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Along the Spectrum of Women's Rights Advocacy: A Cross-Cultural Comparison of Sexual Harassment Law in the United States and India

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Abstract

This Comment compares the development of sexual harassment law in the United States and India. It strives to contribute to this global feminist debate by highlighting the successes and failures of each country's respective anti-harassment protections. It also compares the United States' and India's legal approaches to the problem of workplace sexual harassment. The Comment also discusses the successes and failures of the U.S. and Indian protections in a manner that attempts to minimize the problems present in cross-cultural studies.

COMMENTS

ALONG THE SPECTRUM OF WOMEN'S RIGHTS ADVOCACY: A CROSS-CULTURAL COMPARISON OF SEXUAL HARASSMENT LAW IN THE UNITED STATES AND INDIA

*Louise Feld**

INTRODUCTION

Pornographic e-mails circulate like wildfire through the e-mail system of an Australian corporation.[1] A male Division Commander in the Korean Army repeatedly corners a female lieutenant in his office and forcibly kisses her.[2] Male students in Ireland vandalize the classrooms of two female teachers with sexually explicit graffiti.[3] An Indian social worker suffers a brutal gang rape as a result of her crusade against child marriages in an Indian village.[4] As these examples demonstrate, workplace sexual harassment is a widespread and severe global problem.[5]

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1. *See* Nicole Manktelow, *Death by a Thousand Emails*, SYDNEY MORNING HERALD, Nov. 10, 2001, at 4 (noting incident resulting in firing of staff at offices of Australian company).

2. *See Division Commander Suspended for Sexual Harassment*, KOREA HERALD, Jan. 18, 2001 [hereinafter *Commander Suspended*] (describing female officer's subjection to her supervisor's sexual harassment and advances).

3. *See* Emmet Oliver, *Labour Court Awards Teacher Eur 40,000*, IRISH TIMES, Feb. 1, 2002, at 4 (describing judgment against school for students' sexual harassment of teachers).

4. *See* Vishaka v. State of Rajasthan, 1997 S.C.R. 3011 (India), *available at* http://www.lawinc.com [hereinafter *Vishaka*] (describing assault and rape of social worker).

5. *See* Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1227-31 (1994) (discussing spread of U.S. concept of sexual harassment law to Europe); Beverley H. Earle & Gerald A. Madek, *An International Perspective on Sexual Harassment Law*, 12 LAW & INEQ. 43, 43 (1993) (stating that after Hill-Thomas hearings, sexual harassment was at forefront of global consciousness); Namita Bhandare et al., *Workplace Victory*, INDIA TODAY, Sept. 1, 1997, at 66 (asserting that sexual harassment has achieved pop culture status in India because of high-profile U.S. cases, such as those involving President Clinton and Justice Thomas, carried around the world by the media, and quoting Shobha De, Indian author and pop culture diva, who stated that it is politically

Feminists throughout the world engage in the task of trying to restructure traditional solutions to this problem.[6]

This Comment, which compares the development of sexual harassment law in the United States and India, strives to contribute to this global feminist debate by highlighting the successes and failures of each country's respective anti-harassment protections. Part I of this Comment acknowledges the difficulties inherent in cross-cultural comparison and, in an attempt to overcome these difficulties, details an anti-imperialist, anti-hierarchal theory to compare and analyze women's issues across and between cultures. Part II of this Comment introduces and explores the problem of workplace sexual harassment in the United States and India, examining the history of sexual harassment, and theorists' discussions of the origin of sexual harassment in both countries. Then, looking at U.S. and Indian Supreme Court definitions of sexual harassment and assignation of employer liability, Part II traces the development of the existing U.S. and Indian laws that were designed to protect women from, and combat against, workplace sexual harassment. Finally, Part III compares the United States' and India's legal approaches to the problem of workplace sexual harassment. Part III discusses the successes and failures of the U.S. and Indian protections in a manner that attempts to minimize the problems present in cross-cultural studies.[7]

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correct to talk about sexual harassment because it is happening in West). *See generally* Joseph M. Kelly & Bob Watt, *Damages in Sexual Harassment Cases: A Comparative Study of American, Canadian, and British Law*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 79 (1996) (comparing compensation and damages paid to successful sexual harassment plaintiffs in United States, Canada, and Great Britain); Jacqueline M. Efron, *The Transnational Application of Sexual Harassment Laws: A Cultural Barrier in Japan*, 20 U. PA. J. INT'L ECON. L. 133 (1999) (describing sexual harassment as universal and ubiquitous).

6. *See* Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 98 (1996) [hereinafter Higgins, *Anti-Essentialism*] (recognizing existence of global feminist politics); Efron, *supra* note 5, at 134-35 (describing scholars' debates about workplace sexual harassment, especially in context of growing multinational enterprises). *See generally* Anna M. Han, *Exploring Feminism Globally to Achieve Global Feminism*, 11 J. CONTEMP. LEGAL ISSUES 785 (2001) (describing global discussion of feminism, and discussion's possibilities and importance).

7. This Comment recognizes that a multitude of cultural norms influence the sexual harassment of women in the United States and India, and inform both the judicial and the societal responses to such harassment. Both countries contain enormous populations with varying geographical regions, cultures, religions, and ways of life. To avoid essentializing the experiences of women in the United States and India, this Comment

I. *SHADES OF GRAY: UNIVERSALISM, RELATIVISM, AND THE MIDDLE GROUND IN CROSS-CULTURAL COMPARISONS*

Promoting women's rights, including anti-sexual harassment protections, in a global context poses several difficulties.[8] First, there are methodological difficulties inherent in cross-cultural studies.[9] Second, Western feminists working in a global context run the risk of imposing cultural norms derived from Western moral thought on women in other cultures.[10] Finally, governments and activists alike may put forth cultural justifications for oppressive State actions.[11] Given these difficulties, feminists and human rights workers must understand both the spe-

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focuses only on U.S. and Indian Supreme Court approaches and decisions concerning workplace sexual harassment.

8. *See* NEGOTIATING REPRODUCTIVE RIGHTS: WOMEN'S PERSPECTIVES ACROSS COUNTRIES AND CULTURES 20-21 (Rosalind P. Petchesky & Karen Judd eds., 1998) (explaining that cross-cultural reproductive rights study presents unavoidable tension between political ideology and truly listening to other women's voices and opinions); *see also* MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 35 (2000) [hereinafter NUSSBAUM, DEVELOPMENT] (recognizing that exercise of cross-cultural comparison and development of defensible set of cross-cultural categories is difficult, intellectually and politically); Higgins, *Anti-Essentialism*, *supra* note 6, at 119-20 (urging Western feminists to eschew simplistic assumptions about other cultures' lack of freedom for women, and adopt new, consciousness-raising approach to cross-cultural advocacy and communication); Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 2 (1997) (cautioning against applying Western liberal ideals across cultures).

9. *See* NEGOTIATING REPRODUCTIVE RIGHTS, *supra* note 8, at 21-22 (explaining structural problems of cross-cultural study, including geographical distance, funding, and determining approach to study); *see, e.g.*, Nancy R. Hauserman, *Comparing Conversations About Sexual Harassment in the United States and Sweden: Print Media Coverage of the Case Against Astra USA*, 14 WIS. WOMEN'S L.J. 45, 56-57 (1999) (recognizing possible technical difficulties in cross-cultural studies). *See generally* Janet Sigal & Heidi Jacobsen, *A Cross-Cultural Exploration of Factors Affecting Reactions to Sexual Harassment Attitudes and Policies*, 5 PSYCHOL. PUB. POL'Y & L. 760, 760-65 (1999) (explaining cross-cultural sexual harassment study and problems inherent in study).

10. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 100 (explaining that many Western feminists sometimes assert their Western-derived political vision into non-Western world); Otto, *supra* note 8, at 2 (cautioning against generally applying Western morality in non-Western countries); Shefali Desai, Note, *Hearing Afghan Women's Voices: Feminist Theory's Re-Conceptualization of Women's Human Rights*, 16 ARIZ. J. INT'L & COMP. L. 805, 810 (1999) (asserting that Westerners' attempts to employ universal human rights standards that stem from Western ideology draw criticisms of neo-colonialism).

11. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 113 (warning that State actors often invoke cultural claims to justify oppression); Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 92 (1993) (recognizing that male-controlled governments use excuse of culture to stifle women's rights and choices); Otto, *supra* note 8, at 13-14 (explaining that cultural arguments can mask oppressive aims of patriarchy).

cific situation of women in other cultures, as well as in their own cultures, and critically examine the parallels and differences between the two, in order to be effective advocates on behalf of women in other countries and cultures.[12]

A. *Potential Methodological Problems*

Women's advocates caution that cross-cultural analysis must be conducted with extreme caution, especially when feminists in the United States critique non-Western law and culture.[13] First, cross-cultural comparisons can be rife with technical difficulties, given language differences and the necessity of translation.[14] Those conducting the comparisons may misunderstand statements, legal decisions, and the nature of the problem in general.[15] Individual subjects may also discuss certain topics less

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12. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 126 (urging advocates to forge realistic strategy that respects commonality and difference between cultures); Han, *supra* note 6, at 789-90 (advocating sharing women's stories to further exploration of women's similarities and differences, in order to achieve global feminism); Kim, *supra* note 11 (exploring how feminist theorists can reconceptualize women's rights and human rights debates). *See generally* Otto, *supra* note 8 (urging restructuring approach to women's rights in global context).

13. *See* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 35 (describing cross-cultural comparisons as peril-fraught); Higgins, *Anti-Essentialism*, *supra* note 6, at 98 (challenging feminists and human rights workers to examine how they advocate for women in different cultures); Otto, *supra* note 8, at 2 (asserting that Westerners should not assume people elsewhere want to live and be treated as Westerners want to live and be treated); *see also* Keven H. Friedman & Christine R. Mertz, *Borderline Sexual Harassment: A Study of Sex Based Discrimination in the United States and Argentina and the Problem of Extraterritorial Application of U.S. Law*, 15 HOFSTRA LAB. & EMPLOYMENT L.J. 569, 571 (1998) (urging U.S. women's advocates to confront U.S. sexual harassment policies and problems before applying U.S. ideals and laws to international sexual harassment problems).

