"It Wasn't That Bad": The Necessity of Social Framework Evidence in Use of the Reasonable Woman Standard

Anna I. Burke[*]

ABSTRACT: The #MeToo era will likely lead to an increased number of sexual harassment claims. The movement has additionally highlighted the diverging ways that sexual harassment is perceived, largely along gender lines. Because of these varying viewpoints, a reasonable woman standard is necessary so that sexual harassment cases are not limited to the most extreme instances of workplace harassment. However, the reasonable woman standard assumes that individuals with different gender perspectives perceive the same social interaction differently. If social framework evidence cannot be used to give background information on how different people handle sexual harassment, the reasonable woman standard will become ineffective. This Note argues that the admissibility of this background evidence is necessary to give victims of sexual harassment a greater chance to obtain justice.

[*] J.D. Candidate, The University of Iowa College of Law, 2020; M. Sc., University of Glasgow, 2017; B.A., Luther College, 2015.

I. INTRODUCTION

Sexual harassment is a long-standing, pervasive issue in the workplace. However, in the last few years sexual harassment has permeated national headlines and has become a perennial topic in national discourse. Some of the most notable controversies in the last few years include: the allegations and actions of President Trump during the 2016 presidential election;[1] the Hollywood scandals involving Harvey Weinstein,[2] Kevin Spacey,[3] Louis CK,[4]

1. Laignee Barron, *'Of Course He Said It.' Billy Bush Hits Back at Trump's* Access Hollywood *Tape Claim*, TIME (Dec. 4, 2017), http://time.com/5047223/donald-trump-access-hollywood-tape-billy-bush [https://perma.cc/X9DY-URMK] (discussing the *Access Hollywood* tape which features President Trump bragging about past sexual misconduct); Eliza Relman, *The 25 Women Who Have Accused Trump of Sexual Misconduct*, BUS. INSIDER (Oct. 9, 2019, 2:07 PM), https://www.businessinsider.com/women-accused-trump-sexual-misconduct-list-2017-12 [https://perma.cc/V5KF-T6U8] (discussing the number of women who have accused President Trump of sexual misconduct).

2. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/MV7A-S5DK] (breaking the news story of Weinstein's harassment and payoffs); Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/KSK6-3MPC] (detailing the stories of the harassment victims).

3. Adam B. Vary, *Actor Anthony Rapp: Kevin Spacey Made a Sexual Advance Toward Me when I Was 14*, BUZZFEED NEWS, https://www.buzzfeednews.com/article/adambvary/anthony-rapp-kevin-spacey-made-sexual-advance-when-i-was-14 [https://perma.cc/N6J3-KG2U] (last updated Oct. 30, 2017, 12:37 AM) (reporting on the interview where Rapp made the allegation); *see also* E. Alex Jung, *Man Comes Forward to Describe an Alleged Extended Sexual Relationship He Had at Age 14 with Kevin Spacey*, VULTURE (Nov. 2, 2017), http://www.vulture.com/2017/11/kevin-spacey-alleged-sexual-relationship.html [https:// perma.cc/N557-27BE] (providing further detail on the Spacey allegation).

4. Melena Ryzik et al., *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html [https://perma.cc/H2TZ-KWA3] (breaking the Louis C.K. allegations); *see also* Elahe Izadi, *Louis C.K. Responds to Sexual Misconduct Allegations: 'These Stories Are True,'* WASH. POST (Nov. 10, 2017),

among others; the uncovering of pervasive sexual assault by USA Gymnastics doctor, Larry Nassar;[5] and the rampant sexual harassment by Judge Kozinski,[6] being some such examples of major controversies in recent years. Judge Kozinski is just one example of the pervasiveness of accused sexual misconduct on the people we entrust with maintenance of our legal system. The Supreme Court hearings of now-Justice Brett Kavanaugh displayed not only the imbalance between how individuals remember certain events—he did not even remember the party, while the event for Dr. Christine Blasey Ford was "indelible in the hippocampus"[7]—but the extent that cases of sexual misconduct has permeated our airwaves. Dr. Blasey Ford's accusation of sexual assault resulted in hearings that were watched by over 20 million people.[8] This ordeal paralleled a similar situation 27 years before, when Anita Hill brought similar accusations against Justice Clarence Thomas.[9]

Following Justice Thomas's confirmation, the number of women who brought forward sexual assault and sexual harassment claims exploded.[10] Similarly, interest in federal sexual harassment claims has been on the rise

https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/11/10/louis-c-k-these-stories-are-true [https://perma.cc/V7CZ-CYZ4] (providing a response to the allegations).

5. Associated Press, *Three Top American Gymnasts Accuse Doctor of Sexual Abuse*, N.Y. TIMES (Feb. 19, 2017), https://www.nytimes.com/2017/02/19/sports/american-gymnasts-larry-nassar-abuse.html [https://perma.cc/K82U-7J9S] (providing an early account of the Nassar scandal); Carla Correa & Meghan Louttit, *More Than 160 Women Say Larry Nassar Sexually Abused Them. Here Are His Accusers in Their Own Words*, N.Y. TIMES (Jan. 24, 2018), https://www.nytimes.com/interactive/2018/01/24/sports/larry-nassar-victims.html [https://perma.cc/P35E-5HM2].

6. Vanessa Romo, *Federal Judge Kozinski Retires Following Sexual Harassment Allegations*, NPR (Dec. 18, 2017), https://www.npr.org/sections/thetwo-way/2017/12/18/571677955/ federal-judge-retires-in-the-wake-of-sexual-harassment-allegations [https://perma.cc/8XBX-NUXF].

7. *Hearing on the Nomination of Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court (Day 5), S. Judiciary Comm.*, 115th Cong. (2018) (statement of Dr. Christine Blasey Ford), video *available at* https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-brett-m-kavanaugh-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-5 [https://perma.cc/4PQ2-S2GY]; transcript *available at* https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript [https://perma.cc/22H9-K378].

8. Toni Fitzgerald, *Kavanaugh Hearing Ratings: How Many People Watched the Senate Testimony?*, FORBES (Sept. 28, 2018, 2:31 PM), https://www.forbes.com/sites/tonifitzgerald/2018/09/28/kavanaugh-hearing-ratings-how-many-people-watched-the-senate-testimony [https://perma.cc/JFX6-57XP]. The viewership of the Anita Hill hearings (around 20 million) exceeded the much-watched James Comey hearing prior to his dismissal by President Trump (19 million). *Id.*

9. Annys Shin & Libby Casey, *Anita Hill and Her 1991 Congressional Defenders to Joe Biden: You Were Part of the Problem*, WASH. POST (Nov. 22, 2017), https://www.washingtonpost.com/lifestyle/magazine/anita-hill-and-her-1991-congressional-defenders-to-joe-biden-you-were-part-of-the-problem/2017/11/21/2303ba8a-ce69-11e7-a1a3-0d1e45a6de3d_story.html [https://perma.cc/F6J7-D56C].

10. Gene Maddaus, *'Weinstein Effect' Leads to Jump in Sexual Harassment Complaints*, VARIETY (June 18, 2018, 3:40 PM), https://variety.com/2018/biz/news/weinstein-effect-sexual-harassment-california-1202849718 [https://perma.cc/S9PF-L678].

since late 2018.[11] While the number of federal sexual harassment claims has remained consistent,[12] the number of state sexual harassment cases has increased since the start of the #MeToo movement. For example, "[c]omplaints of sexual harassment in California nearly doubled in the first three months of 2018, while New York state has seen a 60% increase since the Harvey Weinstein scandal broke."[13] Therefore, legal questions around Title VII sexual harassment claims are particularly important to address and clarify.

