ordinance responded that, without it, their own right to freedom of speech and their right to security from degrading, humiliating, and injurious conduct were threatened.[165] Thus, the court had to decide whether the freedom of one side was worth more or less than the security (and freedom) of the other. A ruling for the pornographers inevitably harmed their opponents; a ruling in favor of the ordinance inevitably harmed the pornographers. The groups' rights were in conflict, and pluralistic tolerance of both was simply impossible.[166]

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162. This is not as farfetched as it may sound. *See infra* notes 167–73 and accompanying text.

163. To the extent that they recognize that helping one group inevitably entails harming others, those who label affirmative action measures "reverse discrimination" are logically correct (*if* you define discrimination as the exercise of group freedom in a way that harms others). Where they go wrong is in viewing a *refusal* to engage in such programs as neutral, rather than as reinforcing existing inequalities which *also* raise one group over another.

164. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd per curiam*, 475 U.S. 1001 (1986).

165. *See* MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 22–23 (1985).

166. Allowing the pornographic "speech" would not constitute simply protecting all sides' freedom. To the extent that pornographers are allowed to construct women as objects who enjoy being abused against their wishes, women's protests against such abuse will be all too easy to dismiss, and thus their speech will be restricted. Moreover, women's right to be protected from harm will still be implicated in any case.

b. *The Relational Construction of Groups*

The ideal of pluralism is logically incoherent not only because the concepts of freedom and security are relational (one group's liberty is another's injury), but also because group identities themselves are relationally and hierarchically constructed in current American society. As a result of that construction, individual groups' fates are inextricably linked: One group's benefit will almost always be another's loss.

By saying that group identities are relationally constructed, I mean that groups attain their identity in contrast with other groups, in the same way that words attain their meaning in contrast with other words:

> [T]he meaning generated by linguistic conventions is negative and differential rather than positive and fixed. The meaning of the word "tree" is *artificial* in that it does not flow from anything in the nature of the word itself. Instead the meaning flows from the word's relationship to other words within the socially created representational practice. It acquires its meaning from not being another word, say, "bush" or "woods."[167]

In a similar way, to be "male" is defined in part as to be "not female," "black" attains its meaning in contrast to "white," "rich" in contrast to "poor," and so forth.

Perhaps more importantly, group identities are hierarchized, as feminist scholarship has amply demonstrated. The categories of male and female, for instance, are socially constructed in a relationship of domination and submission, such that what makes a man "masculine" (i.e., truly male) is his ability (and desire) to dominate women and what makes a woman "feminine" (truly female) is her susceptibility to (and apparent desire of) domination by a man.[168] Extending the analysis to a more general level, one could say that maleness is defined, at least in part, as superiority to women, and femaleness as inferiority to men.[169]

The briefest consideration of popular ideology about sex difference confirms this interdependence and hierarchization of male and female identities.[170] Consider, for example, the fact that a man who is "feminine" in demeanor or clothing is considered unmanly (think of how most people would react to a man in a skirt); that the worst epithet to hurl at a male is a charge of homosexuality, that is, of having "female" sexual urges; and that a man who cannot "control" his woman is often considered emasculated. Similarly, to be attractive as a woman is to be pretty (read: pleasing

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167. Peller, *supra* note 5, at 1164.

168. *See generally* MacKinnon, *supra* note 165, at 19-20 (describing this construction of male and female as existing in relationship of domination and submission).

169. *See* F. Olsen, The Sex of Law (unpublished manuscript on file with author).

170. I take my terminology from Olsen. *Id.* at 2.

as a sexual object) and soft (read: vulnerable, incapable of self-protection), while to be unattractive is to be overly strong, harsh, or aggressive—that is, to be like (and able to resist) a man. And, of course, the worst epithet to fire at a woman is to call her a lesbian (like a man in sexual urges), or, perhaps, ugly (unable to serve as a sex object for men).[171]

Similarly, part of the definition of class identity involves contrasting oneself with other social classes. Suntans indicate wealth precisely because those who work all day lack the leisure time needed to acquire them;[172] unblemished hands mark the professional since laborers' hands get calloused. Part of each group's identity is its awareness of its position in a hierarchy of groups. Because groups are mutually defined in this way, it is simply impossible to accommodate one group without in some way affecting others. And, since one group's gain will virtually inevitably be another's loss, any judicial decision, even one that attempts merely to bring one group up to another's level of power or status, inevitably constitutes a decision that favors one group and harms another.