14. *See* Sigal & Jacobsen, *supra* note 9, at 765 (noting that some countries translate their studies into English, while others conduct studies in their native tongue); *see also* NEGOTIATING REPRODUCTIVE RIGHTS, *supra* note 8, at 25 (explaining that translating and editing women's voices into languages that are not their own risks misinterpretation and misrepresentation of those voices); Azizah Y. al-Hibri, *Is Western Patriarchal Feminism Good for Third World/Minority Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 41, 42 (Joshua Cohen et al. eds., 1999) (explaining that Western women writing about other cultures rely on secondary sources, and therefore may make significant factual errors in assessing other cultures or belief systems).

15. *See* NEGOTIATING REPRODUCTIVE RIGHTS, *supra* note 8, at 21-22 (explaining structural problems of cross-cultural study, including geographical distance, funding, and determining approach to study); Hauserman, *supra* note 9, at 56-57 (recognizing that different countries treat speech differently, and therefore media in those countries may use varying approaches to reporting legal problems); Sigal & Jacobsen, *supra* note 9, at 760-65 (describing research program examining reactions to sexual harassment

freely with members of other cultures, depending on the subjects' personal level of discomfort with an issue, as well as their adherence to societal norms.[16]

Additionally, cross-cultural researchers admit that cross-cultural exploration and advocacy can fall prey to larger cultural misunderstandings.[17] Sociocultural factors, such as the individualistic or collectivist nature of a culture, the receptiveness of a culture towards reform, and the existence of formal policies (or lack thereof) on the subject in question may inform a society's opinion on an issue.[18] Issues of reproductive rights addressed in international forums serve as an example.[19] Critics assert that some feminists in the United States fail to translate reproductive rights debates into a broader, international language, instead ad-

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occurring in university settings in several countries, including United States, Canada, Ecuador, Germany, Netherlands, United Kingdom, and Pakistan, and explaining methodological difficulties present in such cross-cultural comparisons).

16. *See* Hauserman, *supra* note 9, at 62 (explaining that Swedes interviewed claimed they could talk more openly about sex than people in United States); Sigal & Jacobsen, *supra* note 9, at 765 (describing how researchers had to modify hypothetical scenario in their study to include engaged woman, as opposed to woman with boyfriend, when they administered study in Pakistan, because men and women in that society do not interact freely); *see also* NEGOTIATING REPRODUCTIVE RIGHTS, *supra* note 8, at 22-25 (explaining need for researcher and subject to overcome discomfort stemming from political, economic, and social differences between them).

17. *See* Phoebe A. Haddon, *All the Difference in the World: Listening and Hearing the Voices of Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 377, 378 (1999) (explaining that culture shapes women's ideas about equality and justice); Hauserman, *supra* note 9, at 62 (disagreeing with Swedish interviewees' opinions on U.S. culture); *see also* Desai, *supra* note 10, at 817 (grounding debate in realistic example to minimize cross-cultural misunderstanding).

18. *See* Efron, *supra* note 5, at 135 (recognizing that societal norms and attitudes towards sexual harassment differ across cultures); Sigal & Jacobsen, *supra* note 9, at 772-81 (discussing how sociocultural factors influenced outcome of authors' study); *see also* Hauserman, *supra* note 9, at 61 (explaining that cultural difference effects storytelling and story perceptions); Kim, *supra* note 11, at 69-70 (citing reproductive rights debate as example of international concern and tool of oppression in many different countries, including United States).

19. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 90 (describing failure of Western attendees of 1994 United Nations ("U.N.") Population Conference in Cairo to address non-Western visions of women and family roles, and resulting political obstacles); Tracy E. Higgins, *Regarding Rights: An Essay Honoring the Fiftieth Anniversary of the Universal Declaration of Human Rights*, 30 COLUM. HUM. RTS. L. REV. 225, 246 (1999) [hereinafter Higgins, *Regarding Rights*] (citing 1994 United Nations Population Conference in Cairo and 1995 United Nations Conference on Women in Beijing). *See generally* NEGOTIATING REPRODUCTIVE RIGHTS, *supra* note 8 (studying reproductive rights in seven countries to better understand goal of reproductive rights and importance of goal in different countries).

vocating for women's rights solely in the context of Western ideology.[20] These advocates in the United States are criticized for focusing on sexual freedom and individual autonomy when advocating for reproductive rights, and subsequently ignoring non-Western interests, such as population control.[21] As a result, non-Western leaders may decline to support reproductive rights projects because such initiatives appear to represent disagreeable Western ideologies, rather than potential benefits.[22] In turn, reproductive rights advocates from the United States may misconstrue such decisions as patriarchally motivated, thereby exacerbating the cultural misunderstanding.[23]

Finally, critics acknowledge that perhaps most dangerous to the success and accuracy of a cross-cultural study is the nature of researchers' own perceptions and subjective moral standards regarding both the culture to which one belongs and the culture

20. *See* NEGOTIATING REPRODUCTIVE RIGHTS, *supra* note 8, at 20-21 (questioning how to deal with women's voices in other cultures that espouse different priorities and support ideologies with which we do not agree); Higgins, *Anti-Essentialism, supra* note 6, at 90 (explaining that this failure to recognize different cultures' ideals concerning family resulted in Vatican joining with several Muslim governments to denounce Western advocates as attempting to impose Western sexual freedoms upon other cultures); *see also* Kim, *supra* note 11, at 70 (including United States in list of countries where reproductive rights are subject to oppressive State regulation, thereby highlighting necessity of global approach to problem).

21. *See* Higgins, *Anti-Essentialism, supra* note 6, at 90 (citing Pakistani Prime Minister Benazir Bhutto's recognition that reproductive control could help address problems of overpopulation, but often represents Western attempts to impose sexual norms on rest of world); *see also* NEGOTIATING REPRODUCTIVE RIGHTS, *supra* note 8, at 302-04 (determining from international study that women's primary reason for desiring reproductive control is their role and view of motherhood, and asserting that individual liberty is important, yet secondary).

22. *See* Alan Cowell, *Vatican Rejects Compromise on Abortion at U.N. Meeting*, N.Y. TIMES, Sept. 7, 1994, at A1 (quoting Islamic newspaper's criticism of conference as representing lack of morality and calling for promiscuity); *see also* Higgins, *Regarding Rights, supra* note 19, at 246 (explaining that non-Western leaders couched arguments denouncing conference agenda in language of difference, but really only offered alternative vision of universal norms); Kim, *supra* note 11, at 57 (explaining that Western and non-Western leaders differ about priorities, means, and goals for their countries' progress and growth).

23. *See* Higgins, *Anti-Essentialism, supra* note 6, at 91 (admitting that one Western feminist response to cultural representative's claim that women's roles reflect cultural norms is that culture is simply justification for oppression); *see also* NEGOTIATING REPRODUCTIVE RIGHTS, *supra* note 8, at 266-70 (detailing reproductive rights history in United States, and demonstrating different approaches and opinions about reproductive rights within different U.S. cultures and regions); Otto, *supra* note 8, at 2 (explaining that Westerners vilify non-Western traditions).

with which one's culture is compared.[24] Expected outcomes, sometimes based on stereotypes, may exist when one initiates a study comparing her own culture to that of a foreign nation or group.[25] Furthermore, opinions or awareness of one's own culture may also improperly influence a cultural study.[26]

B. *Universalism v. Relativism*

International human rights advocates express concern that methods employed to carry out cross-cultural critique may prove potentially hazardous for the position and treatment of members of other cultures.[27] On one hand, commentators recognize that human rights workers, by asserting universal moral norms, may imperialistically impose values on those for whom they advocate.[28] For example, non-Western leaders criticize the privileg-

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24. *See* Haddon, *supra* note 17, at 386 (recognizing that Western feminists display inconsistencies in willingness to tolerate body mutilation in different contexts, such as Western non-health related surgeries); Kim, *supra* note 11, at 61 (explaining that relativists criticize feminists for attempting to impose Western moral standards on non-Western societies); Otto, *supra* note 8, at 2 (cautioning against blanket application of Western moral ideals in non-Western countries). *See generally* Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996) [hereinafter Volpp, *Talking Culture*] (criticizing feminists in West for making assumptions about non-Western women's difficulties and ignoring negative realities present in Western women's lives).

25. *See* Shobha A. Menon & Suresh Kanekar, *Attitudes Toward Sexual Harassment of Women in India*, 22 J. APPLIED SOC. PSYCHOL. 1940, 1947 (1992) (using language demonstrating that certain results were anticipated, such as "most unexpected" and "as expected"); *see, e.g.*, Sigal & Jacobson, *supra* note 9, at 770 (making statements, such as "sexual harassment *may* be high *in countries with more traditional gender-role attitudes*," which evidence conditional, cautious language used in cross-cultural studies) (emphasis added).

26. *See* Menon & Kanekar, *supra* note 25, at 1947 (registering surprise that Indian subjects did not assign more blame to divorced sexual harassment victims than to sexually harassed); *see also* Volpp, *Talking Culture*, *supra* note 24, at 1577 (criticizing feminists in West for assuming Western life is less oppressive to women, and therefore better for women than non-Western life); Haddon, *supra* note 17, at 379-80 (critiquing Western feminists who do not self-reflect, and therefore fail to see their own subordination and perpetuation of subordination of others); Otto, *supra* note 8, at 33 (encouraging Western feminists to recognize their privileged position).