One such question is the standard applied in sexual harassment cases. The differing experiences between men and women have led some courts to shift from the reasonable person standard—the standard often applied in civil cases—to a reasonable woman standard. The Third and Ninth circuits have embraced the reasonable woman standard, and other circuits have applied a similar reasonable victim standard.[14] To date, the Supreme Court has not decided which standard is more appropriate for sexual harassment cases.[15]

There have been many critiques raised over the use of the reasonable woman standard: A few common ones being that it engrains gender stereotypes and erases male victims.[16] This Note does not address the broader policy arguments for or against the adoption of a reasonable woman standard. It focuses on the practicality of adopting a standard that, by its nature, assumes that people with different gender perspectives view things differently. It argues that a reasonable woman standard is a better standard for sexual harassment cases, particularly in addressing hostile work environment cases where the decisive actions in proving the work environment was adequately hostile that may seem commonplace to some are offensive to others. However, it further argues that the reasonable woman standard loses any benefit that might be gained if sociological and psychological evidence is not presented to provide background information on how different individuals perceive sexual harassment. Such social framework evidence should be admitted whenever the reasonable woman standard is used.

Part II gives background information on the development of sexual harassment as a cause of action under Title VII. Sexual harassment was not always viewed as actionable under Title VII, both because courts worried not only that it would significantly increase the number and kinds of claims

11. Maya Rhodan, *#MeToo Has 'Tripled' Web Traffic for the Federal Agency That Investigates Harassment*, TIME (June 12, 2018), http://time.com/5308836/sexual-harassment-metoo-eeoc-complaints [https://perma.cc/H3FR-2J6T] (noting, however, that despite the increased search traffic, "the number of complaints it's received has remained steady").

12. *Id.*

13. Maddaus, *supra* note 10.

14. Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. U. J. GENDER SOC. POL'Y & L. 633, 637–38 (2002).

15. *Id.* at 636–37.

16. *See generally* Linda L. Peterson, *The Reasonableness of the Reasonable Woman Standard*, 13 PUB. AFF. Q. 141 (1999) (summarizing many of the common critiques of the reasonable woman standard).

brought, but also because sexual harassment was largely seen as a private issue.[17] Part II also discusses the evolution of the reasonable woman standard in the court system. Finally, Part II discusses the type of evidence that is required for sexual harassment claims and the admissibility of expert testimony for such cases. Part III considers the issues presented by the reasonable woman standard; specifically, jury decision-making with regard to different cognitive processes.[18] Part III also discusses the divergence of gendered perceptions of sexual harassment providing evidence for both the need for a reasonable woman standard and the necessity for further expert evidence on psychological functioning.[19] Finally, Part IV suggests using social framework evidence to provide background information for the reasonable woman standard. Without such social framework evidence, the standard does not serve the issue that it was developed to address and therefore provides no benefit.

II. SEXUAL HARASSMENT CLAIMS UNDER TITLE VII

The #MeToo and #WhyIDidntReport social media movements have created a new spotlight for the pervasiveness of sexual assault and harassment. One benefit of social movements such as #MeToo is the inundation of personal experiences that makes other victim's stories more believable,[20] and likely will result in an increased number of legal claims.[21] While a majority of these cases belong in state courts, sexual harassment can be actionable in a federal forum under Title VII of the Civil Rights Acts of 1964. This Part provides a brief history of sexual harassment claims under Title VII, the scope and requirements of such claims, and the admissibility of expert testimony in federal claims.

A. EVOLUTION OF SEXUAL HARASSMENT AS A CAUSE OF ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACTS OF 1964

Unlike state level sexually motivated cases, Title VII sexual harassment applies only to interactions that arise to the level of employment discrimination. Title VII provides for a federal cause of action through the prohibition of employment discrimination on the basis of "race, color, religion, sex, or national origin."[22] However, sexual harassment as a form of

17. *See infra* notes 45–51 and accompanying text.

18. *See infra* Section III.A.

19. *See infra* Section III.B.

20. *See* Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 51.

21. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 33 (2018).

22. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2 (2012)).

employment discrimination was not initially read into the Act,[23] as "Title VII says nothing about sexuality."[24] It was not until 1980 that the Equal Employment Opportunity Commission ("EEOC") published guidelines advising that sexual harassment constituted a form of sex discrimination,[25] and it was not enshrined in the case law by the Supreme Court until it decided *Meritor Savings Bank v. Vinson* in 1986.[26]

Sexual harassment, though an ageless problem, did not have a legal name until the 1970s.[27] The term did not appear in print until 1975 in the form of a letter published by the Cornell University Human Affairs Program.[28] Sexual harassment as a form of discrimination is an "unwanted, demeaning, or threatening sexual conduct [that] can limit women's opportunities, ambitions, and rewards in workplaces and in schools—that such conduct at work or in school substitutes a woman's sex for her personhood, interposing sex between a woman and her job or education."[29] Sexual harassment under Title VII is actionable because of its discriminatory nature; the harassment must result in sex discrimination.

The early advocates of the sexual harassment cause of action found assistance in racial discrimination movements.[30] However, unlike the racial harassment movement, sexual harassment advocates struggled from the beginning to show that the harassment "occur[ed] within a larger social framework—a framework in which men, as a group, still ran the world, and women, as a group, were still second-class citizens."[31] The struggle was to show that the harassment was "because of sex," because the victim was a woman, and that it was not "personal"—i.e., exempted from discriminatory effect.[32] Specifically, the need was to show that "sex-based demands . . . preserve gender hierarchy and remind women of their proper place" and were not merely tiffs between partners or potential partners.[33] Such a showing would

23. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 8–9 (Catharine A. MacKinnon & Reva B. Siegel eds., Yale Univ. Press 2004) (summarizing historical perspectives on sexual harassment in the United States).

24. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064 (2003).

25. Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11).

26. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).

27. GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK 84 (2016).

28. FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 218–19 (2009).

29. GWENDOLYN MINK, HOSTILE ENVIRONMENT: THE POLITICAL BETRAYAL OF SEXUALLY HARASSED WOMEN 3 (2000).

30. Dianne Avery, *Overview of the Law of Sexual Harassment and Related Claims*, *in* LITIGATING THE SEXUAL HARASSMENT CASE 1, 2 (Matthew B. Schiff & Linda C. Kramer eds., 2nd ed. 2000); *see also* THOMAS, *supra* note 27, at 86–87.

31. THOMAS, *supra* note 27, at 86–87.

32. *Id.* at 87.

33. Schultz, *supra* note 21, at 47. This need not be restricted to unwelcome sexual conduct. *Id.* Any gendered discrimination used to keep a person in their place because of their sex would

bring the wrong into the public sphere as a form of discrimination actionable under Title VII, otherwise the "private" conduct in question would need to be severe enough to violate a state criminal law. The next Sections in this Part explore the general causes of action under Title VII and their evolutions through the court system.

B. CAUSE OF ACTION UNDER TITLE VII

There are two general causes of action under Title VII, disparate treatment and disparate impact.[34] Disparate treatment causes of action arise where the employer "fail[s] or refuse[s] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[35] Therefore in disparate treatment cases, the plaintiff must show that she was treated less favorably than individuals who were not part of her protected class, and that her poor treatment was due to the fact that she was a member of that class.[36]

The second type of action which can be brought through Title VII is discrimination based on disparate impact. This cause of action is concerned with the result of an employer's actions rather than the motivation behind the practice.[37] Title VII makes unlawful any employment practices that "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's" status as a member of a protected class.[38] Such practices are unlawful if the employer cannot show the business necessity of the practice, and that there are no alternative practices that the employer could use instead.[39]

With regards to sex discrimination under Title VII, disparate treatment and disparate impact are often referred to as *quid pro quo* and hostile work

---

suffice. *Id.* Schultz specifies that when a superior causes a subordinate to "suffer his angry tirades, to serve food or clean up at work, to take notes or 'tone down' their behavior, to endure being ignored and interrupted, to sit in the back and avoid the limelight, or to attend to his personal needs, these are all patronizing" enough to constitute harassment. *Id.*

34. Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 222 (1995).

35. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2012)).

36. Carla A. Ford, *Gender Discrimination and Hostile Work Environment*, U.S. ATT'YS' BULL., May 2009, at 1, *available at* https://www.justice.gov/sites/default/files/usao/legacy/2009/05/07/usab5702.pdf [https://perma.cc/H5BU-GXK6].