In this light, it can be seen that the display of pornography in which women are demeaned and threatened reaffirms the male identity of the displayer, underlining his ability to subordinate women. Simultaneously, of course, such displays affirm the construction of women as willing victims. Thus, a judicial decision that bars pornography in the workplace, rejecting the notion that women exist as sexual objects for men, also rejects and undermines a definition of men as beings who can objectify and subordinate women. Because the sexes are mutually defined, Judge Keith's approach would necessarily harm men, just as Judge Krupansky's harms women.[173]

In summary, given that any action by one group produces some sort of harm to others, the ideal of a pluralistic coexistence of all groups is unrealistic, especially within existing social arrangements.[174] Neither the principle of tolerance for diversity nor the concept of societal consensus can provide neutral grounds upon which to resolve cases, for choices

171. The fact that women do wear pants, and that feminine beauty has recently been redefined to include (slight) muscularity, whereas male clothing and body styles are still severely constrained, is one of many contrasts that illustrate the fact that the sexes are not only mutually defined but also hierarchically related. Women can adopt some "male" traits (work in the public sphere, for example) because that elevates them. For men to adopt "female" traits (doing housework, for example) is much more unthinkable, because it involves losing status.

172. Contrast current ideals of tanned beauty, for example, with the era when workers worked primarily outside instead of inside, and wealth was indicated by white skin, untouched by the sun.

173. This is not to reject the idea that, ultimately, the elimination of patriarchy would probably benefit both sexes. *See infra* note 192. But it simply cannot be denied that the transition period would be painful and difficult for many men.

174. Of course, some cultures clearly can (and do) include more groups than others, and I do not mean to say that it is impossible to assess the extent to which a particular society is tolerant of difference. Moreover, I do not mean to suggest that such tolerance is not a laudable goal for a society to have. *See infra* notes 200-201 and accompanying text. My point is only that to believe tolerance for diversity will assure neutral judicial decisions obscures the fact that some groups are—and must be, given current social arrangements—favored over others through such decisions.

among conflicting groups cannot be avoided. By relying on such concepts, both Judge Krupansky and Judge Keith reached the mistaken conclusion that doctrine could overcome inter-group conflicts—that a reasonableness test could assure fair results to all. In so doing they failed to recognize that liberty is necessarily the freedom *to* harm others,[175] and courts must decide whose liberty wins.[176]

C. *Hierarchies, Helplessness, and Hate: Why Does Douglas Henry Harass?*

Conflict may be inevitable, under current conditions, but that does not mean that progress is impossible. However, in order for efforts at transforming society to be productive, they must recognize and attack the interlocking effects of the various social hierarchies that structure American society. While it is essential that legal decision-makers eschew neutrality in favor of explicit choices, it is equally essential that those working for social change recognize not only the conflicts between different groups but also the connections between the systems that oppress them.

In this Section, I will try to shed some light on those connections by suggesting an explanation for Douglas Henry's behavior towards women. It is not my purpose here to present a thorough or definitive analysis of

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175. Singer, *supra* note 14, at 986–94, 1049–50 (discussing work of Wesley Hohfeld).

176. Of course, this problem of conflicting liberties only arises if the conflict in a case is between two *groups*. If either the plaintiff or the defendant is not a member of a protected group, then the case will not implicate pluralism concerns and will probably result in a verdict against that individual. While individual freedom might be implicated in such a situation, it would probably lose out to the principle that one's liberty does not extend to the right to harm others. This would seem to be especially true in the area of antidiscrimination law, since group membership is a prerequisite to claiming discrimination. (In fact, the case of an idiosyncratic individual harming a group member is the prototypical case for the deviant-bad-act model of discrimination. *See supra* pp. 1204–05.) The following chart sets out the implications of the parties' group identities in a discrimination case:

	Conduct/Treatment of Plaintiff	
Conduct/Treatment of Defendant	As Individual	As Member of Group
As Individual	(1) no discrimination	(2) discrimination against P[a]
As Member of Group	(3) discrimination against D[b] ("reverse discrimination")	(4) conflict of liberties problem (discrimination, but against whom?)

[a]This could also be characterized as a violation of D's individual right to liberty, but that does not trigger pluralism concerns.

[b]This could also be characterized as a violation of P's individual right to liberty, but that does not trigger pluralism concerns.