27. *See* Volpp, *Talking Culture*, *supra* note 24, at 1573 (critiquing "backlash scholarship" that concerns culture, gender, race, and multiculturalism); Haddon, *supra* note 17, at 379 (calling cross-cultural equality work complex project necessitating hard work to actually succeed); Otto, *supra* note 8, at 7 (explaining that universal law of human rights can potentially erase cultural diversity); Desai, *supra* note 10, at 812 (describing certain feminist methods of human rights advocacy as faulty).

28. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 92 (citing Universal Declaration of Human Rights ("U.D.H.R."), which embraced assumption of universality of human

ing of political and civil rights, at the expense of cultural norms, evident in the earliest human rights documents, which Westerners primarily authored.[29] On the other hand, commentators warn against the dangers of cultural relativism, because the refutation of an objective standard of morality may permit assertion of cultural differences to defend oppression.[30]

1. *Universalism*

Historians explain that the authors of the earliest human rights documents, signed after World War II,[31] embraced the idea that there existed a set of universal human rights.[32] Early

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rights and contained standards and values prevalent in West); Kim, *supra* note 11, at 60-61 (describing common relativist critique of Western feminist approaches to international advocacy); Otto, *supra* note 8, at 7 (noting critique that West is guilty of ascribing cultural inferiority to non-Western cultures and priorities).

29. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 93 (recognizing criticism some commentators have expressed about hierarchy of human rights created in international human rights documents, in which political and civil rights dominate social and cultural rights); Kim, *supra* note 11, at 57 (explaining debate between leaders of Western and non-Western countries concerning priorities regarding human rights); Otto, *supra* note 8, at 6 (explaining international human rights hierarchy, which subordinates traditionally non-Western rights, such as claims of indigenous peoples and solidarity rights).

30. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 113 (explaining how cultural defenses can justify oppressive State actions); Higgins, *Regarding Rights*, *supra* note 19, at 243 (recognizing that culture is sometimes asserted to continue oppressive practices); Kim, *supra* note 11, at 104 (arguing that practices affecting women's lives are deemed cultural, and therefore sometimes escape international scrutiny); Desai, *supra* note 10, at 815 (asserting that feminism should not blindly accept culture as excuse to justify oppressive treatment of women).

31. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 92 (explaining that because U.D.H.R. was written directly after Nazi Holocaust, global audience feared any moral relativism that would permit similar occurrences); *see also* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 5 (1995) (asserting that World War II served as catalyst in producing revolutionary developments in international human rights); Matthew A. Ritter, *Human Rights: The Universalist Controversy*, 30 CAL. W. INT'L L.J. 71, 75 (1999) (describing 1945 Charter Convention of United Nations); Desai, *supra* note 10, at 808 (describing post-World War II roots of modern human rights law).

32. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 92 (stating that U.D.H.R. embraced assumptions that human rights are universal); *see also* Martha Nussbaum, *Women and Work—The Capabilities Approach*, THE LITTLE MAGAZINE, June 2000, *at* http://www.littlemag.com/martha.htm [hereinafter Nussbaum, *Women and Work*] (listing central human functional capabilities, including control over one's environment, in forms of effective political participation, free speech, ability to hold property, right to equal employment and ability to work); Otto, *supra* note 8, at 7 (explaining that earliest authors of human rights documents assumed that objective, true knowledge about rights is possible); Desai, *supra* note 10, at 808 (listing human rights recognized following World War II, including liberty and security of person).

treaties, such as the Charter of the United Nations ("U.N. Charter") and the Universal Declaration of Human Rights ("U.D.H.R."), list principles of equality, anti-discrimination, and peace.[33] According to historians, the inclusion of these supposedly universal rights in these international conventions reveals the authors' idea that such protections are the basic principles that all societies should incorporate into their political systems to ensure fairness to all people.[34] Because these rights are fundamental to humanity, as the international documents declare, a person does not have to earn them.[35] Rather, they apply to every person, regardless of the society in which she may live.[36] In the context of women's rights, women's advocates assert that such assumptions present an opportunity for unity among women, regardless of their backgrounds.[37] Not surprisingly, however, critics recognize that these supposedly universal rights reflect Western political thought.[38] Thus, many critics disparage universalist

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33. *See generally* U.N. CHARTER art. 1; U.D.H.R. art. 1.

34. *See* Maurice Cranston, *Are There Any Human Rights?*, *in* DAEDALUS 15 (1983) (explaining that natural rights combined with human vulnerability result in man's living under system of rules that ensure peace for himself and his neighbors); Otto, *supra* note 8, at 7 (explaining that U.D.H.R. drafters attempted to produce document free of political and cultural allegiances that guaranteed all people fundamental freedoms); Ritter, *supra* note 31, at 75 (stating purpose of Charter was to reaffirm faith in fundamental human rights and equal rights of all people); Desai, *supra* note 10, at 808 (stating universalist idea that international human rights apply equally to people everywhere).

35. *See* Cranston, *supra* note 34, at 12 (distinguishing human rights, deprivation of life, which represents grave affront to justice, and other "wishes," such as social security, which are not moral imperatives, but "ideals"); Ritter, *supra* note 31, at 77-78 (explaining that all individuals hold human rights simply because they are human); Desai, *supra* note 10, at 808 (explaining that universal human rights standards rest upon notion that all people are entitled to core set of rights simply because they are human).

36. *See* Cranston, *supra* note 34, at 12 (refuting John Locke's assertion that all rights must be earned, and making distinction between moral rights and those rights that must be earned, such as right to property); Kim, *supra* note 11, at 63-64 (explaining that many human rights scholars find certain rights fundamental and, therefore, universal); Ritter, *supra* note 31, at 77-78 (explaining that all humans hold human rights equally).

37. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 99 (discussing that focus of women's groups on common experience of private oppression, rather than on political rights, represents triumph of universalism); Kim, *supra* note 11, at 53-54 (describing traditional liberal feminism as attempting to eliminate discrimination against all women); Ritter, *supra* note 31, at 79 (stating that human rights language prevents difference in worth based on socially defining characteristic, such as sex).

38. *See* LOUIS HENKIN, THE AGE OF RIGHTS 6-10 (1990) (recognizing that international human rights are derived from English, American, and French natural rights theories and stating that idea of human rights has spread beyond West, and, nominally

thought because it can potentially exclude those non-Western cultural ideals and norms that Western cultures do not value.[39]

2. Cultural Relativism

Oppositely, scholars explain that cultural relativists refute the existence of universal norms, arguing that different cultures should be entitled to create their own specifically tailored human rights norms.[40] Cultural relativists find the truths espoused within a culture contingent on that culture's values and practices.[41] Since all cultures are equally valid in the eyes of cultural relativists, cultural norms exist as truth to that culture, regardless of how other cultures may react.[42] Thus, commentators assert that cultural relativism functions not only to link morality

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at least, has been universally accepted); Higgins, *Regarding Rights*, *supra* note 19, at 231 (stating that human rights framework derives from Western political thought); Otto, *supra* note 8, at 8 (stating that Western States are scared to acquiesce to non-Western ideals).

39. *See, e.g.*, al-Hibri, *supra* note 14 (explaining that Western women may misinterpret or misrepresent other cultures or belief systems); *see also* Sander Gilman, *"Barbaric" Rituals*, *in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 14, at 53 (using previously held view that Jewish male circumcision ritual ("brith melah") was barbaric as example of how current Anglo-American culture can mistakenly define morality); Otto, *supra* note 8, at 7 (stating that post-structuralist perspective recognizes culturally contingent nature of truth); Bhikhu Parekh, *A Varied Moral World*, *in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 14, at 69, 72 (asserting that requiring minority cultures to conform to Western fundamental liberal values is equivalent to saying that minority cultures should be respected only if they become liberal, which shows intolerance and disrespect for minority identity).

40. *See* ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM V. RELATIVISM 56-60 (1990) (using examples of child labor and female circumcision to demonstrate that not all cultures share common conception of human rights, thereby negating presumption of universality); *see also* Higgins, *Anti-Essentialism*, *supra* note 6, at 95 (stating that cultural relativists are skeptical about availability of universal norms); Desai, *supra* note 10, at 809 (recognizing that rights and morality rules depend on cultural context).

41. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 95 (explaining that because cultural relativists find knowledge and truth culturally contingent, they face barriers to cross-cultural understanding); Kim, *supra* note 11, at 56 (premising knowledge on one's cultural upbringing); Otto, *supra* note 8, at 8 (explaining that cultural relativists, who have poststructural perspective on rights, understand that truth is contingent on culture).

42. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 95 (identifying premise of cultural relativism); *see also* Higgins, *Regarding Rights*, *supra* note 19, at 242 (explaining that cultural relativists urge majority cultures to tolerate minority practices); Kim, *supra* note 11, at 56 (stating that main premise of cultural relativism is that all cultures are equally valid); Desai, *supra* note 10, at 809 (explaining that cultural relativists view all cultures as equally valid).

with culture, but to force into question any assertions of the superiority of one culture over another, which may result from universalist thought.[43] Relativist advocates praise cultural relativism for including and encouraging the participation of marginalized voices.[44] Commentators thus find that relativism holds promise for feminists who advocate listening to the many different voices and stories of women's experiences.[45]

International human rights scholars explain that relativism, applied in moderate form, cautions critics against rushing to criticize other cultures.[46] Scholars acknowledge that relativism taken to an extreme, however, can be dangerous.[47] First, radical

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43. *See* RENTELN, *supra* note 40, at 66 (pointing to Marshall Herskovitz's commentary on complex familial systems of Aboriginal Australians to demonstrate that cultural relativists seek both to demonstrate that standards of morality and normalcy are culture-bound and to call into question ethnocentric assumption of Western superiority); *see also* Higgins, *Regarding Rights*, *supra* note 19, at 242 (discussing cultural relativists' refusal to enforce majority norms); Desai, *supra* note 10, at 809 (linking morality with culture and recognizing cultural validity).

44. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 91 (recognizing that feminism, like relativism, values listening to women's voices and increasing women's participation); Haddon, *supra* note 17, at 378 (recognizing that women do not speak in one voice); Barbara Stark, *Bottom Line Feminist Theory: The Dream of a Common Language*, 23 HARV. WOMEN'S L.J. 227 (2000) (explaining that there are many feminist voices on particular issues, and therefore no one individual can speak for all feminists); Desai, *supra* note 10, at 842 (urging feminists to listen to voice of Afghan woman refugee to best help her).

45. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 91 (stating that relativist view of human rights is consistent with feminist theory); *see also* Will Kymlicka, *Liberal Complacencies*, *in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 14, at 31, 34 (arguing that multiculturalism and feminism can be allied in struggle for justice that is inclusive); Parekh, *supra* note 39, at 75 (arguing that multiculturalism gives women unique historical opportunities to radically transform their patriarchal cultures); Volpp, *Talking Culture*, *supra* note 24, at 1612 (advocating consideration of party's culture in criminal cases where cultural defense is invoked, but limiting those considerations to individual's history and community, rather than cultural stereotypes); Desai, *supra* note 10, at 814 (explaining that universalism can be antithetical to feminism because women who condone government's unequal treatment of women will be ignored).

46. *See* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 109-10 (1989) (categorizing relativism as either weak or radical); Higgins, *Regarding Rights*, *supra* note 19, at 243 (asserting that strongest case for cultural claims is that they are asserted in good faith, represent cultural consensus, and request exemption from majority conception of human rights); Kim, *supra* note 11, at 56 (explaining weak form of relativism).

47. *See* Kim, *supra* note 11, at 56 (explaining strong form of relativism); *see also* Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 23 N.Y.U. J. INT'L L. & POL. 294 (2000) (pointing to example of "Asian values" argument, which its proponents use to argue both for and against human rights). *See generally* Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN?,

relativism admonishes possible critics to stay out of another culture, because cultural traditions can never be wrong.[48] Following this reasoning, State actors who permit oppressive practices can invoke culture as an excuse to justify their acts.[49] Furthermore, scholars caution that cultural relativism can oversimplify culture.[50] Cultural relativist arguments, some critics assert, present culture as a monolithic entity, and fail to account for intragroup differences.[51] Additionally, critics realize that cultural rel-

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supra note 14, at 7, 9 (arguing that multiculturalism is not necessarily good for women); Katha Pollitt, *Whose Culture?*, *in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 14, at 27 (explaining how multiculturalism arguments fail); Yael Tamir, *Siding with the Underdogs*, *in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 14, at 47 (cautioning against acceptance of group rights, multiculturalist arguments).

48. *See* DONNELLY, *supra* note 46, at 109-10 (defining different degrees of relativism); Engle, *supra* note 47, at 311 (explaining that in 1990s, non-Western States began to articulate cultural challenge to human rights); Kim, *supra* note 11, at 56 (stating that strong cultural relativists assert culture as primary source of moral rights and sufficient reason for cultural practice).

Note that this argument is an evolved form of the U.N. Charter Article 2(7) argument of State sovereignty, which is rarely asserted anymore. *See* LILLICH & HANNUM, *supra* note 31, at 613 (explaining that human rights protection was inadequate without ability to act in face of Article 2(7)).

Often, the greatest advocates of cultural relativism are the leaders of oppressive regimes, using the excuse of culture to protect their diversion of resources or mistreatment of citizens. *Id.* at 715-24. For example, both the Isle of Mann and Singapore defend caning as native cultural traditions. *Id.* at 715, 721-23.

49. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 113 n.97 (noting as example of this justification that while Egyptian government dissolved Arab Women's Solidarity Association for supposed political reasons, government also stated organization offended Islam); Ritter, *supra* note 31, at 72 (recognizing argument that political motives are often used to justify oppressive practices); *see also* Engle, *supra* note 47, at 291 (arguing that "Asian values debate" embodies controversy over essentialism).

The proponents of the "Asian values" argument criticize international human rights advocates as perpetuating a neoliberal political agenda that hurts Third-World countries. *Id.* at 292. As a result, Southeast Asian governments asserted their cultures as a defense against this perceived imposition of Western liberal ideals. *Id.* This defense gained popularity with Southeast Asian governments after the 1993 U.N. World Conference on Human Rights in Vienna, and was borrowed from both Third-World post-colonialist critiques and the "Eastern" stance during the Cold War. *Id.* Over forty Asian States signed the Bangkok Declaration, which criticized the existing human rights regime for ignoring Asian regional history, culture, and religious particularity. *Id.*

50. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 112 (cautioning that cultural relativist arguments may oversimplify complexity of culture by treating culture as monolithic and moral norms within that culture as easily identifiable); Kim, *supra* note 11, at 86-87 (defining culture as flexible entity that contains multiple viewpoints, rather than homogeneous, fixed, easily discernible entity); *see also* Okin, *supra* note 47, at 12 (stating that relativist approach to rights ignores intra-cultural differences).

51. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 112 (pointing to differences in beliefs within United States concerning issues such as abortion in order to demonstrate

ativist arguments are often applied to justify non-Western cultural practices, while culture is ignored as a plausible justification for the actions of someone from a Western culture.[52] Thus, commentators claim that the cultural rights argument works best for claims concerning the practices of those cultures about which Westerners know very little.[53] Finally, cultural relativism places culture in opposition to politics, which results in a pitting of culture against rights.[54]

C. *Placing the Debate in the Context of Women's Rights*

Feminist legal theorists and international human rights scholars recognize that the logical and practical defects apparent in both universalism and relativism are disquieting, especially in the context of women's rights.[55] Although these flaws evidence

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that members of one culture do not necessarily share same beliefs); *see also* Okin, *supra* note 47, at 12 (stating that relativist approach to rights focuses on differences between groups and ignores differences within group); Desai, *suprà* note 10, at 831 (stating that culture is constructed, and not monolithic).

52. *See* Pollitt, *supra* note 47, at 28 (asserting that multiculturalism is connected to "Third Worldism"); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1183-84 (2001) [hereinafter Volpp, *Multiculturalism*] (urging Western feminists' examination of non-Western women's conditions in more accurate and self-reflective light); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57, 62 (1994) (explaining that U.S. law is perceived as norm, and country or region from where defendant came is considered culture); Farah Sultana Brelvi, *"News of the Weird": Specious Normativity and the Problem of the Cultural Defense*, 28 COLUM. HUM. RTS. L. REV. 657, 682 (1997) (describing view that United States is neither without culture nor represents norm).

53. *See* Pollitt, *supra* note 47, at 28-29 (using example that Italian immigrant in United States could not justify beating his wife based on Italian traditions, and asserting that cultural rights argument works best for cultures about which most American know comparatively little); Volpp, *Multiculturalism, supra* note 52, at 1189 (pointing to Western feminist reactions to sexual violence in immigrant communities that ignore cultural aspects of sexual violence affecting Western white women); *see also* Brelvi, *supra* note 52, at 661 (explaining that courts can envision monolithic Muslim culture).

54. *See* Engle, *supra* note 47, at 294-95 (observing that when States assert cultural defense, culture is positioned against rights, rather than being affirmatively asserted as right); Higgins, *Regarding Rights, supra* note 19, at 232 (explaining that cultural rights are invoked as counters to political and civil rights); *cf.* Nussbaum, *Women and Work, supra* note 32 (rejecting this argument in relation to women's rights in developing countries because groups working to improve lives of women are providing those women with means to achieving end that women assert they want).

55. *See* Higgins, *Anti-Essentialism, supra* note 6, at 91 (acknowledging that both universalism and relativism are consistent with feminist theory, but stand in opposition to one another, and therefore necessitate inquiry about how seriously feminism must take cultural defenses); *see also* Kim, *supra* note 11, at 104 (urging feminists to adopt multiperspective approach, rather than strictly using cultural relativist or universalist ap-

the need for a different approach to women's rights advocacy, no uniform feminist response to cope with this friction exists.[56] Several feminists, however, recognize that the differences between Western and non-Western cultures create tensions that U.S. and Western human rights advocates must address before attempting to shield women in non-Western countries from seemingly sexist practices.[57]

1. Universalism

Critics of universalism disparage some U.S. feminists for presumptuously attempting to assert their "enlightened" views about how women should be treated into environments outside the United States.[58] These notions regarding the ideal treatment of women result from the evolution and projection of beliefs that many feminists in the United States hold, often unconsciously.[59] For example, critics contend that some U.S. feminists

proach); Antoinette Sedillo Lopez, *Ethnocentrism and Feminism: Using a Contextual Methodology in International Women's Rights Advocacy and Education*, 28 S.U. L. REV. 279, 279 (2001) (recognizing clash between universality and respect for culture); Desai, *supra* note 10, at 830 (using example of Taliban to show limits of relativism and universalism when applied).

56. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 91 (stating that feminist responses to charges of relativism or universalism can be conflicting and complicated); *see also* Haddon, *supra* note 17, at 379 (recognizing that feminists have conflicting interests because they recognize dangers of trivializing difference and of succumbing to extreme relativism); Desai, *supra* note 10, at 813 (explaining that feminists either appear to be culturally imperialist or to condone oppressive patriarchies, and therefore face dilemma of how to avoid both criticisms).

57. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 91 (recognizing that both universalism and relativism possess positive and negative aspects, and acknowledging that tension between universalism and relativism exists in human rights advocacy in general, and feminism in particular); *see also* Haddon, *supra* note 17, at 379 (recognizing tension in feminists' task of addressing difference and subordination); Lopez, *supra* note 55, at 286-87 (suggesting alternative framework for women's advocacy to avoid imperialism and to listen to women's different voices).

58. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 100 (explaining that many Western feminists have expanded their political vision into non-Western world); Martha Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 57 (2001) [hereinafter Nussbaum, *Implementing Sex Equality*] (arguing that other nations should not act as colonialists and apply sanctions to promote sex equality in India); Volpp, *Talking Culture*, *supra* note 24, at 1602 (disparaging some Western feminists for first constructing non-Western as "other," and then subsequently invoking notions of inferior cultural practices to justify attempts to Westernize or assimilate those belonging to "other"); Desai, *supra* note 10, at 810 (asserting that relativists raise threat of neo-colonialism when Westerners attempt to employ universal human rights standards that stem from Western ideology).

59. *See* Haddon, *supra* note 17, at 380 (urging feminists to promote dialogue in

share an unconscious assumption that women in the United States live in liberated, progressive realities, far superior to those of non-Westerners.[60] The view that Western values triumph over non-Western values flows from this mistaken self-aggrandizement, and critics assert that the disparagement of non-U.S. cultural practices automatically follows.[61] Subsequently, popular conceptions, or misconceptions, develop to the effect that the "other" (the non-Western woman) lives in a desperate reality.[62]

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order to learn more about themselves, and recognize and avoid perpetuating subordination of non-Western women); Volpp, *Talking Culture*, *supra* note 24, at 1578 (recognizing Western women's discursive self-representation).

60. *See* Kim, *supra* note 11, at 100 (finding 1970s Western feminist condemnation of female sexual surgeries to be demonstrative of some radical feminists' disregard of validity of other cultures' practices); Volpp, *Multiculturalism*, *supra* note 52, at 1185-86 (explaining that discourse pitting feminism against multiculturalism presumes that minority cultures are more patriarchal than Western cultures); Volpp, *Talking Culture*, *supra* note 24, at 1577 (criticizing contention that Asian and African women who immigrate to United States are moving to more enlightened culture from patriarchal culture).

61. *See* Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 57 (extolling attitudes of Western politicians that draw attention to women's plight in India, but do not condition aid on Indian government enacting specific Western ideals about treatment of women); Otto, *supra* note 8, at 33 (suggesting that Western human rights advocates recognize their own privilege and take responsibility for their role in subordination of non-Westerners); Volpp, *Multiculturalism*, *supra* note 52, at 1198-99 (explaining that idea of non-Western women's desperate reality is developed in relation to Westerner's self-perception of own enlightened and free state); Volpp, *Talking Culture*, *supra* note 24, at 1577 (explaining that feminist version of racist ideology presents immigrant women as requiring liberation into progressive norms and customs of West); *see also* Brelvi, *supra* note 52, at 657-59 (explaining that when Albanian-American asserted cultural defense in child abuse case, U.S. courts and public considered individual Albanian and his culture weird).

62. *See* Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 182 (1997) (explaining that in order to understand stereotypes about Asian Pacific American women, one must first understand social construction of those women in United States); Volpp, *Multiculturalism*, *supra* note 52, at 1186 (stating that notion of suffering immigrant or Third World woman versus liberated Western woman has strong hold on imaginations in United States); Volpp, *Talking Culture*, *supra* note 24, at 1573-74 (commenting on Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996), which Volpp feels represents "backlash scholarship," through its U.S. ethnocentrism and rejection of race consciousness); *see also* Brelvi, *supra* note 52, at 681 (realizing that cultural defenses can result in essentialization of culture as "other"); Desai, *supra* note 10, at 836 (urging feminists to truly listen to "other" women's voices, thereby legitimizing women's voices that do not support dominant feminist views of human rights).

The social construction of Asian women's identity perpetuated in the United States serves as an example. Cho, *supra*, at 182. U.S. popular culture portrays Asian women as the model minority. *Id.* at 183. Asian women are depicted as passive, servile, and obe-

Critics further charge that U.S. feminists' assumption of U.S. cultural superiority creates a hierarchy of cultures,[63] ignores the important contexts in which non-Western women live,[64] and imposes Western ideals of women's and cultural enlightenment on non-Western women.[65]

As an example of U.S. feminists' misguided concern for women in "oppressive" and "patriarchal" cultures, theorists consider the assumption that all non-Western women immigrants flee non-Western cultures for a less oppressive United States, and the dangers of that assumption.[66] First, theorists claim that this view ignores that U.S. culture, like non-Western culture, exists under patriarchal control.[67] The mere need for, and exis-

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dient. *Id.* at 186. Further, Asian women are over-sexualized, in part because of their perceived submissiveness. *Id.* Western feminists may project these mistaken portrayals onto their understanding of Asian women's situations, and therefore may find Asian women's immigration to the United States attributable to the patriarchal and anti-woman nature of their native cultures. Volpp, *Talking Culture, supra* note 24, at 1577.

63. *See* Volpp, *Multiculturalism, supra* note 52, at 1186-87 (recognizing that Westerners consider violence against women in West aberrational, whereas violence against women in non-Western countries is considered part of non-Western cultures); Volpp, *Talking Culture, supra* note 24, at 1577 (disparaging view that non-Western women who immigrate to United States are entering more enlightened culture because that perspective implies non-Western cultures are patriarchal); *see also* Brelvi, *supra* note 52, at 682 (arguing that U.S. culture functions as norm, and becomes non-culture, when juxtaposed with non-Western culture of defendant asserting cultural defense).

64. *See* Higgins, *Anti-Essentialism, supra* note 6, at 116 (cautioning against accusing those who disagree with Western norms as falsely conscious); Volpp, *Talking Culture, supra* note 24, at 1602 (stating that West constructs non-West as primitive "other," defines itself as progressive and liberal, and justifies colonialism and imperialism); Desai, *supra* note 10, at 835 (asserting that listening to women's voices includes crediting stories that women who disagree with Western norms tell).

65. *See* Higgins, *Anti-Essentialism, supra* note 6, at 91 (recognizing that these feminists want to extend rights Westerners consider fundamental, such as right to marry and divorce and right to own property, to women everywhere, despite cultural and religious prohibitions); Volpp, *Talking Culture, supra* note 24, at 1604 (calling this practice "epistemic violence").

66. *See* Volpp, *Talking Culture, supra* note 24, at 1577 (criticizing Westerners that feel non-Western women come to enlightened United States to escape patriarchal culture); *see also* Hope Lewis, *Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas*, 5 J. GENDER RACE & JUST. 197, 230-31 (2001) (citing movement of women from South America to North America as example of journey characterized as movement from backward culture to freedom and enlightenment); Volpp, *Multiculturalism, supra* note 52, at 1187 (comparing violence against women in both Western and non-Western countries as another example of assuming United States is safer and less patriarchal than non-Western countries).

67. *See* Haddon, *supra* note 17, at 386 (arguing that Westerners ignore inconsistencies in their advocacy and actuality); Kim, *supra* note 11, at 49 (stating that oppression exists in United States); Lewis, *supra* note 66, at 230 (explaining that culture-based deci-

tence of, an American feminist movement provides sufficient evidence to prove this condition.[68] Second, theorists observe that this assumption contributes to the construction of a false opposition: feminism is Western, and patriarchy is non-Western.[69] In actuality, feminism and patriarchy exist in Western and non-Western settings.[70] Finally, theorists disparage the above proposition as negatively impacting cross-cultural relationships because it implies that non-Western cultures are backwards and oppressive.[71] Theorists charge that this view of non-Western women's choices provides justifications for Western imperialism and racial subordination,[72] and further polarizes Western and

sions are attributed to women in West only when they are immigrant, non-Western women); Volpp, *Multiculturalism*, *supra* note 52, at 1187 (recognizing that violence against women occurs in United States, but is not viewed as cultural problem). *See generally* Volpp, *Talking Culture*, *supra* note 24 (arguing that U.S. feminists ignore their own oppression when analyzing that of other women).

68. *See* Volpp, *Multiculturalism*, *supra* note 52, at 1189 (stating that cultural aspects of sexual violence affect Western white women, and asserting that Westerners sometimes fail to recognize this); Volpp, *Talking Culture*, *supra* note 24, at 1578 n.25 (claiming that need for feminist movements in West demonstrates that Western women's empowerment is not reality).

69. *See* Kim, *supra* note 11, at 49 (recognizing that feminism is not only present in West); Volpp, *Multiculturalism*, *supra* note 52, at 1193 (asserting that feminism exists in communities of color); Volpp, *Talking Culture*, *supra* note 24, at 1577 (explaining assumptions of some liberal feminists that African and Asian cultures are male-defined and patriarchal, while feminists are "Western" and "American").

70. *See* Kim, *supra* note 11, at 94 (asserting that burgeoning women's rights movement exists around world); Volpp, *Talking Culture*, *supra* note 24, at 1577 (criticizing liberal feminists for ignoring reality that Western culture can be patriarchal, and non-Westerners can be feminists); Desai, *supra* note 10, at 834 (acknowledging women of color and Third World women's feminist scholarship); *see also* Volpp, *Multiculturalism*, *supra* note 52, at 1203 (criticizing universalist versus relativist discourse, in which feminism represents rights, multiculturalism represents culture, and both terms exclude each other).

71. *See* Volpp, *Talking Culture*, *supra* note 24, at 1577 (explaining that this view can result in outdated feminism that is imperialistic); *see also* Volpp, *Multiculturalism*, *supra* note 52, at 1189 (explaining that Third World becomes site of monstrosity and entertainment for Westerners). *See generally* Brelvi, *supra* note 52 (arguing that non-Western cultures are viewed as strange in U.S. courts when cultural defense is asserted).