37. Munroe, *supra* note 34, at 224.

38. Civil Rights Act of 1964 § 703(a)(2) (codified as amended at 42 U.S.C. § 2000e-2(a)(2)).

39. *Id.* § 703(k)(1)(A)(ii) (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(ii)).

environment causes of action, respectively.[40] The distinction, however, between *quid pro quo* and hostile environment as a practicality only matters with regard to the threshold question of whether the plaintiff can prove discrimination.[41] The distinction between the two theories are not controlling on employer liability.[42] According to the Federal Guidelines on Discrimination Because of Sex, violations of Title VII on the basis of sex occur when:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[43]

With these guidelines in mind, it is important to remember that not all sexual conduct in the workplace leads to a cause of action under Title VII. To prove a sexual harassment claim under Title VII, the plaintiff must establish *prima facie* that: (1) she is a member of a Title VII protected group, (2) subject to sexual harassment, (3) such harassment was based on sex, (4) the harassment affected her employment, and (5) the employer was complicit in the creation of a hostile work environment.[44] The next Section gives an overview of these claims in the courtrooms.

C. SEXUAL HARASSMENT AS SEX DISCRIMINATION IN COURT

The first federal sexual harassment case was *Barnes v. Train*.[45] In *Barnes,* the plaintiff alleged that her supervisor at the EPA propositioned her for an affair, and when she rejected the advances her employment was terminated.[46] Barnes' case initially failed[47] because the court determined "that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."[48] While this may well have

40. Avery, *supra* note 30, at 3.

41. *Id.*

42. *Id.*

43. 29 C.F.R. § 1604.11(a) (2018).

44. Henson v. City of Dundee, 682 F.2d 897, 903–05 (11th Cir. 1982); Avery, *supra* note 30, at 5.

45. Barnes v. Train, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

46. *Id.*

47. The decision in *Barnes v. Train* was later reversed by *Barnes v. Costle,* 561 F.2d at 995.

48. *Barnes*, 1974 WL 10628, at *1.

been "inexcusable," it did not constitute an employment cause of action.[49] Several cases following *Barnes* led to the same result, that sexual conduct in the workplace was a private matter and not to be dealt with through Title VII.[50] However, the reversal of *Barnes* was a tipping point; while courts still viewed *sexual* actions private, they began to acknowledge that some actions in the workplace could be distinguished as based on sex.[51]

Like other forms of discrimination,[52] sex discrimination was first accepted in courts under a disparate treatment theory.[53] The first successful sexual harassment claims were, typically, those where the plaintiff refused a boss's sexual advances and therefore was fired, a textbook example of *quid pro quo* sexual harassment.[54] The first case to address a hostile "condition of work" was *Vinson*.[55] In *Vinson,* the Supreme Court ultimately held that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[56] However, *Vinson* was a unique case as the plaintiff, Mechelle Vinson, acquiesced to her boss's sexual advances and therefore kept her job rather than being terminated.[57] This posed a new problem for *quid pro quo* sexual harassment. While on one hand it reinforced the *quid pro quo* logic, instead of refusing to sleep with her boss and losing her job, Vinson slept with her boss

49. *Id.*

50. *See, e.g.*, Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) (explaining that Title VII "is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley"), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976) ("It is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability."), *rev'd*, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163–64 (D. Ariz. 1975) ("[H]olding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual."), *vacated*, 562 F.2d 55 (9th Cir. 1977).

51. *Barnes*, 561 F.2d at 984; STREBEIGH, *supra* note 28, at 258.

52. Munroe, *supra* note 34, at 222.

53. THOMAS, *supra* note 27, at 87.

54. *See generally* Garber v. Saxon Bus. Prods., Inc., 552 F.2d 1032 (4th Cir. 1977) (holding that a valid cause of action exists under Title VII when an employer policy compels employees to submit to sexual advances from superiors); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1390–91 (D. Colo. 1978) (holding that damages were appropriate where an employee was terminated for refusing to have sexual relations with her supervisor); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977) (holding that an employer can be liable under Title VII when not investigating employee's complaint that she was discharged for refusing sexual advances of her supervisor); THOMAS, *supra* note 27, at 87 (discussing the trends in sexual harassment litigation).

55. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64–68 (1986); STREBEIGH, *supra* note 28, at 259 (describing the background of the *Vinson* case).

56. *Vinson*, 477 U.S. at 64 (second alteration in original).

57. *See id.*

and kept it.[58] Yet, there was a worry that the court, rather than seeing discrimination, would revert to the understanding that whatever happened was a personal issue between the parties and not in the purview of Title VII.[59] Indeed, this is what happened at the trial level.[60]

At the Supreme Court, however, *Vinson* resulted in the first win of a sexual harassment claim on the basis of a hostile work environment. Justice Rehnquist, writing for the Court, noted: "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."[61] Further, the Court made clear in *Vinson* that "voluntariness" was not to be equated with welcomed conduct.[62] While providing a big win for advocates fighting against sex based discrimination, the Court still left much unclear and did not announce standards for a hostile work environment.

Since 1993, the controlling case on the standards for the creation of a hostile work environment suit under Title VII has been *Harris v. Forklift Systems, Inc.*[63] In *Harris*, Justice O'Connor "t[ook] a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[64] While Justice O'Connor rejected the idea that "concrete psychological harm" was a requirement under Title VII,[65] the conduct in question must have created an environment that "would reasonably be perceived, and is perceived, as hostile or abusive."[66] Therefore, showing of a hostile work environment took a two-pronged approach: The environment must be both objectively hostile to the reasonable woman, and subjectively hostile to the plaintiff.[67] This implies the use of a reasonable woman standard—when the victim is a woman—yet, in *Harris* the reasonable woman standard was not used. It was the start, however,

58. *See id.*; STREBEIGH, *supra* note 28, at 259.

59. STREBEIGH, *supra* note 28, at 259.

60. Vinson v. Taylor, No. 78-1793, 1980 WL 100, at *7 (D.D.C. Feb. 26, 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd and remanded sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) ("If the plaintiff and Taylor did engage in an intimate or sexual relationship during the time of plaintiff's employment with Capital, that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at Capital or her advancement or promotions at that institution.").

61. *Vinson*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

62. *Id.* at 68.

63. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

64. *Id.* at 21.

65. *Id.* at 22.

66. *Id.*

67. *Id.* at 21–22 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

of the evolution of standards in Title VII cases which are discussed in the next Section.

D. THE REASONABLE WOMAN STANDARD

In *Harris*, the Supreme Court used a reasonable person standard to determine the objective hostility of a work environment.[68] Following *Harris* however, some lower courts took different perspectives on who the reasonable person in question was. The reasonable woman standard was first promoted by Sixth Circuit Judge Damon Jerome Keith, dissenting in *Rabidue v. Osceola Refining Company*.[69] As Judge Keith noted, a reasonable woman standard would allow "courts [to] adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant."[70] The emphasis on the different perceptions—that individuals in different classes have their "sociological differences"—is important.[71] For, as Judge Keith further noted, "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."[72] In making this point, Judge Keith amplified the fact that the perceptions of "society" and the perceptions of a reasonable woman were not the same thing.[73]

The Ninth Circuit was the first circuit to use the reasonable woman standard.[74] In *Ellison v. Brady*, the Ninth Circuit evaluated the hostility of the work environment through the perspective of the victim.[75] This required the

68. Avery, *supra* note 30, at 7.

69. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting) ("Nor do I agree with the majority holding that a court considering hostile environment claims should adopt the perspective of the reasonable person's reaction to a similar environment. In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men." (citation omitted)), *abrogated by Harris*, 510 U.S. 17; *see also* V. Blair Druhan, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355, 362 (2013).

70. *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting).

71. *Id.*

72. *Id.*

73. *Id.* at 627 ("Nor can I agree with the majority's notion that the effect of pin-up posters and misogynous language in the workplace can have only a minimal effect on female employees and should not be deemed hostile or offensive 'when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at newsstands, on prime-time television, at the cinema and in other public places.' 'Society' in this scenario must primarily refer to the unenlightened; I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. . . . However, the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery." (citation omitted)).

74. Alyssa Agostino, Note, *The Reasonable Woman Standard's Creation of the Reasonable Man Standard: The Ethical and Practical Implications of the Two Standards and Why They Should Be Abandoned*, 41 J. LEGAL PROF. 339, 339 (2017).

75. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

court to take a gendered approach.[76] In doing so, the court acknowledged that decisions on whether or not sexual assault occurred had to account of the different power dynamics at play in the environment and secondly, the decision had to acknowledge that these power dynamics disproportionately affected women.[77] Therefore, "[a]t its roots, the argument for the standard is based squarely on the assumption that there is indeed a 'wide divergence' between the perspectives of men and women when evaluating social-sexual behaviors."[78] The standard developed addressing the need to take into account differing perceptions of actions that could lead to a sexual harassment claim.

The Supreme Court has not rejected the use of the reasonable woman standard for Title VII cases. When *Harris* reached the Court, the Justices acknowledged in passing the use of the reasonable woman standard by lower courts in *Harris*[79]—yet Justice O'Connor, writing for the Court,[80] and Justices Scalia[81] and Ginsburg,[82] concurring separately, kept with the reasonable person standard. Many courts have utilized a reasonable victim's perspective, encompassing sex discrimination claims for LGBTQ individuals.[83] This approach is the one suggested by the guidelines of the EEOC.[84]

E. EVIDENCE OF UNWELCOMED CONDUCT IN TITLE VII CLAIMS

In sexual harassment cases, as the evolution of sexual harassment shows, much depends on how the trier of fact—or society—views professional interactions between individuals. The salient issue is the line where workplace interactions went from uncomfortable to harassment. As noted by experts and practitioners, sexual harassment "was about the sort of *situations* that society

76. *Id.* ("If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy. We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women.").

77. Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 35 (1998).

78. *Id.*

79. Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993).

80. *Id.* at 21.

81. *Id.* at 24 (Scalia, J., concurring).

82. *Id.* at 25 (Ginsburg, J., concurring).

83. Avery, *supra* note 30, at 8–9.

84. *Policy Guidance on Current Issues of Sexual Harassment*, EEOC, https://www.eeoc.gov/policy/docs/currentissues.html [https://perma.cc/4SV9-U3TW] (last updated June 21, 1999) ("The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant.").

expected could be handled by *a mature woman*."[85] What, then, signified that a situation has gone beyond benign cultural interactions to actionable sexual harassment and how is it proven in the court of law? By whose standards is this determined?

As with many causes of actions, "[d]isputes over evidentiary issues lie at the core of most employment trials."[86] Evidentiary issues in sexual assault cases have always been a contentious issue. The unwelcomeness requirement has led many defendants to present "[e]vidence of a complainant's sexually provocative speech or dress [as] relevant in determining whether she found particular advances unwelcome."[87] The EEOC notes that such "[e]vidence . . . should be admi[ssible] with caution in light of the potential for unfair prejudice."[88] This highlights the unique problem with sexual harassment, especially hostile work environment cases, where how a person reacts to a situation may be a poor indicator of how that person actually perceives of the interaction, but is the necessary evidence presented at trial.

In disparate treatment cases, the plaintiff must show that the defendant intended to discriminate against her because of her protected class.[89] Here "the plaintiff is required to prove that the defendant had a discriminatory intent or motive."[90] This discrimination, however, need not be conscious and can be based on stereotyping.[91] In such cases, the plaintiff has the burden of making out a *prima facie* case against the employer, then the burden shifts where the employer must show by a preponderance of the evidence that there was a legitimate reason for the treatment in question.[92] Unwelcomed conduct, as the Court in *Meritor Savings Bank, FSB v. Vinson* noted, "presents [a] difficult problem[] of proof" which "turns largely on credibility determinations."[93] To make out a *prima facie* case the plaintiff must overcome potential credibility questions and stereotypes. Applying a reasonable woman standard makes this more possible.

85. STREBEIGH, *supra* note 28, at 223.

86. Lisa J. Banks & Alan R. Kabat, *Evidence Issues in Harassment and Retaliation Cases: The Plaintiff's Perspective*, ALI-ABA 1 (2005), *available at* https://www.kmblegal.com/wp-content/uploads/ALI_ABA_Evidence_Chicago.pdf [https://perma.cc/5XCU-J5BD].

87. *Policy Guidance on Current Issues of Sexual Harassment*, *supra* note 84.

88. *Id.*

89. Munroe, *supra* note 34, at 222–23.

90. Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986 (1988).

91. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e–2(m) (2012)); *see also* Munroe, *supra* note 34, at 223.

92. *Watson*, 487 U.S. at 986.

93. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

III. THE REASONABLE WOMAN STANDARD IS GROUNDED IN THE THEORY THAT DIFFERENT GENDERS SEE THE WORLD DIFFERENTLY

When courts adopt a reasonable woman standard, they are trusting people of all genders to apply that standard at trial. In hostile work environment sexual harassment cases, the salient issue is whether the environment created was both objectively hostile, and the victim perceived the environment as hostile.[94] This standard requires jurors to evaluate social interactions, theoretically from a layperson's perspective. As such, it is problematic; sociological and psychological studies show that perceptions and evaluations of social interactions are inherently gendered. These gendered perceptions could have significant implications when a juror is asked to consider whether a hostile work environment was created, implications that are not present in the reasonable person or even reasonable man standards due to the long histories of those standards. This Part will give a brief overview of how persuasive information is processed, with emphasis on commonplace situations to highlight the fundamental issue with the reasonable woman standard. It then highlights how this evidence of the divided gendered perceptions applies to the reasonable woman standard. As the concept that different genders have different world views is foundational in the reasonable woman standard, the standard is ineffective standing on its own.

A. THE IMPACT OF VARYING PERCEPTIONS ON COGNITIVE PROCESSING

People form opinions and come to conclusions through a myriad of psychological processes. Psychologists generally accept that when individuals process information meant to persuade, they either do so systematically or heuristically.[95] When determining the persuasive weight to give information, a two-step or dual cognitive process is utilized.[96] An individual goes through

94. *See supra* Section II.C.

95. Margaret Bull Kovera et al., *Reasoning About Scientific Evidence: Effects of Juror Gender and Evidence Quality on Juror Decisions in a Hostile Work Environment Case*, 84 J. APPLIED PSYCHOL. 362, 363–64 (1999).

96. *See generally* John T. Cacioppo & Richard E. Petty, *The Elaboration Likelihood Model of Persuasion*, 11 ADVANCES IN CONSUMER RES. 673 (1984) (presenting the "elaboration likelihood model" as a theory for how consumers utilized their cognitive resources when being presented with information meant to persuade them). When individuals have both the motivation and ability to engage with an issue, they are more likely to scrutinize, elaborate, and draw inferences from the information and come to a more complete evaluation of that information by going through a systematic cognitive process. *Id.* When the information is presented so that it is viewed as unimportant or is of a matter which they cannot understand the individual will utilize heuristic processing. *Id.*; *cf.* Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCHOL. 752, 754 (1980) (presenting the Systematic-Heuristic analysis as a theory for evaluating a response to persuasive information). When presented with information that is important and requires a reliable evaluation, a systematic strategy will be employed to come to an accurate judgement. *Id.* Heuristic reasoning however, requires less cognitive effort by relying on general rules and may come to less accurate conclusions. *Id.* at 753. Cacioppo & Petty's and Chaiken's theories are generally

systematic cognitive processing when they carefully consider the argument presented before them, scrutinizing arguments and the quality of the information used in the decision-making.[97] Systematic processing, however, requires both cognitive ability and the capacity to process the information presented.[98] Therefore, studies show that systematic processing is "less likely to be seen among perceivers who possess little knowledge in the domain."[99] Conversely, heuristic processing uses pre-conceived decision rules to help form a conclusion.[100] This kind of processing occurs when judgments are made based off memories that are available, accessible, and applicable to the judgment that needs to be made.[101] These decision rules are things like: expert opinions, social consensus, the perceiver's current opinions, etc.[102]

Both internal and external factors influence the type of cognitive process a person will use in a given situation. External factors include things such as quality of the messaging conveying the information so that it is easier to understand.[103] However, internal factors can also influence a person's cognitive process, namely, elements of a person's disposition that require more or less effort to process information.[104] The differing gender experiences can be such internal factors. Some studies suggest that:

> [G]ender differences exist in part because it is easier for women than for men to imagine themselves being offended by the plaintiff's working environment, what they call a self-referencing effect. It is possible that this self-referencing effect is due to women's greater experience with, and therefore greater knowledge of, harassing situations.[105]

---

accepted by persuasion researchers. *See* Shelley Chaiken & Alison Ledgerwood, *Heuristic Processing*, *in* ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 427, 427 (Roy F. Baumeister & Kathleen D. Vohs eds., 2007).