The *Rabidue* court's privatization of Vivienne Rabidue—its depiction of her as an idiosyncratic, aberrational woman—narrowed the possible boxes that the case could be identified with to 1 or 3; its class identification of Douglas Henry as a worker placed the case in box 3. In this way, the court avoided the conflict-of-liberties problem that results if the case is situated in box 4. As this case illustrates, the initial characterization of a case as posing group/individual or group/group conflict is yet another place where seemingly value-neutral determinations of fact actually reimport the freedom/security contradiction back into the law.

the causes of sexual harassment[177] or of the effect of feminist reform efforts on men.[178] Rather, I want merely to offer some preliminary observations that will illustrate the need for a complex understanding of how other social hierarchies might affect the genesis of social phenomena like sexual harassment.

In her groundbreaking work, *Sexual Harassment of Working Women*, Catharine MacKinnon provides a powerful account of the dynamics of sexual harassment in the workplace. She argues that women's work role has always been defined as requiring that they be sexually attractive and that they at least *seem* to be sexually available to the men for whom they work.[179] Just as women's role in the home has been defined as providing personal services, sexual pleasure, admiration, and status to their male partners, so female workers are expected to present a "pleasing" appearance and perform "wifely" tasks (getting coffee, keeping the calendar, generally organizing the petty everyday details of the boss's life) in a deferential, loyal, and (preferably) affectionate way.[180] Given the "sexualization of the woman worker as a part of the job,"[181] MacKinnon asserts, sexual harassment should not be seen as individual perversion but rather as merely business as usual—the logical "extension of a gender-defined work role."[182] If men are socialized to think that women should project an image of sexual availability on the job, then it is not that unusual to find women feeling compelled to do so. Nor is it unusual to find men responding to that image, and then blaming women as having "asked for it" when they subsequently complain that they were sexually harassed.[183]

MacKinnon's analysis clearly goes a long way toward explaining the phenomenon of sexual harassment in general and the atmosphere at the Osceola Refining Company in particular. But it does not seem to me to fully capture the dynamics of an interaction like that between Douglas Henry and Vivienne Rabidue. After all, Henry was not Rabidue's superior, and probably had no feelings of being entitled by his position (as opposed to merely by his gender) to deference, sexual availability, or per-

177. Much of that task has already been accomplished, of course, by the influential work of Catharine MacKinnon. *See infra* notes 179–83 and accompanying text.

178. That impact is beginning to be explored in a series of recent works that attempt to address the more general issue of the effect of the social construction of gender on men. *See, e.g.*, THE MAKING OF MASCULINITIES: THE NEW MEN'S STUDIES (H. Brod ed. 1987); MEN IN FEMINISM (A. Jardine & P. Smith eds. 1987).

179. C. MACKINNON, *supra* note 1, at 18, 22–23.

180. *Id.* at 18–23.

181. *Id.* at 18.

182. *Id.* at 32; *see also id.* at 18–23. MacKinnon makes a similar argument about rape, suggesting that, because male and female sexual roles are defined in terms of domination and submission, rape is just an exaggerated form of everyday sex. MacKinnon, *supra* note 75, at 647. It would seem, however—and I do not think MacKinnon would necessarily disagree with me here—that even if rape and sex (or harassment and flirting) are variations on the same theme, it is important to differentiate between what a woman experiences as consensual intercourse (or interaction) and what she experiences as violent invasion (or derogation).

183. C. MACKINNON, *supra* note 1, at 21–23.

sonal service from her. Of course, he might very well have felt angered by her managerial status in the company, a status that violated the traditional definition of women's work role that MacKinnon describes. But reading his treatment of Rabidue as nothing more than the aggressive exercise of a male right of sexual access seems to me to ignore the aspects of his situation at Osceola that undercut the image of Henry as someone exerting power, having authority, or feeling a sense of entitlement.

Of course, *Rabidue* does not provide a full-color portrait of Henry's situation at Osceola, but certain details in the case suggest that he was hardly a powerful or high-status member of the managerial staff. Consider, for example, the advice that one of his supervisors gave him, suggesting that he would have better prospects in the company if he learned to become "an executive type person."[184] The patronizing tone of this comment could hardly have made its recipient feel comfortable or respected. Rather, he must have felt painfully aware of his own limited power and nonprofessional status in the company. Labelled as someone who simply did not relate to people or perform his job with the right style, he could not improve by bettering his performance or increasing his productivity; rather, he had to somehow become a different "type." Such feelings of insecurity and inferiority could certainly contribute to a desire to compensate by subordinating women. The behavior that results, then, would seem to be a product of a somewhat different dynamic than just the acting-out of accepted male workplace roles.