72. *See* Haddon, *supra* note 17, at 379 (recognizing potential for imperialism and ignoring one's perpetuation of subordination in cross-cultural advocacy); Kim, *supra* note 11, at 60 (explaining that relativists attack feminism as culturally imperialistic); Volpp, *Multiculturalism*, *supra* note 52, at 1191 (explaining that feminism versus multiculturalism discourse relies on idea that minority cultures are sexist, static entities); Volpp, *Talking Culture*, *supra* note 24, at 1602 (stating that scholars have discredited idea that certain cultures are more advanced as racist, especially when used to justify colonialism).

non-Western countries.[73]

Disregarding such dangers, critics warn, can result in feminism that is imperialistic and racist, not only because it creates a hierarchy of culture, but also because it automatically privileges women's rights over culture.[74] Furthermore, critics caution that favoring Western ideals demonstrates the universalist attitude that certain innate human rights transcend the boundaries of a particular cultural mandate that may stand in opposition to a universally accepted norm.[75] Thus, critics explain that universalists find a culture that does not grant or believe in a certain human right as serving to deny its members a fundamental human entitlement.[76]

According to critics of universalism, U.S. feminists should recognize that universalism fails to represent all women because it is innately essentialist.[77] Essentialism is the idea that there is a common attribute all women share, regardless of race, class, sex-

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73. *See* Kim, *supra* note 11, at 100 (describing how some African feminists are forced to choose between certain African cultures, which practice female sexual surgery, and Western feminism, which condemns female sexual surgery); Volpp, *Talking Culture*, *supra* note 24, at 1590 (using discussion of *People v. Moua*, in which Hmong woman who lived and worked in California was raped, to explain that one is considered American when she assimilates, separating herself from her ethnic identity and family ties).

74. *See* Volpp, *Talking Culture*, *supra* note 24, at 1580 (describing how liberal feminists pit culture against women's rights, and then embrace gender consciousness, thereby rejecting race or culture consciousness); Desai, *supra* note 10, at 814 (asserting importance of cultural context in determining rights). *But see* Volpp, *Multiculturalism*, *supra* note 52, at 1183 (arguing that positing feminism against multiculturalism is premised on faulty logic).

75. *See* Desai, *supra* note 10, at 814 (explaining that universalist feminist theory would view any violation of Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") as violating women's human rights, even without conducting examination of particular woman's culture); *see also* Higgins, *Anti-Essentialism*, *supra* note 6, at 107 (critiquing non-self-reflective universalist masking of its own underlying normative standards); Haddon, *supra* note 17, at 380 (finding universalist consensus about moral standards potentially dangerous because such agreement about moral norms can undermine Western feminist's self-reflection about her own culture's morality systems and norms).

76. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 107 (explaining that State that enforces what it feels are universally accepted fundamental rights may attempt to force other States to enforce same rights); *see also* Kim, *supra* note 11, at 57 (noting that Western States argued for recognition of civil and political rights' primary importance, even though non-Western States prioritize social and economic rights).

77. *See* Haddon, *supra* note 17, at 387 (explaining that universalist feminists exclude and essentialize experiences of women of color in United States); Volpp, *Multiculturalism*, *supra* note 52, at 1199 (explaining that constructing unitary woman ignores other sources of women's oppression, such as racism and poverty); Desai, *supra* note 10,

ual orientation, or other personal situations.[78] Since essentialism is inherent in universalist feminist goals of cross-cultural unity, critics explain that universalism often ignores the voices of women who live in societies that those in the United States find oppressive.[79] A system that recognizes only one voice can produce very few responses to the experience of oppression.[80] Thus, commentators urge U.S. feminists working on behalf of women within the global context to respect women's different voices to take successful and productive collective action.[81]

2. Cultural Relativism

Conversely, scholars explain that other U.S. feminists, eager to listen to all women's voices, may accept that cultural norms justify the treatment of women living within that culture.[82]

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at 815 (explaining that universalism ignores real differences between women, and includes only voices of most privileged women).

78. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 86 (1999) (defining essentialism); Haddon, *supra* note 17, at 387 (asserting that universalism ignores women's intersecting and influential identities); Desai, *supra* note 10, at 815 (declaring notion of women's common oppression as illusory because of differences among women).

79. *See* CHAMALLAS, *supra* note 78, at 86 (describing failed National Women's Studies Association 1990 annual meeting, in which many U.S. feminists were accused of essentialism); Haddon, *supra* note 17, at 381 (advocating consciousness-raising concerning voices of all types of women); Volpp, *Multiculturalism*, *supra* note 52, at 1199 (asserting that gender oppression is contingent on diverse contexts shaping woman's experience); Desai, *supra* note 10, at 815 (explaining that asserting notion of women's common oppression results in ignoring real differences existing among women).

80. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 102 (commenting that essentialist approaches to women's issues allow only few privileged voices to define feminist agenda); Lopez, *supra* note 55, at 287 (promoting critical race feminist ideology that supports women of color and Third World women defining how to improve their own lives); Desai, *supra* note 10, at 815 (explaining that valuing individual women's voices allows creation of effective solutions to women's issues).

81. *See* CHAMALLAS, *supra* note 78, at 86 (acknowledging that tension between universalist and relativist thought reflects tension within feminism itself between describing women's experience to take political action and respecting differences among women); Haddon, *supra* note 17, at 378 (asserting that women do not speak in one voice, as anti-essentialist feminist writings evidence); *see* Kim, *supra* note 11, at 88 (espousing reconception of women's human rights that includes women's actual experiences of oppression); *see* Volpp, *Multiculturalism*, *supra* note 52, at 1217-18 (urging new strategies and possibilities for collective action on behalf of women); Desai, *supra* note 10, at 814 (explaining that feminists who attempt to employ Western ideology in non-Western cultures are cultural imperialists who fail to respect difference).

82. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 103 (drawing parallel between anti-essentialist feminist theory and cultural relativism, and recognizing that both lead to conclusion that gender inequality cannot be explained across cultures); Haddon,

These scholars note that feminism and multicultural acceptance, however, are not always effortlessly reconcilable entities.[83] Rather, scholars recognize that the cultural defense is often invoked in situations that involve male control over women.[84] Further, many State actors who invoke culture as a defense admit that they engage in some cultural practices specifically to control women, one of their culture's aims.[85] Scholars therefore warn that relativism may allow women's oppressors to defend harmful, patriarchal acts with claims that cultural norms support, if not mandate, their actions.[86]

Critics assert that advocates of a relativist approach should also recognize that State representatives who cite cultural justifications for oppressive practices may not represent the desires of

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supra note 17, at 379 (acknowledging that feminists working in human rights arenas may be subject to paralyzing relativism); Desai, *supra* note 10, at 811 (describing relativism, in part, as preoccupation with difference).

83. *See* Okin, *supra* note 47, at 10 (stating that people who are politically progressive have been too quick to assume that muticulturalism and feminism are both good things that are easily reconciled); Otto, *supra* note 8, at 13-14 (arguing that cultural arguments can protect patriarchal goals); Desai, *supra* note 10, at 812 (recognizing that listening to different voices is insufficient because culture can subordinate women, and therefore advocating examination of women's systemic subordination in male-dominated societies).

84. *See* Higgins, *Regarding Rights*, *supra* note 19, at 243 (explaining that States can invoke culture to mask oppression of women); Okin, *supra* note 47, at 18 (discussing non-Western criminals' use of cultural defense in their American trials to justify oppression of women, and how those defenses result in reduced sentences for crimes against women, and subsequent reinforcement of practices that oppress women); Otto, *supra* note 8, at 13 (explaining that States can use culture to disguise true, patriarchal agenda).

85. *See* Kim, *supra* note 11, at 92 (noting that male-controlled governments stifle women's choices); Okin, *supra* note 47, at 13-14 (noting that many cultures are not overt in their sex discrimination because they aim to control women in private sphere); Otto, *supra* note 8, at 13 (explaining that cultural arguments serve to protect gender status quo).

Since these practices often deal with the private sphere, such as family life and customs related to gender, the West is more willing to make accommodations for cultural justifications. *See* Pollitt, *supra* note 47, at 29. To illustrate how this accommodation may differ if one asserts cultural defenses to justify actions taken in the public realms to which the West assigns higher value, one commentator asks how far an Algerian immigrant would get in the United States if he refused to pay the interest on his credit card bill because Islam forbids interest on borrowed money. *Id.*

86. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 113 (recognizing that State actors invoke culture to justify oppression of women); Otto, *supra* note 8, at 14 (noting that States advocating cultural relativism want to avoid international scrutiny of their regimes); Desai, *supra* note 10, at 813 (cautioning that cultural relativist feminists stand in danger of condoning oppressive patriarchal structures).

either the culture's female members, or the culture's majority sentiment.[87] Men will surely serve as the representatives for a culture that endorses male control over women.[88] Thus, the actors articulating a culture's beliefs and practices will not be women.[89] Additionally, critics fear that those beliefs and practices will most likely fail to reflect the concerns and desires of those within the culture who do not support those cultural practices that oppress women.[90]

D. *The Middle Ground*

The above debate places feminists working for human rights in a quandary, working to take both arguments of cultural difference and of universal women's oppression seriously.[91] Addressing this quandary, human rights scholar Professor Tracy E. Higgins poses the question: How can feminists, with varying ideologies, cultures, and desires, work collectively to determine, and ultimately achieve, global political goals in the face of women's

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87. *See* Higgins, *Regarding Rights*, *supra* note 19, at 243 (advising that women's advocates question who asserts cultural defenses and true reason that cultural defenses are asserted); Kim, *supra* note 11, at 90-91 (arguing that essentialist view of culture ignores contributions of women in particular society); Tamir, *supra* note 47, at 51 (asserting that members of culture should be ones who determine fate of that culture).

88. *See* Higgins, *Regarding Rights*, *supra* note 19, at 243 (supporting investigation of who is entitled to speak for dissenting communities); Kim, *supra* note 11, at 90 (asserting that men comprise majority of power elite in almost every society); Okin, *supra* note 47, at 12 (asserting that in culture where men clearly have more power than women, men will be decision-makers who determine and articulate cultural practices and beliefs); Desai, *supra* note 10, at 815 (acknowledging that holders of power determine what constitutes rights for women).

89. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 113 (cautioning that relativists may too readily accept cultural defenses that State actors who are not women articulate); Kim, *supra* note 11, at 90 (explaining that women's opinions and choices are ignored in male-dominated cultures); Desai, *supra* note 10, at 815 (recognizing that women do not hold power in most societies, and therefore do not make decisions about women's rights).

90. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 113 (stating that it is unlikely that State-offered cultural defenses will adequately reflect changing, and possibly conflicting, cultural concerns of its citizens); Higgins, *Regarding Rights*, *supra* note 19, at 242 (urging feminists to examine legitimacy of religious and cultural group claims); Kim, *supra* note 11, at 91-92 (recognizing importance of subordinated groups' participation in political process to avoid injustice).

91. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 105 (urging feminists to recognize cultural differences, without abandoning ability to criticize women's oppression); Otto, *supra* note 8, at 15 (stating that debate between relativism and universalism diverts attention from pressing issues); Desai, *supra* note 10, at 816 (explaining that feminism has embraced both universalism and relativism).

cultural differences?[92] In struggling to figure out how feminists can work together, human rights scholars suggest making a compromise between cultural relativism and cultural imperialism.[93] These scholars urge U.S. feminists to first acknowledge the different forces shaping women's voices, experiences, and wishes,[94] while remaining wary of imperialism and relativism when working for, or examining, women's rights in other countries.[95] Further, U.S. feminists should examine their own environment with a critical eye, recognizing the weaknesses and strengths of their own culture, and the influences affecting their perceptions.[96]

Scholars advocating new approaches to cross-cultural women's advocacy maintain that context plays a crucial role in

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92. *See* Higgins, *Anti-Essentialism, supra* note 6, at 89 (asking how, in light of profound cultural differences among women, feminists can maintain global political movement and simultaneously avoid charges of cultural imperialism); *see also* Higgins, *Regarding Rights, supra* note 19, at 232 (questioning how international human rights discourse fares in face of critiques of universalism and cultural relativism).

93. *See* Haddon, *supra* note 17, at 379 (suggesting compromise between universalism and relativism); Otto, *supra* note 8, at 43 (suggesting transformative strategy that refuses singular definition of woman while recognizing power of universal law); Desai, *supra* note 10, at 806 (suggesting that feminists take alternative to either/or discourse of feminism and apply both universalist and relativist principles to make informed decisions). *See generally* Higgins, *Anti-Essentialism, supra* note 6 (exploring question of how to compromise between universalism and cultural relativism).

94. *See* Haddon, *supra* note 17, at 380 (recognizing dangers of ignoring women's voices and needs); Otto, *supra* note 8, at 43 (urging feminists to adopt transformative rights strategy that does not ignore or silence languages of need, community, and economic justice); Desai, *supra* note 10, at 838 (asserting that feminism must conceptualize women's rights through multilayered, multivoiced category of woman). *See generally* Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994) [hereinafter Abrams, *Complex Female Subject*] (surveying recent U.S. judicial decisions to determine whether courts acknowledge, and respect, complex nature of woman as subject).

95. *See* Higgins, *Anti-Essentialism, supra* note 6, at 126 (concluding that feminists must forge hybrid strategy that respects commonality and difference); Haddon, *supra* note 17, at 379 (recognizing that challenge for human rights proponents is negotiating problems of both relativism and universalism in advocacy); Otto, *supra* note 8, at 31–33 (urging feminists to adopt transformative dialogue to make advocacy across cultures more effective and less imperialistic); Desai, *supra* note 10, at 816 (acknowledging importance of both relativism and universalism for achieving feminist goals).

96. *See* Volpp, *Talking Culture, supra* note 24, at 1616 (encouraging feminists to abandon ethnocentric ideas of Western and U.S. superiority and recognize that all cultures and communities have patriarchal and anti-patriarchal aspects); Haddon, *supra* note 17, at 380 (stating that dialogue helps feminists learn more about themselves and how they may perpetuate oppression, and therefore helps feminists successfully build coalitions to address oppression); Otto, *supra* note 8, at 34 (urging Western feminists to recognize their privilege and, after that recognition of power, rethink their positions).

cross-cultural advocacy and critique.[97] As criticism of essentialist Western feminists indicates, Western feminists do not live in ideal conditions, free from patriarchy.[98] Feminists from the United States advocating in the global arena, however, may fail to acknowledge the difficulties their fellow country-women face, while emphasizing the hardship of their non-Western counterparts.[99] Thus, critics accuse these U.S. feminists of falling prey to the false consciousness[100] they attribute to women in non-Western countries suffering from gender-based harassment.[101] To remedy this flaw, commentators suggest that feminists from the United States search their own lives and experiences to understand how their culturally specific gender roles, and other personal identities, such as race, can bias their perspectives.[102] If all feminists, Western and non-Western, explore their cultures and the sources of their consciousness, women may begin to find

97. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 91 (advocating close look at particular conditions of specific women); Lopez, *supra* note 55, at 283 (proposing method of comparative analysis that contextualizes analysis of women's issues, thereby respecting culture); Desai, *supra* note 10, at 814-15 (stating that some critics find feminism and relativism compatible because both force scrutiny of women's voices and women's true conditions).

98. *See* Volpp, *Talking Culture*, *supra* note 24, at 1577-79 (critiquing essentialized assumptions about women from Third World); Haddon, *supra* note 17, at 379-80 (asserting that problems of violence and abuse are not local, non-Western problems); *see also* Otto, *supra* note 8, at 36 (explaining that rethinking feminist strategy involves rejecting notions of solidarity based narrowly on geography and identity).

99. *See* Haddon, *supra* note 17, at 380 (suggesting that Western feminists should recognize their role in perpetuating subordination); Otto, *supra* note 8, at 46 (stating that transformative strategies of human rights advocacy necessitate individual recognition of responsibility for participating in power relations); Volpp, *Multiculturalism*, *supra* note 52, at 1198-99 (explaining that Western feminists unrealistically disregard their own oppression when describing non-Western women's oppression).

100. *See* Catharine A. MacKinnon, *Method and Politics*, *in* TOWARD A FEMINIST THEORY OF THE STATE 106, 122 (1989) (identifying false consciousness of women living under patriarchy) [hereinafter MACKINNON, THEORY OF THE STATE].

101. *See* Haddon, *supra* note 17, at 390 (stating that dialogues about hearing women's voice force exploration of one's own cultural attitudes and privilege, and therefore force true questioning about meaning of equality); Kim, *supra* note 11, at 99 (explaining how radical feminists are guilty of false consciousness in international human rights context).

102. *See* Higgins, *Anti-Essentialism*, *supra* note 6, at 120 (advising Western feminists to examine their own cultural texts, which are sometimes conflicting); Haddon, *supra* note 17, at 381 (encouraging all feminists, especially Western feminists, to share personal experiences and self-reflect); Otto, *supra* note 8, at 32-33 (advocating self-reflection, open dialog, and rethinking of own dominant societal structures); Volpp, *Multiculturalism*, *supra* note 52, at 1198-99 (criticizing Western feminists' blind disregard of their own oppression and culture).

commonalities that not only unite them, but aid in their struggle to distinguish oppressive practices from acceptable cultural norms.[103] Just as ideals widely held in the United States do not have to represent modernity and civility, multiculturalism does not have to be antithetical to feminism.[104]

II. *DEVELOPING THE ISSUE: SEXUAL HARASSMENT LAW IN THE UNITED STATES AND INDIA*

Sexual harassment has existed in the United States and in India for as long as women in both countries have participated in the workplace.[105] The U.S. courts, however, failed to recognize that sexual harassment constituted a form of sex discrimination until 1976.[106] Similarly, the Indian judiciary has only recently implemented anti-sexual harassment protections.[107]

A. *Sexual Harassment Law in the United States*

The problem of workplace sexual harassment has existed throughout U.S. history.[108] Although legislation fighting sex-

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103. *See* Higgins, *Anti-Essentialism, supra* note 6, at 120 (urging critical exploration of differences to better understand gender hierarchies of each culture); Haddon, *supra* note 17, at 380 (promoting dialog to learn more about self and others to build coalitions against oppression); Otto, *supra* note 8, at 32 (advocating meaningful feminist dialog); *see also* Volpp, *Talking Culture, supra* note 24, at 1616 (clarifying, in her discussion of identity and asylum, that she is not calling for end to gender-based asylum, but is instead suggesting that other, less stereotypical narratives can be used to win women asylum).

104. *See* Haddon, *supra* note 17, at 390 (advocating listening to voices of women from all cultures as effective feminist advocacy); Volpp, *Talking Culture, supra* note 24, at 1616 (deeming this perceived polarity of multiculturalism and feminism false opposition); Desai, *supra* note 10, 816 (asserting that feminism's major goals require approach to women's rights that incorporates relativistic respect for differences).

105. *See* KERRY SEGRAVE, THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993, at 160-61 (1994) (reporting great degree of sexual harassment professional Indian women suffer at work and detailing history of sexual harassment in workplace); ROSEMARIE SKAINE, POWER AND GENDER: ISSUES IN SEXUAL DOMINANCE AND HARASSMENT 31-55 (1996) (tracing history of sexual harassment in workplaces in United States from colonial period to present day); Bhandare et al., *supra* note 5 (quoting survey concerning great degree of sexual harassment in Indian workplace); *see also* Nussbaum, *Women and Work, supra* note 32 (explaining cultural forces contributing to sexual harassment of Indian women). *See generally* Menon & Kanekar, *supra* note 25 (studying problem of sexual harassment in Indian workplace).

106. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) (recognizing that sexual harassment is form of sex discrimination).

107. *See Vishaka, supra* note 4 (establishing anti-sexual harassment guidelines to fight workplace sexual harassment).