97. Craig W. Trumbo, *Heuristic-Systematic Information Processing and Risk Judgment*, 19 RISK ANALYSIS 391, 392 (1999).

98. Serena Chen & Shelly Chaiken, *The Heuristic-Systematic Model in Its Broader Context*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 73, 74 (Shelly Chaiken & Yaacov Trope eds., 1999).

99. *Id.*

100. Trumbo, *supra* note 97, at 392.

101. Chen & Chaiken, *supra* note 98, at 74.

102. Trumbo, *supra* note 97, at 392.

103. Kovera et al., *supra* note 95, at 363.

104. John T. Cacioppo et al., *Effects of Need for Cognition on Message Evaluation, Recall, and Persuasion*, 45 J. PERSONALITY & SOC. PSYCHOL. 805, 806 (1983) ("[J]ust as there are situational factors such as distraction and issue involvement that influence the likelihood that individuals will think about and elaborate on the externally provided message arguments, so too must there be dispositional factors governing message processing and, indirectly, persuasion.").

105. Kovera et al., *supra* note 95, at 363 (citation omitted).

Heuristics reasoning explains a lot of the decisions made in day to day life,[106] as it requires less cognitive effort on the part of the perceiver.[107] However, this reliance on heuristic reasoning is problematic for legal applications. Decisions and judgments of jurors based off of heuristic reasoning often leads to inaccurate, or "sub-optimal" choices as "heuristic reasoning often will cause actors subject to the legal system to make non-optimal judgments and choices because the actors over- or underweight information concerning facts in the world or their subjective preferences relative to that information's probative value."[108] Therefore, unless the decision at hand is one that is suited for heuristic reasoning, the use by a jury member would result in inaccurate outcomes.

There are significant implications of how jurors process information when it comes to sexual harassment cases. As sexual harassment, particularly in hostile work environment cases, involve situations where most people have experience—interactions in the work place—it is reasonable that they would revert to heuristic processing when judging the interactions. Memories of such interactions are available, accessible, and appear to be applicable to the question before them: Did this interaction objectively create a hostile work environment?

B. GENDERED PERCEPTIONS OF SEXUAL HARASSMENT

That different people perceive social interactions differently goes without saying. Yet, in addition to highlighting the prevalence of sexual harassment, the #MeToo movement has underscored obvious fault-lines, largely between men and women. A recent Pew study showed that 51 percent of male respondents thought the movement would make it more difficult to navigate workplace interactions.[109] Whatever other inferences that can be drawn from such studies, it is clear that one interaction can be viewed dramatically different by different actors. The difference in perceptions with regard to sexual harassment is even more stark along political and ideological lines. A 2018 Pew Research Center study noted that "Democrats and Democratic-leaning independents say that men getting away with sexual harassment (62%) and women not being believed when they claim they have

106. Russell Korobkin, *The Problems with Heuristics for Law* 3 (Univ. of Cal., Law & Econ. Research Paper Series, Working Paper No. 04-1, 2004) ("In reality, individuals more often rely on simpler, heuristic reasoning to make both judgments about the world and decisions of how to act within that world. Difficult questions (i.e., which tactic is most dangerous?) are dealt with by substituting answers to easier questions (i.e., which tactic most easily brings to mind an example of a harmful outcome?), and difficult decisions (i.e., which tactic will maximize benefits minus costs?) are resolved by making easier choices (i.e., which option has the greatest positive affective valence?).").

107. Chen & Chaiken, *supra* note 98, at 74.

108. Korobkin, *supra* note 106, at 3.

109. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RES. CTR. (April 4, 2018), http://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo [https://perma.cc/T4VZ-JEB7].

experienced it (60%) are major problems."[110] Conversely, "just 33% of Republicans and Republican-leaning independents see men getting away with it as a major problem, and 28% say the same about women not being believed."[111]

To further obfuscate the juror's job, "sexual" harassment—on the basis of sex under Title VII—does not have to be sexual in nature.[112] As Schulz notes, the essence of "harassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality."[113] The EEOC refers to this as "gender harassment."[114] While the reports that make lasting impressions tend to focus on egregious unwanted sexual advances and sexual assaults,[115] actions that humiliate and engrain inferior statuses on individuals because of their sex can be traumatic as well.[116] This can include harassment of men who fail to conform to social masculine standards.[117] Such non-sexual, gender-based actions that can contribute to a hostile work environment include:

> Patronizing treatment, physical assaults, hostile or ridiculing behavior, social ostracism and exclusion, and work sabotage, for example, are all used to make women feel inferior, just like sexual

110. *Id.*

111. *Id.*

112. Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 19 (2018).

113. *Id.*

114. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 9 (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [https://perma.cc/ZH5B-FNLV].

115. The majority of sexual harassment and abuse issues that dominate multiple news cycles involved overt sexual misconduct by powerful men. *See, e.g.*, Will Hobson, *Larry Nassar, Former USA Gymnastics Doctor, Sentenced to 40–175 Years for Sex Crimes*, WASH. POST (Jan. 24, 2018), https://www.washingtonpost.com/sports/olympics/larry-nassar-former-usa-gymnastics-doctor-due-to-be-sentenced-for-sex-crimes/2018/01/24/9acc22f8-0115-11e8-8acf-ad2991367d9d_story.html [https://perma.cc/NS2W-Y8WL] (covering the sentencing of Larry Nassar, the USA Gymnastics doctor who systematically sexually assaulted gymnasts); Kantor & Twohey, *supra* note 2 (breaking the story of Harvey Weinstein's pay-off for sexual harassment); Eric Levenson & Aaron Cooper, *Bill Cosby Sentenced to 3 to 10 Years in Prison for Sexual Assault*, CNN (Sept. 26, 2018, 10:03 AM), https://www.cnn.com/2018/09/25/us/bill-cosby-sentence-assault/index.html [https://perma.cc/3273-ZSPQ] (covering the sentencing of Cosby for sexual assault); Maria Puente, *Kevin Spacey Scandal: A Complete List of the 15 Accusers*, USA TODAY (Nov. 16, 2017, 12:04 AM), https://www.usatoday.com/story/life/2017/11/07/kevin-spacey-scandal-complete-list-13-accusers/835739001 [https://perma.cc/8BK4-TSXW] (covering the pervasiveness and timeline of Kevin Spacey's sexual assault allegations); Ryzik et al., *supra* note 4 (breaking the story of sexual assault allegations against Louis CK); Erik Wemple, *Bill O'Reilly: An Awful, Awful Man*, WASH. POST (April 2, 2017), https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/04/02/bill-oreilly-an-awful-awful-man [https://perma.cc/3CMC-FTSW] (breaking the story of O'Reilly's sexual misconduct against other Fox News employees).

116. Schultz, *supra* note 112, at 20.

117. Heather McLaughlin et al., *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77 AM. SOC. REV. 625, 626 (2012); Schultz, *supra* note 112, at 19.

> come-ons. Bosses not only demand sexual favors; they also insist that women serve food or clean up, submit to their angry tirades, or behave or dress in ways that please them. Bosses and coworkers engage in sexual advances and ridicule; they also downplay or take credit for women's accomplishments, exclude them from meetings and information, undermine their work and reputations, and comment or otherwise convey that women don't belong.[118]

Such examples highlight the broad range of actions that, if persistent and continual enough, can elevate non-illegal workplace issues into actionable sexual harassment.