A recent analysis of male attitudes towards women in the workplace tends to confirm this conclusion. Anthony Astrachan's study recounts the results of research that included interviews with over 300 men regarding their feelings about the changes women are demanding in society. His description of the way in which feminist demands can threaten men bears quoting at some length:

> The vast majority of men may identify with the powerful, may have explosive fantasies of power, but in reality we have little or no power. We never had . . . . We too, we men, are limited in our choices, dependent on the powerful, and dubious of our ability to change the rules. We find it hard to accept the idea that women are changing the rules themselves. In [Elizabeth] Janeway's words, women are invading the corridors of power, "as if, merely being human, they had a right to be there. But most men have given up that right in return for a quiet life and some sense of security, for government by law as an acceptable bargain between the weak and the powerful. The idea that women are now refusing to accept this bargain acts as a terrifying, a paralyzing challenge to men. Either they too must revolt or they must acknowledge themselves lacking in

184. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 624 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987).

> the courage and ambition being shown by their traditionally inferior sisters."[185]

Astrachan's analysis suggests an account of sexual harassment in general, and of the conduct of Douglas Henry in particular, that is somewhat different than, if complementary to, MacKinnon's. It suggests that the subordination of women in the workplace is sometimes related to the sense of disempowerment that male workers feel. If a woman like Rabidue can rise above the position usually reserved for workers of her sex (recall that she was the only woman in a salaried managerial position at Osceola), then a man like Henry, who has accepted his placement in a mid-level, managerial job and the sense of disempowerment he feels as part of a large corporate bureaucracy, should also be able to. His resigned acquiescence is thrown into question, and the sense of superiority to women with which he sustains his self-esteem is shaken. Furthermore, if he compensates for the low status he holds in his company through an exaggerated identification with his own maleness (and, explicitly, with the male social roles of worker and subordinator of women), then the presence of a female co-worker in his workplace, by challenging both of these traditional lines between male and female, will deprive him of an important aspect of his self-identity. Her presence will not only make him feel emasculated, but will also threaten his very sense of self.[186]

If it is true, then, that sexual harassment is partly a reaction to a socioeconomic structure that disempowers and devalues workers at many levels, making them feel inadequate and unable to control their lives, its eradication will be no simple matter.[187] Rather, to the extent that the male worker's acquiescence in the hierarchical and regimented structuring of the capitalist workplace is "bought" by allowing him to retain some sense

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185. A. ASTRACHAN, *supra* note 110, at 17 (quoting E. JANEWAY, BETWEEN MYTH & MORNING: WOMEN AWAKENING (1975)).

186. *Id.* at 17–18. It is important to point out here that I am emphatically *not* saying that it is the people on the lower end of the socioeconomic and corporate hierarchies who will be the most sexist. While that might at first seem to be the logical conclusion to draw from Astrachan's analysis (and corresponds as well to upper- and middle-class stereotypes), I do not draw it, in part because I believe feelings of powerlessness and inadequacy are not confined to those at the lower strata of the capitalist system. (Astrachan, by the way, also explicitly rejects the conclusion that low-status groups are more sexist. *Id.* at 74.) This is not to deny that those at the top benefit unequally, but only to assert that they feel equally powerless to change the roles they are supposed to play. Nor am I saying that women like Rabidue should not prevail in lawsuits like this one. If we are going to reject traditional gender categories that demean women, relegate them to economic dependency, and hierarchize the relationship between the sexes, then putting up with hostile and humiliating comments and visual displays simply cannot be a condition of work for women seeking to enter, or to remain in, the economic sphere.

187. Another aspect of harassment as a social phenomenon that I have not addressed here is its racial component. The fact that a large proportion of the sexual harassment cases that have been litigated were brought by black plaintiffs begs for explanation. The history of slavery, in which African American women were constructed as "fair game" for the sexual exploits of their white masters, would certainly seem a promising place to start.

of power through subordinating women,[188] sexual harassment will be difficult to stop without changing the workplace structure itself. (And conversely, of course, the harms of capitalism will not be eliminated without addressing the patriarchal system that supports current economic arrangements.[189])

Recognition of the fact that existing economic and gender hierarchies mutually reinforce one another could have a significant impact on efforts to transform society. For instance, understanding the connection between sexual harassment and worker powerlessness might motivate both feminists and labor organizers to work closely with other disempowered employees to more broadly reform the workplace.[190] By encouraging collective action based on a mutual recognition of powerlessness, an analysis that focuses on the interdependence of economic, gender, race, and other hierarchies can help forge alliances among disempowered groups that all too often see themselves as antagonists.[191]

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188. *Cf.* Crenshaw, *supra* note 37, at 1381 (role of blacks as inferior "other" in race consciousness allows whites to "include themselves in the dominant circle—an arena in which most hold no real power, but only their privileged racial identity"); Davis, *Rape, Racism, and the Myth of the Black Rapist*, in FEMINIST FRAMEWORKS 431 (A. Jaggar & P. Rothenberg eds. 1984) ("When working-class men accept the invitation to rape extended by the ideology of male supremacy, they are accepting a bribe, an illusory compensation for their powerlessness.").