Further, the status of women in the workplace does not track with the common perceptions of sexual harassment. Feminist theory has long contended that harassment is a product of power dynamics.[119] Yet, studies have shown that women who hold authority positions are more likely to experience harassment.[120] While this could be equally indicative of several things distinct from increased sexual harassment *because* of those authority positions, such as increased likelihood to recognize and report harassment or being in the workforce for a longer period of time, harassment of women in managerial positions is notable when compared with men, where the type of positions has no bearing on the likelihood of discrimination.[121]

Regardless of these varying perceptions, a reasonable woman standard is only necessary if those differences in perceptions of sexual harassment must be "large, consistent, and inexplicable on grounds other than gender."[122] There are many other factors that could lead to diverging perceptions of actions that could lead to actionable sexual harassment, such as power imbalances, age of either party in the interaction and age of the person judging the interaction, professional status of either party, and political leanings to name a few.[123] Scholars have argued however, that, while the significance that gender has in differing perceptions varies, gender is nearly

---

118. Schultz, *supra* note 112, at 20 (footnote omitted).

119. Amy Allen, *Feminist Perspectives on Power*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), *available at* https://plato.stanford.edu/archives/fall2016/entries/feminist-power [https://perma.cc/6W8G-7PKK].

120. McLaughlin et al., *supra* note 117, at 627; Kevin Stainback et al., *The Context of Workplace Sex Discrimination: Sex Composition, Workplace Culture and Relative Power*, 89 SOC. FORCES 1165, 1178 (2011). Stainback et al. note in their study the obvious point that this increased rate of reported harassment by women in authority positions could be an indication of increased likelihood to report harassment rather than solely an indicator of increased harassment because they are in positions of authority. *Id.* ("The fact that those in the managerial ranks are more likely to report having experienced sex discrimination could reflect a backlash toward their garnering of a higher status institutional position, or greater education and thus knowledge of their rights concerning equitable treatment.").

121. Stainback et al., *supra* note 120, at 1179–80.

122. Blumenthal, *supra* note 77, at 46.

123. *Id.*

universally found as a factor in these varying perceptions.[124] Therefore, the reasonable woman standard, as opposed to the reasonable person standard, does seem to be the most appropriate standard in sexual harassment cases.

C. *Ability to Apply the Reasonable Woman Standard*

The aspects of sexual harassment that call for the need to use a reasonable woman standard are at the heart of a main issue with using such a standard. Namely, how do men apply the standard if they have not had the same life experiences as a woman? This may seem like an insincere consideration; woman have been tasked with applying a reasonable person standard, that for most of its evolution was a reasonable man standard, since they were allowed to sit on juries. The reasonable person standard, though certainly distinct from the English Common Law reasonable man standard,[125] largely still conceptualized a masculine perspective.[126] However, the reasonable woman standard was a new development tasked with addressing

---

124. There is a philosophical hiccup here. *See, e.g.*, KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 146–49 (2017). In her book, Manne defines "misogyny," as the means of enforcing the patriarchy, "it functions to *police* and *enforce* a patriarchal social order without necessarily going via the intermediary of people's assumptions, beliefs, theories, values, and so on. Misogyny serves to enact or bring about patriarchal social relations." *Id.* at 79. Conversely, "Sexism," according to Manne, "works by *naturalizing* sex differences, in order to justify patriarchal social arrangements, by making them seem inevitable, or portraying people trying to resist them as fighting a losing battle." *Id.* As Manne notes, misogyny does not merely display itself in violent outbursts, but often acts as mundane as catcalls or microaggressions, referring to women as shrill or power hungry. *See id.* at 284–88. Further, she notes that women are often the strictest policers of this social order. *Id.* at 146–49.

> Women's role as givers, and privileged men's as takers, is internalized by women as well as men; so women who are fully paid-up members in the club of femininity are no less prone to enforce such norms, at least in certain contexts. Indeed, when it comes to third-personal moralism, as opposed to second-personal reactive attitudes, they may be *more* prone to do so, because women who appear to be shirking their duties, in being, for example, careless, selfish, or negligent, make more work for others who are "good" or conscientious. Moreover, such women threaten to undermine the system on which many women have staked their futures, identities, sense of self-worth, etc.

Id. at 146–47.

I will not attempt to argue with Manne's thesis and, in fact, personally agree with her conceptions of misogyny versus sexism. I do not think, however, the fact that many (most/all) women have some level of engrained misogyny diminishes the point I am making in this Note. Yes, non-sexual, nevertheless, gender-based aggressions fall under the umbrella of sexual harassment under Title VII *because* they uphold the (gendered) status quo and therefore fall within Manne's "policing" conception of misogyny. That does not mean, however, that a misogynistic man's perception of an event is the same as a misogynic woman's perception of the same event, even if the conclusion the two individuals eventually come to is the same (i.e., nothing to see here).

125. Vaughan v. Menlove (1837) 132 Eng. Rep. 490, 493 ("[W]e ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.").

126. Peterson, *supra* note 16, at 154 ("[T]he presumption of gender-neutrality is often a cover for gender-bias."); *see also* Agostino, *supra* note 74, at 342.

sexual harassment.[127] Therefore, the application of the standard has not had the benefit of gradual evolution as the reasonable person standard.

The issue in the use of the reasonable woman standard, therefore, is that its necessity makes it impossible for someone of a different gender perspective to apply it. In addition to implicit biases held by every individual,[128] the scientific literature on cognitive functioning supports the premise that individuals revert to heuristic processing if they recognize a situation but are unable to understand the inconsistent information being presented to them. This is the issue posed by the use of the reasonable woman standard; it is to be applied in social situations everyone recognizes, but asks the jury to apply information that, from an efficiency viewpoint, is not conducive for systematic cognitive processing. Because these social situations seem so commonplace, without emphasis on the importance of the other perspective, jurors will subconsciously revert to heuristic reasoning.

Sexual harassment cases, therefore, present a situation where the standard used is hard to apply. A reasonable person standard is inadequate to address the social wrong presented by such cases, as the cases themselves are "inherently gendered."[129] The issue to address is how to use a standard that cannot be applied without presenting a jury with the information to understand the differing gendered perceptions of workplace interactions and the significance of such a difference. Without this further information, the reasonable woman standard does not do what it was created to accomplish.

IV. SOLUTION—SOCIAL FRAMEWORK EVIDENCE AS A FOUNDATION TO USE THE REASONABLE WOMAN STANDARD

Background information is needed to apply the reasonable woman standard. The jury should perceive this evidence as unbiased and coming from a reputable source. Despite its imperfections, expert testimony is the best course of action. Expert testimony is admissible at trial to help the jury understand an issue that is not common knowledge. That is, in fact, the test for whether expert testimony is relevant: consideration of whether a person without specialized training could come to a conclusion on an issue without the help of someone who did have specialized knowledge of the applicable subject.[130] Evidence shows that the average man and the average woman perceive workplace interactions differently. Therefore, expert testimony would be of value in sexual harassment cases where the reasonable woman standard is used.

---

127. Peterson, *supra* note 16, at 141.

128. Implicit and explicit biases are beyond the scope of this paper but are another important issue with regards to sexual harassment cases and should be noted.

129. Peterson, *supra* note 16, at 154. This is true even regarding cases of same sex discrimination, as such harassment often occurs because the victim fails to meet expected gender norms.

130. FED. R. EVID. 702 advisory committee's notes to 1972 Proposed Rules.

The use of expert evidence seems particularly fitting as research and social science literature have helped spur the adoption of the reasonable woman standard.[131] This Note, however, is not suggesting that expert testimony be used to provide evidence that sexual harassment took place. Rather, that the use of the reasonable woman standard, which seems beneficial considering the nature of sexual harassment, is unable to be accurately applied in cases without background information speaking to the gendered differences in how individuals perceive the same workplace interactions. While this need not be presented through expert testimony, this is the best vehicle, as

> [c]ommunicating . . . testimony of expert witnesses [is] more effective than communicating frameworks via instruction. For example, "live" testimony may be more understandable to juries, cross-examination of experts may help explain methodological aspects of the research, and, in some jurisdictions, jurors can submit clarifying questions to be asked of the witness.[132]

The use of experts as opposed to jury instructions would protect the jurors from confusion and would be more effective.

Social framework evidence fits the task of providing background information to the jurors from experts. To fit with the varying needs of each trial, judges' procedures allowing or requiring social framework evidence for sexual harassment cases would be the simplest and most effective solution.[133] After introducing social framework evidence, this Note will discuss some of the possible issues with using such a tool. Nevertheless, social framework evidence is the best way for presenting jurors the information they need to apply the reasonable woman standard.

A. SOCIAL FRAMEWORK EVIDENCE

As noted above, the testimony used to provide foundation information necessary for the reasonable woman standard is not, strictly speaking, being used as evidence for either the plaintiff or the defendant's case. Traditionally, there are two kinds of facts at play in a trial: legislative and adjudicative.[134] Adjudicative facts are facts that immediately pertain to the case where they

---

131. Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 801 (1993).

132. John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1732 (2008).

133. FED. R. CIV. P. 83(b) ("A judge may regulate practice in any manner consistent with federal law . . . .").

134. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 561 (1987). The distinction between adjudicative facts and legislative facts was originally meant to add clarity to administrative law, however, the distinction has now been embraced and applied outside of the administrative law context. *Id.*

are presented.[135] Legislative facts, however, relate to broader law and policy concerns beyond the scope of the trial in which they are presented.[136] They, therefore, "have relevance to legal reasoning and the lawmaking process."[137] While social science has been used as evidence towards both adjudicative and legislative facts, in the late 1980s the use of social science evidence was increasingly being used in ways that did not fit squarely into either category[138] and instead had elements of both.[139] Therefore, a third category of facts was proposed—social framework—where "the use of general conclusions from social science research in determining factual issues in a specific case."[140]

Social framework evidence is evidence presented for the purpose of providing the factfinder with information about the context of the facts on which the factfinder is tasked with making a determination.[141] It is therefore defined as "testimony [which] does not bear directly on the ultimate fact to be decided by the trier; rather, it provides a social and psychological context in which the trier can understand and evaluate claims about the ultimate fact."[142] The presentation of such evidence cannot tell the jury how to decide a case but "tells them what to consider" when doing their duty as a factfinder.[143] Confusion lies in that social framework evidence uses "general conclusions drawn from social science research to help evaluate factual issues in a specific case," but does not make determinations on those facts.[144]

The jurists who first suggested the use of social framework evidence to provide background information in cases, Laurens Walker and John Monahan, cited four notable times when social science evidence would be particularly helpful to the jurors.[145] These areas were: "eyewitness identification, risk assessments of violence, battered woman syndrome, and rape trauma syndrome."[146] These are all situations where the perceptions of the individual being presented to the fact-finder are difficult for the average person to relate or understand because they do not have the requisite experience. Where the situation of presenting social framework evidence for application to the reasonable woman standard expands the class of people

135. *Id.* (specifying the difference between adjudicative facts and legislative facts and the methods for establishing each); *see also* FED. R. EVID. 201(a) advisory committee's note to 1972 Proposed Rules (same).

136. Walker & Monahan, *supra* note 134, at 561.

137. FED. R. EVID. 201(a) advisory committee's note to 1972 Proposed Rules.

138. Walker & Monahan, *supra* note 134, at 563.

139. *Id.* at 569.

140. *Id.* at 570 (emphasis omitted).

141. Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 L. & CONTEMP. PROBS. 133, 133 (1989).

142. *Id.* at 135.

143. Tuli v. Brigham & Women's Hosp., Inc., 592 F. Supp. 2d 208, 211 (D. Mass. 2009).

144. Vidmar & Schuller, *supra* note 141, at 135.

145. Monahan et al., *supra* note 132, at 1726.

146. *Id.*

with the requisite expertise to everyone with a female-gendered life experience—or rather, restricts the class that requires the information to individuals who lack such life experience—the same need is present.

B. THE ADMISSIBILITY OF EXPERT TESTIMONY IN FEDERAL COURTS

As Title VII provides for a federal cause of action, the admissibility of expert testimony for social framework evidence must be pursuant to the Federal Rules of Evidence and federal case law. Expert witnesses are governed by Federal Rule of Evidence 702. First, the expert must be qualified "by knowledge, skill, experience, training, or education."[147] Once qualified, the expert may testify "in the form of an opinion or otherwise" to "scientific, technical, or other specialized knowledge" needed to help the factfinder "understand the evidence or to determine a fact in issue."[148] This testimony is allowed so long as it "is based on sufficient facts or data," and "is the product of reliable principles and methods."[149] Finally, the court should consider whether or not "the expert has reliably applied the principles and methods to the facts of the case."[150] While the rules of evidence are meant to be applied liberally, and err on the side of admitting evidence,[151] "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . misleading the jury."[152]

Daubert v. Merrell Dow Pharmaceuticals is the controlling case with regards to the admissibility of expert testimony.[153] In fact, Rule 702 of the Federal Rules of Evidence was actually amended to reflect the Court's opinion in *Daubert*.[154] According to *Daubert*, the trial court must first decide if the expert is testifying to scientific knowledge, and second, if it will assist the factfinder.[155] In *Daubert*, the Court considered the duplicability of the methods, how rigorous the theory in question "ha[d] been subjected to peer review and publication," the likelihood of error, existence of controls, and "general acceptance"; however, the Court was clear that the factors which they considered were not all-inclusive.[156] The Court, further, was careful to emphasize that the judge was to focus on the "principles and methodology,

147. FED. R. EVID. 702.

148. *Id.* R. 702(a).

149. *Id.* R. 702(b)–(c).

150. *Id.* R. 702(d).

151. *See id.* R. 402.

152. *Id.* R. 403.

153. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 (1993).

154. GEORGE FISHER, FEDERAL RULES OF EVIDENCE 2018–2019 STATUTORY AND CASE SUPPLEMENT 168 (3d ed. 2018).

155. *Daubert*, 509 U.S. at 592. The standard is preponderance of the evidence. FED. R. EVID. 104(a); *Daubert*, 509 U.S. at 592.

156. *Daubert*, 509 U.S. at 593–94.

not on the conclusions that they generate."[157] This focus was expanded in *General Electric Company v. Joiner*, where the Court found that methods and conclusions are inherently connected.[158]

The role of a court with regards to scientific expert testimony, according to *Daubert,* is to play a gatekeeping role that does not merely consider the evidence's relevancy, but also its reliability.[159] Reliability refers not only to the expert him or herself, but also to the science on which the testimony is based.[160] For, as the Seventh Circuit noted in the oft-quoted opinion, even "[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable."[161]The same circuit in *Smith v. Ford Motor Company* emphasized that the trial court should focus on methodology when considering reliability.[162]

Shortly after *Daubert,* the Supreme Court took up another case on the admissibility of expert testimony, this time considering experts who were not scientists.[163] In *Kumho Tire Company v. Carmichael,* the experts in question were engineers.[164] The Court reiterated the importance of finding reliable background methodology on which to make a determination of the reliability of the knowledge in its analysis.[165] In doing so, it dispelled any idea that there would be different processes of determination for scientific versus technical versus other specialized knowledge.[166] However, the Court in *Kumho* highlighted the "broad latitude" afforded to the district court in its determination of reliability,[167] and emphasized that the factors laid out in *Daubert* were informative—not a checklist.[168]

Evidence and testimony from disciplines such as psychology and sociology have been used by courts for decades. For example, in *Brown v. Board of Education*, social scientists provided evidence for the plaintiff's brief showing the impact of discrimination on school aged children through the famous black and white doll study.[169] In the same case, the Court cited psychological reports to support their finding that segregation had a

157. *Id.* at 595.
158. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).
159. *Daubert*, 509 U.S. at 589.
160. Smith v. Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000).
161. Clark v. Takata Corp., 192 F.3d 750, 759 n.5 (7th Cir. 1999).
162. *Smith*, 215 F.3d at 718.
163. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).
164. *Id.*
165. *Id.* at 148.
166. *Id.*
167. *Id.* at 142.
168. *Id.* at 150.
169. Jessica L. Martens, Comment, *Thinking Outside the Big Box: Applying a Structural Theory of Discrimination to* Wal-Mart Stores Inc. v. Dukes [131 S. Ct. 2541 (2011)], 51 WASHBURN L.J. 411, 411–12 (2012) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

detrimental effect on children of color.[170] Further, expert witnesses have generally been accepted in employment litigation situations in areas such as statistics and economics, primarily, however, to calculate damages.[171]

To date, experts in the fields of psychology and sociology have been less accepted, though not entirely rejected.[172] In *Collier v. Bradley University*, the plaintiff Collier, bringing an employment discrimination suit on racial grounds, sought to introduce "an expert on stereotyping."[173] While the court acknowledged that the field in question, social psychology, may have accepted methodology to analyze the content in question,[174] the expert herself must be able to specify the methodology she used so there is something for the court to evaluate.[175] In 2011, the Supreme Court rejected the admissibility of expert testimony as evidence of "a general policy of discrimination" by Wal-Mart.[176] While the Court notes that the testimony in question might not have even been property admitted, the Court makes the broader point that that testimony was so inconclusive that it did nothing to further the plaintiff's case.[177] Although admissibility is the first hurdle for social framework evidence to overcome, there are also notable issue with the evidence itself. The next Section discusses problems with social framework evidence.