189. The interdependence of capitalism and patriarchy is not a new discovery and is the continuing subject of much provocative work by socialist feminists. *See, e.g.*, Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 206-47 (Z. Eisenstein ed. 1979) (arguing that men supported development of job segregation by sex in nineteenth century because it preserved their control over women at home by keeping women economically dependent and by retaining their domestic labor); N. HARTSOCK, MONEY, SEX & POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM 259-61 (1983) (discussing question of why certain abstract dualisms—abstract/concrete, mind/body, etc.—are associated with both "abstract masculinity" and exchange).

An important aspect of some socialist feminist work is the recognition that the racial hierarchy in American society is also closely tied to class and gender hierarchies. *See, e.g.*, The Combahee River Collective, *A Black Feminist Statement*, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM, *supra*, at 362-72. While the discourse of the *Rabidue* case does not easily lend itself to a discussion of the impact of race on the court's analysis (the judicial opinions do not reveal, for example, the races of the individuals involved), I am nevertheless certain that a more complete understanding of that case (and of antidiscrimination ideology in general) would be generated by an exploration of its racial dimensions. To that extent, then, the analysis presented here is incomplete.

190. In fact, the logic behind many feminist reform efforts in the economic sphere would seem to require a radical restructuring of the workplace in any case. Parental leave and comparable worth are two striking examples: the former challenges the traditional management view that workers should be available regardless of family obligations, *see* Finley, *supra* note 37, at 1152-59, 1163, while the latter raises fundamental questions about existing wage hierarchies. *See* Freeman, *The Threat of Comparable Worth*, TIKKUN Jan.-Feb. 1987, at 50. (Of course, feminist theory itself, with its emphasis on including disempowered people and listening to silenced voices, should encourage feminist reformers to be concerned about worker subordination regardless of any perceived connection between capitalism and patriarchy. The women's movement has often, however, been very middle class in its focus and concerns. MacKinnon, *supra* note 5, at 519).

191. This suggestion that both female and male workers could benefit from feminist reforms might make it seem as if conflict among groups is not as inevitable as the discussion thus far has suggested. It does seem clear, for example, that collective action might allow those groups to attain higher degrees of both freedom and security than they currently enjoy. However, *somebody* would still be losing in that scenario: the members of the elite. (Upperclass white women would lose class and race privilege but gain gender equality; workingclass white men would lose gender and race privilege but gain class equality, etc. Only upperclass white men would simply lose.) Thus, I would suggest

Moreover, even without such combined efforts, placing pressure on one system is likely to have an impact on others. Thus, for example, prohibiting sexual harassment might eliminate a safety valve for male workers, forcing them to confront their own dissatisfaction. Seeing women successfully challenge their devalued status might further motivate men to cast a critical eye on both their own position in the class hierarchy and their own assigned gender role, inspiring them to attempt to change their situation as well. Finally, seeing women successfully combine traditionally "male" and "female" traits and escape traditional gender roles might reveal to men the narrow confines of their own gender identities, thus enabling them to see that feminist reforms (ultimately) offer benefits to both sexes.[192]

In short, to ignore the interdependence of capitalism, patriarchy, and other structures of inequality is to guarantee the failure of efforts to eradicate any of them. As the next Section suggests, however, a question still remains as to whether relying upon existing legal constructs to articulate demands for change will eliminate, rather than perpetuate, current social hierarchies.

D. *Transforming the Discourse*

The discussion thus far suggests that both reasonableness and pluralism are problematic concepts which hide the power struggles behind legal issues and mystify the courts' role in resolving such struggles. Moreover, both Judge Krupansky's and Judge Keith's opinions reveal that the two concepts are mutually enforcing: To protect his conviction that his reasonableness analysis was neutral, each judge had to assume an (at least somewhat) egalitarian, pluralistic society;[193] and, to affirm his vision of an

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that the appropriate conclusion to draw from my comments here is not that conflict is avoidable, but rather just that the lines of battle should be carefully and appropriately drawn.