C. PROBLEMS WITH SOCIAL FRAMEWORK EVIDENCE

One important concern with social framework evidence is that it infringes on the distinction between admissibility and weight of evidence, particularly when the information goes to a reasonable person type standard. One risk of expert testimony, at large, is the weight that is given to an expert's statements.[178] While this theoretically is remedied by cross-examination and

170. *Id.* at 411.

171. Brian L. McDermott & Susannah P. Mroz, *The Use of Experts in Employment Discrimination Litigation*, FED. LAW., June 2011, at 20, *available at* http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2011/June/Columns/Labor-Employment-Corner.aspx?FT=.pdf [https://perma.cc/3T29-KX7G].

172. *Id.* at 21.

173. Collier v. Bradley Univ., 113 F. Supp. 2d 1235, 1242 (C.D. Ill. 2000).

174. *See id.* at 1244–46.

175. *Id.* at 1246.

176. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353–55 (2011).

177. *See id.* at 354–55.

178. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993) ("Expert evidence can be both powerful and quite misleading . . . . Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 FED. RULES DECISIONS 631, 632 (1991))). Justice Cardozo, speaking of exclusion of hearsay evidence, gives the best depiction of the importance and necessity of the judge's gatekeeping role in excluding evidence: "The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds . . . that our rules of evidence are framed . . . . When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." Shepard v. United States, 290 U.S. 96, 104 (1933).

experts with differing perspectives, that itself leads to another issue: the worry that adding experts to lay social framework evidence will do more to confuse and delay the case then the benefit it would give to being able to apply the reasonable woman standard. This cost-benefit analysis depends on how great a benefit is gained from using a reasonable woman standard as opposed to a reasonable person standard.

Another issue is that the sociopsychological definition of sexual harassment is more broad than the legal definition of sexual harassment.[179] The sociopsychological definition focuses on the subjective interpretation of the interaction by the victim and does not consider whether the alleged sexual harassment had a negative impact on the work that the victim accomplished.[180] This definition encompasses behavior that would translate to *quid pro quo* sexual harassment and serious and continuous hostile work environment sexual harassment, but not less severe interactions such as general sexist remarks.[181] While this is a distinction that the judge will have to make clear to the jury, there is a potential for confusing the jury if the issue of competing definitions arises on the stand.

When considering expert witnesses, these first two concerns are not unique to social framework evidence. The extra weight given to an expert's statements is not overly problematic. That is exactly what social framework evidence is intended to do: push the juror to consider a common situation from a perspective they have not experienced. The issue is ensuring the experts speak only to how different genders perceive different interactions, not how the interaction or interactions at the center of the case *should* be perceived. The latter would infringe on the job of the jury, not help them. However, this is a common issue in any case where an expert is called to testify. In such cases, the albeit imperfect safeguards of the trial—judges, objections, jury instructions—keep the experts from infringing on factual or legal determinations. Further, having one court appointed expert giving objective determinations would provide the benefit at a greatly reduced cost. Considering the pervasiveness of sexual harassment, such safeguards, sufficient for other cases requiring experts, should be sufficient here. Additionally, issues with varying definitions between sociopsychological and legal sexual harassment can be remedied by either the judge or, more effectively, the process of having a competing expert.

---

179. James Campbell Quick & M. Ann McFadyen, *Sexual Harassment: Have We Made Any Progress?*, 22 J. OCCUPATIONAL HEALTH PSYCHOL. 286, 288 (2017).

180. *Id.*

181. *Id.* Quick and McFadyen place sociopsychological sexual harassment into general categories. *Id.* "Broadly, [sexual harassment] behavior, based on the social psychological definition, generally fits into one of five categories: general sexist remarks and or behavior, inappropriate sexual advances, solicitation of sexual activity, or rewarded sexual favors, coerced sexual activity that include threat of punishment or sexual assault." *Id.*

One final issue is the increased cost of providing expert testimony. The experts for advice or as witnesses at trial routinely charge over $1,000 per hour for their services, not including travel and lodging expenses.[182] Further, the phenomenon of dueling experts will likely double the overall costs of the trial.[183] Lawyers advocating for the use of the reasonable woman standard will need to balance the benefit of having a standard that fits better for the situation with the added costs and protentional confusion that it could bring to trial. However, despite these issues, if the reasonable woman standard is applied, the extra costs and potential confusion are outweighed by the necessity of social framework evidence.

Therefore, the most significant issue is the practicality of having an expert testify to social framework evidence. As noted above, experts rapidly add to the costs of litigation. If an expert is needed to supply social framework evidence for the case to be winnable, one might ask: Is the likelihood of winning the case enough to justify the increased cost? A person who allegedly suffered sexual harassment should have the tools to win their case, but this really goes to a broader view of the issue. The pervasiveness of sexual harassment and significant differences in how genders perceive it suggests that many kinds of sexual harassment will go unaddressed if victims do not have the opportunity to bring them to court. Each case requires its own balancing of the extra costs with the potential benefits, having cases that take seriously the problem of these perceived differences can additionally have a legitimizing effect on society as a whole.

D. Social Framework Evidence Allows the Reasonable Woman Standard to Be More Effectively Applied

While the issues with social framework evidence are things to be aware of, it should be seen as a necessary part of sexual harassment cases applying the reasonable woman standard. The risk of a juror placing undue weight on expert testimony is present whenever expert testimony is given. The protections of heightened admissibility requirements for expert testimony[184]—as well as further protections such as experts called by the opposing counsel and cross-examination—also alleviate some of the worry that jurors will grant too much deference to an expert providing social framework evidence. The weightier issue is the potential for confusion that is introduced to the jury by social framework testimony, the differing definitions being one example. However, if the reasonable woman standard is required

182. Marc Davis, *For an Expert Witness, Consider Reputation, Location and Cost*, ABA JOURNAL (Nov. 1, 2016, 1:20 AM), http://www.abajournal.com/magazine/article/choosing_expert_witness [https://perma.cc/L28M-GS7C]. The amount that an expert costs is highly dependent on the field that they are in; forensic accountants can cost up to $150,000. *Id.*

183. *See* Theresa W. Parrish, *Tips for Dealing with Exorbitant Expert Witness Fees*, 29 TRIAL PRAC., Summer 2015, at 7.

184. FED. R. EVID. 701–703; *supra* notes 147–77 and accompanying text.

for a fair sexual harassment trial, clear instructions from the bench and, again, zealous advocacy by the opposing counsel, must be sufficient protection.

V. CONCLUSION

Sexual harassment has been a long-standing problem in society that different people view with very different perspectives. These differing perceptions on sexual harassment, while stemming from many complex factors, fall distinctly along gender divides.[185] This gender divide makes a reasonable woman standard necessary in sexual harassment cases, less a great number of sexual harassment situations be ignored for not being severe enough to be actionable. However, this foundational premise of the reasonable woman standard makes application of the standard difficult for individuals who do not share the same life experiences.

Social framework evidence can be used to supply the jury with background information that will aid them in assessing the information presented to them at trial. Without access to such information, and without explanation of the significance of the difference in gendered perceptions, jurors will fail to go through systematic reasoning to come to an accurate answer to the questions presented them.[186] As a result, jurors will be better able to fairly weigh sexual harassment cases. To make the reasonable woman standard workable in practice, judges should require or promote the use of social framework evidence when applying a reasonable woman standard for a workable application of the standard.

185. *See supra* Section III.B.

186. *See supra* Section III.A.