Moreover, the extent to which it is important to emphasize the existence of conflict among groups seems to me to depend upon the audience being addressed. Thus, given their penchant for seeing decisions that support the elite as neutral, legal decisionmakers need to be made aware of the conflicts among groups and the choices among them that those decisions often implicitly make. In contrast, those fighting powerlessness do not necessarily need to become more conscious of group conflict per se, but rather to change their focus—to see the commonalities and connections between the conditions of all powerless groups and to recognize the extent to which they are all in conflict with the elite.

192. A. ASTRACHAN, *supra* note 110, notes not only that men are sometimes envious of women's apparent ability to combine characteristics of both genders, *id.* at 29, but also that they can feel tremendous relief at any lessening of the burdens of their own sex role, burdens such as having primary responsibility for economic support of the family, being prohibited from expressing emotion or vulnerability, having to project an image of confidence and control at all times, etc., *id.* at 31-32. This information would suggest that to the extent that men can change their identity—rejecting the hierarchical relationship to women central to its current construction—they will benefit, rather than lose by the elimination of gender hierarchy. Nevertheless, because such a wholesale rejection, especially by those who benefit not only from gender but also from class (and race) hierarchy, seems unlikely to me to happen anytime soon, I believe that it is sufficiently accurate for the time being to say that men must lose for women to gain. (Of course, as I noted *supra* note 191, the elimination of other overlapping hierarchies would complicate the ultimate tally of wins and losses.)

193. The dissenter had to assume at least equality among women. *See supra* notes 156-58 and

egalitarian and pluralistic world, each judge had to perceive himself as making nonpolitical, neutral decisions. It is worth exploring briefly, therefore, whether either of these constructs can be salvaged—whether our understanding of either reasonableness or pluralism can be sufficiently transformed to eliminate those constructs' harmful effects and still retain their usefulness.[194]

There are both risks and benefits to retaining and redefining problematic legal and political constructs rather than discarding them altogether.[195] The major risk is that, even when used by the disempowered, the constructs will continue to hide power relationships and thereby legitimate a fundamentally unequal system.[196] Especially if new formulations of old constructs are presented as neutral themselves, the redefined constructs will still merely reinforce and legitimate an unequal status quo. The primary benefit of retaining problematic concepts like reasonableness and pluralism is that their immense symbolic power can serve to legitimate the demands for social transformation that they are used to articulate,[197] while their very vagueness and abstractness can allow them to serve as valuable vehicles for generating dialogue on national values.[198] In this respect, the problem is not with the terms themselves, but with the meanings that we give them.[199] The question, then, becomes essentially one of transition. To the extent that concepts can be infused with new meaning, they can be valuable tools for reform. To the extent that they resist such redefinition, they will continue to legitimate inequality.

1. *The Futility of Retaining Reasonableness*

In this light, it seems futile to attempt a transformation of the concept of reasonableness. While it might be possible to reconceptualize the reasonable person (or woman) standard as merely shorthand for something

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accompanying text.

194. Despite their interrelatedness, I think it is both possible and worthwhile to consider the two concepts separately. As Part I indicates, the reasonableness test is used in individualist contexts as well as pluralist ones, and even in group-based analyses it is sometimes more closely tied to economic theories such as efficiency analysis than to political theories such as pluralism. *See supra* pp. 1180–93.

195. There is a growing debate on whether legal constructs like "rights" are valuable or harmful. *See* Crenshaw, *supra* note 37; Freeman, *supra* note 26; Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Olsen, *supra* note 88; Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

196. For a critique of legal doctrine's reliance upon the concept of rights and an argument that rights discourse should be abandoned in favor of explicitly political, values-focused discussion, see Olsen, *supra* note 88, at 430.

197. For the suggestion that concepts like "legal rights," despite their indeterminacy, are nevertheless valuable, see Crenshaw, *supra* note 37, at 1367 (they allow disempowered groups to elicit concessions by using system's own logic against it); Schneider, *supra* note 195, at 611 (they can help to define goals of political struggle and of community); Williams, *supra* note 195, at 414 (they give such groups feeling of legitimacy and empowerment).

198. *See* Minow, *supra* note 195, at 1871–82.

199. *See* Williams, *supra* note 195, at 432.

like "the judge's considered judgment about the appropriateness of the conduct in question," such a revised vision seems unlikely to succeed. Reasonableness in legal ideology is simply too closely tied to the idea of objectivity—to the notion that the law can resolve legal conflicts without reflecting or reinforcing any personal perspective—to allow for such a transformation. And the homogeneous image of society that results from the traditional equation of reasonableness with societal consensus is simply too harmful, excluding all but the dominant elite, to justify retention.

2. *Toward a Transformed Vision of Pluralism*

In contrast, the concept of pluralism seems to have the potential for articulating valuable and meaningful ideals. While the idea that judicial decisions can be dictated by a principle of pluralistic tolerance of all groups is unrealistic,[200] this does not mean that the whole notion of a tolerant and diverse nation is bankrupt. Rather than be seen as a guaranty of judicial neutrality, however, pluralism and tolerance for diversity should be viewed as part of an expanded commitment to the true sharing of social power. While it would no doubt be helpful to see pluralism as requiring an in-depth, empathic exploration of social problems,[201] and as mandating that we not ignore the group identification of each individual,[202] these changes in attitude are not enough. It is also essential that we

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200. It is incoherent to think that the principle of tolerance for diversity can provide the ground for a neutral methodology. *See supra* notes 161–76 and accompanying text. Pluralism simply cannot provide an external referent that will assure the neutrality of judicial decisions; to ignore that fact is merely to clothe a particularized perspective in the false veneer of objectivity.

201. I have in mind something like Minow's commitment to "the moral relevance of contingent particulars." Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 76 (1987). That is, I believe that we should not think of pluralism as a methodological dictate, as a relativistic refusal to judge; rather, we should think of it instead as a substantive commitment—a dedication, first, to making decisions based on genuine attempts at understanding the perspectives and social circumstances of others, and, second, to reaching results that actually produce the sharing of power with the powerless.

In short, the realization that there is no one "true" perspective should not cause us to eschew choices, but rather lead us to make necessary choices with care and humility. *See* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 646 (1982) ("[W]hat we need when we make decisions affecting the well-being of other people is correct intuition about their needs and an attitude of respect for their autonomy. . . . And even intuition and respect may do no good at all. There isn't any guarantee that you'll get it right, but when it's wrong you're still responsible.").

The recognition that there are multiple perspectives should also, of course, lead us to appreciate that a fundamental restructuring of society is essential, for hierarchical social arrangements, in which decision-makers have little contact with those who are different from them, and virtually no exposure to other social worlds, are not very conducive to the development of empathic understanding.

202. J.R. Pole identifies an individualism that rejects group identification as the basis of the concept of equality throughout most of America's history. *See* J. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 293 (1978). Thus, for example, if an employer considers race, sex, or religion in making a hiring decision—whether positively or negatively—the decision is often considered illegitimate, unless those traits are somehow relevant to job performance. (Of course, "equal results" advocates explicitly reject this principle, and affirmative action is considered an exception to it.) As Pole notes, this definition is closely related to moral individualism: "The individualist principle dissociates people from the context of family, religion, class, or race and when linked with the idea of equality in the most affirmative sense . . . it assumes the co-ordinate principle of interchangeability." *Id.* at 293.

think more expansively about the need for the redistribution of power, and be willing to accept the hard choices—and losses—that true redistribution would entail. Such expansive thinking and acting is crucial for the success of any effort to eliminate inequality. For as the preceding Section demonstrates, behavior like that of Douglas Henry can be neither understood nor eradicated without addressing the other hierarchies of power and status that contribute to male assertions of dominance over women through harassment, intimidation, and violence.

IV. CONCLUSION

Despite the Statue of Liberty's welcoming arms, American cultural pluralism has always contained an element of coercion. As Guido Calabresi puts it, "The term 'melting pot' implies that equality will not be granted until the group which seeks equality is melted into the pot."[203] Yet American ideology often serves to prevent people from recognizing the limited nature of the society's tolerance for diversity, perpetuating the myth that ours is truly a pluralistic country.

The assimilation of immigrants, for example, tends to be viewed as a gradual process of voluntary adoption of American values, language, and culture, rather than as a forced loss of foreign identities.[204] In addition,

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By the principle of interchangeability, Pole means the idea that people are fundamentally alike, that it is only through the historical accidents of "social history, oppression, and privilege" that differences are produced, and that those differences are irrelevant to how the person should be treated by the law. *Id.* at 293.

One of the problems with this traditional American view of equality is that it fails to recognize the extent to which what a person *is* is a product of his or her various group memberships. Thus, the argument that those memberships are irrelevant, while at one level an appealing articulation of the concept of tolerance for diversity, at another level strips people of their very identity. *Cf.* Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571, 578 (1977) ("[A legal] form that defines individuals as individuals only insofar as they are severed from the social ties and activities that constitute the real ground of their individuality necessarily fails to contribute to the recognition of genuine individuality.").

This conception of equality also prevents members of devalued groups from ever eliminating negative stereotypes, because their conduct is always seen as that of individuals and therefore as not undermining the validity of the group identification itself. *See, e.g.*, Pole, *supra*, at 340 ("The trouble with making it a policy to stress individual rather than racial achievements [of black people] . . . was that 'the white people will not let you get rid of the idea of race.' ")

203. G. CALABRESI, *supra* note 3, at 28; *see also* Finley, *supra* note 37, at 1153 ("The American melting pot has been a cauldron into which we have put black, brown, red, yellow, and white men and women, in the hope that we will come up with white men."). Who are also Anglo-Saxon Protestant, physically and mentally able, and heterosexual, one might add.

204. Analysts often identify assimilation with choice, *see, e.g.*, Carlin, *Charm and the English Language Amendment*, 101 CHRISTIAN CENTURY 822, 823 (1984) (criticizing English Language Amendment on grounds that it "assumes that compulsion, not attraction, is the best way of spreading a language or a culture"), ignoring the numerous structural barriers to the retention of alien ways. In the area of language, for example, those barriers range from early laws that prohibited the use of languages other than English in public and private schools, Marshall, *The Question of an Official Language: Language Rights and the English Language Amendment*, 60 INT'L J. SOC. LANG. 7, 14 (1986), required English-speaking for naturalization, Leibowicz, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL'Y REV. 519, 537–38 (1985), and even, in some cases, banned the use of other languages in private conversation, *see* FISHMAN, LANGUAGE LOYALTY IN THE UNITED STATES 238 (1966), to the more subtle barriers currently presented by English-only

the prevailing ideology systematically ignores differences among the citizenry as a whole, promoting a homogeneous vision of American society that both excludes those groups who do not fit the accepted American model and elevates a small but powerful elite to the status of universal "type." The history of the exclusion of women and African Americans from American culture and politics[205] is only the most striking example of this pervasive privatization and depoliticization of powerless groups. Rendering such groups invisible by ignoring their differences (or even their existence) and assimilating everyone into a purportedly general type, American ideology conceals the conflict created by those differences and thus allows us to avoid the hard decisions that such conflict requires. Only by denying diversity have we been able to see ourselves as tolerant of it.

The reasonable person standard both reflects and reproduces this mystifying ideology. Perceived as a mediating construct that allows group diversity without sacrificing collective security, it suggests that pluralism is both a descriptively accurate and a normatively viable vision of American society. Creating the impression that judges can rely on abstract tolerance and private orderings to resolve questions of group conflict, it obscures the political decisions that inevitably underlie such resolutions.

Conversely, the concept of pluralism legitimates the reasonable person standard, affirming its message of objectivity. Descriptive pluralism, by presenting contemporary society as egalitarian, affirms that the societal consensus the reasonableness test relies upon is a meaningful concept, reflecting a true and voluntary agreement among groups. Normative pluralism, by suggesting that the coexistence of all groups is not only morally right but also logically possible, validates the idea that the reasonableness test allows courts to avoid political choices between litigants by simply being tolerant of all.

Of course, the concepts of reasonableness and cultural pluralism need not of necessity be vehicles for denying difference and obscuring choices. But as long as reasonableness means abstract neutrality and pluralism means limitless tolerance, each concept will reinforce the other, and both will perpetuate an unequal status quo.

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education, ballots, governmental forms (such as welfare applications and driving tests), and the like. *See* Leibowicz, *supra*, at 519, 527–28.

Regardless of whether one thinks that bilingual education or other accommodations should be made, to attribute the predominance of English to individual choice makes no more sense than to view Vivienne Rabidue as having voluntarily chosen to be subjected to Douglas Henry's harassment. In language and many other areas, immigrants have become "Americanized" because they were required to do so in order to reap the benefits of American society.

205. On the history of the exclusion of women from culture and politics, see E. FLEXNER, CENTURY OF STRUGGLE (1959), and B. HOOKS, AIN'T I A WOMAN (1981). On the arguably even more severe exclusion of blacks, see E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1972), T. GOSSESS, RACE: THE HISTORY OF AN IDEA IN AMERICA (1964), B. HOOKS, *supra*, R. KLUGER, SIMPLE JUSTICE (1976), and C. WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974).