108. *See* SKAINE, *supra* note 105, at 31-55 (detailing sexual harassment in U.S. work-

based workplace discrimination was passed in 1964, U.S. courts failed to acknowledge that sexual harassment constituted sex discrimination until 1976.[109] Subsequently, the U.S. Supreme Court has issued decisions clarifying both the nature of the behavior that qualifies as sexual harassment at work,[110] and the extent of employer liability for workplace sexual harassment.[111]

1. Origins

Sexual harassment began as soon as women in the United States entered the workplace, and has persisted throughout all stages of U.S. history and economic development.[112] Historians explain that during slavery, black women slaves suffered sexual harassment and exploitation at the hands of white male slaveholders.[113] Men continued to sexually harass working women

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place from colonial period through present day). *See generally* SEGRAVE, *supra* note 105 (detailing history of sexual harassment in workplace).

109. *Saxbe*, 413 F. Supp. at 654 (finding sexual harassment qualifies as sex discrimination).

110. Meritor v. Vinson, 477 U.S. 57, 73 (1986) (holding that creating hostile work environment constitutes illegal sex discrimination); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993) (determining sexual harassment case using objective and subjective standard).

111. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) (holding that employers can be held liable for supervisor conduct); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (holding that employers can be held liable for supervisor conduct).

112. *See* SKAINE, *supra* note 105, at 31-55 (detailing U.S. history of sexual harassment at work); *see also* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1195-97 (1998) [hereinafter Abrams, *New Jurisprudence*] (recognizing sexual harassment as male response to entrance of women into traditionally all-male workplaces); Elvia R. Arriola, *"What's the Big Deal?" Women in the New York City Construction Industry and Sexual Harassment Law, 1970-1985*, 22 COLUM. HUM. RTS. L. REV. 21, 25 (1990) (explaining that women throughout U.S. history have faced sexual harassment); Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163, 163 (1997) (calling women's workplace presence historical workplace hazard).

113. *See* LIN FARLEY, SEXUAL SHAKEDOWN 40 (1978) (stating that black women in United States first began to suffer sexual harassment as slaves); SEGRAVE, *supra* note 105, at 16-17 (asserting rampant abuse of female slaves in United States); *see also* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598-99 (1990) (discussing commonplace occurrence of white slave holders raping black women, and lack of recourse that slave had because white man's rape of black woman was not considered crime).

Several academics point out the importance of recognizing that women of different backgrounds and identities have historically different experiences with workplace sexual harassment and sexual abuse in general. *See* Harris, *supra*, at 598-600 (analyzing black women's experience of rape and U.S. rape laws' failure to adequately protect

during the U.S. industrial revolution in the late nineteenth-century, when women's workforce participation increased dramatically.[114] Historians note that when the corporate business form emerged at the turn of the twentieth century, women who worked in sex-segregated white-collar jobs had to answer to male supervisors, who took advantage of their positions of power to harass women subordinates.[115] In recent years, sexual harassment cases featured in the news, such as the Hill-Thomas hearings,[116] Paula Jones' allegations of sexual harassment against for-

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black women in order to demonstrate how feminist discourse fails to recognize complex experience of black women); *see also* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139, 149 (1989) (asserting many ways that black women's experience of discrimination is result of several oppressive forces); bell hooks, *Reflections on Race and Sex*, *in* YEARNING: RACE, GENDER, AND CULTURAL POLITICS 57, 57-64 (1989) (discussing overlap between race and sex, and asserting that this overlap is most apparent in how both black and white men treated black women); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 233 (1994) (arguing that differences of race, gender, and national origin influence how Latinas experience domestic violence).

114. *See* STEPHEN J. MOREWITZ, SEXUAL HARASSMENT AND SOCIAL CHANGE IN AMERICAN SOCIETY 41 (1996) (recognizing that expansion of capitalism, combined with technological innovations, provided new job opportunities for unskilled workers, and therefore, young women, including many immigrants, began to enter occupations outside home); *see also* Susan Silberman Blasi, *The Adjudication of Same-Sex Sexual Harassment Under Title VII*, 12 LAB. LAW. 291, 305-06 (1996) (stating that sexual harassment is old phenomenon, dating back to nineteenth century); Eleanore K. Bratton, *The Eye of the Beholder: An Interdisciplinary Exam of Law and Social Research on Sexual Harassment*, 17 N.M. L. REV. 91, 95 (1987) (acknowledging prevalence of sexual harassment at end of nineteenth century); Jill L. Goodman, *Sexual Harassment: Some Observations on the Distance Traveled and the Distance Yet to Go*, 10 CAP. U.L. REV. 445, 449 (1981) (noting prevalence of sexual harassment in nineteenth century). *See generally* Sara McLean, *Confided to His Care or Protection: The Late Nineteenth-Century Crime of Workplace Sexual Harassment*, 9 COLUM. J. GENDER & L. 47 (1999) (arguing that sexual harassment existed as both act and legal claim in nineteenth-century United States).

115. *See* MOREWITZ, *supra* note 114, at 55 (explaining how development of suburbs and growth of corporations resulted in greater sexual harassment of working women); SEGRAVE, *supra* note 105, at 103-22 (discussing situation of female clerical workers at turn of century); *see also* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 175-76 (1979) (describing women's experiences in white-collar environments at turn of century).

116. *See* MOREWITZ, *supra* note 114, at 371-82 (describing sexual harassment to which Clarence Thomas subjected Anita Hill, who worked under him at Department of Education and Equal Employment Opportunity Commission, and Senate Judiciary Committee hearings that ensued because of Hill's charges when President Bush Sr. nominated Thomas for U.S. Supreme Court); *see also* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692 (1998) (stating that Thomas-Hill controversy was first sexual harassment case to garner widespread public attention); R.W. Ap-

mer President Clinton,[117] and the Tailhook scandal,[118] serve to demonstrate that sexual harassment continues to be a problem facing women in the United States.[119]

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ple, Jr., *On Thomas: More Questions, Not Fewer*, N.Y. TIMES, Oct. 12, 1991, at A3 (explaining that Hill's allegations raised questions about Thomas' nomination); Felicity Barringer, *Hill's Case Is Divisive to Women*, N.Y. TIMES, Oct. 18, 1991, at A1 (explaining that women in United States have very different reactions to, and beliefs about, Anita Hill's truthfulness); Anna Quindlen, *The Perfect Victim*, N.Y. TIMES, Oct. 16, 1991, at A6 (arguing that even though accuser may be extremely credible, like Hill, he or she will be discredited); Peter T. Kilborn, *Men Say Worry About Harassment Leads Them to Tone Down Conduct*, N.Y. TIMES, Nov. 7, 1991, at A1 (stating that men interviewed say they are toning down their workplace behavior as result of Hill-Thomas hearings); Sheryl McCarthy, *Message Is Clear: Man Won*, NEWSDAY, Oct. 7, 1991, at 7 (asserting that although she is not pleased with Thomas's ultimate naming as Supreme Court Justice, hearings exposed United States to reality that African-Americans are successful lawyers and business-people); Martin Tolchin, *Hearings End as They Began: On a Note of Confrontation*, N.Y. TIMES, Oct. 15, 1991, at A1 (describing testy attitude and remarks of Senators).

117. *See* MOREWITZ, *supra* note 114, at 390-94 (describing sexual harassment allegations Paula Jones made against President Clinton, and President's subsequent response). Many newspaper articles covered the Jones-Clinton scandal. *See generally The Paula Jones Lawsuit*, WASH. POST, May 7, 1994, at A18; Richard Cohen, *Bill Clinton's Anita Hill*, WASH. POST, May 5, 1992, at A23; Michael Isikoff, *Clinton Hires Lawyer as Sexual Harassment Suit Is Threatened; Former State Employee in Arkansas Alleges Improper Advance in 1991*, WASH. POST, May 4, 1994, at A1; Anna Quindlen, *A Tale of Two Women*, N.Y. TIMES, May 11, 1994, at A1; William Safire, *Presume Innocence*, N.Y. TIMES, Jan. 22, 1998, at A5.

118. *See* Schultz, *supra* note 116, at 1693 (describing sexual harassment women suffered at Tailhook Association's 1991 convention); *Hilton Bars Aviator Group Tied to Scandal*, N.Y. TIMES, Aug. 5, 1992, at A5 (reporting hotel chain's decision to bar Tailhook Association's reservations through 1996); Eric Schmitt, *Citing Scandal, Navy Group Cancels Annual Convention*, N.Y. TIMES, June 18, 1992, at B1 (describing decision to cancel convention because of sexual harassment scandal); Eric Schmitt, *Officials Say Navy Tried to Soften Report*, N.Y. TIMES, July 8, 1992, at A1 (reporting that Navy officials tried to soften Tailhook sexual harassment reports to avoid offending the public); Eric Schmitt, *Senior Navy Officers Suppressed Sex Investigation, Pentagon Says*, N.Y. TIMES, Sept. 25, 1992, at A1 (describing report Pentagon made public about horribly misconducted Tailhook investigation); James Webb, *Witch Hunt in the Navy*, N.Y. TIMES, Oct. 6, 1992, at A2 (explaining Navy's leadership problems resulting from Tailhook scandal).

119. *See* MOREWITZ, *supra* note 114, at 395-98 (recognizing influence that cases and scandals in United States involving sexual harassment influenced politics of, and public opinion about, sexual harassment); David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594, 597 (1998) (discussing high incidence of sexual harassment at law firms); Lucetta Pope, *Everything You Ever Wanted to Know About Sexual Harassment But Were Too Politically Correct to Ask (Or, the Use and Abuse of "But For" Analysis in Sexual Harassment Law Under Title VII)*, 30 SW. U. L. REV. 253, 253 (2001) (recognizing that sexual harassment has taken permanent residence in both U.S. culture and laws).

Reported incidents of sexual harassment have grown exponentially. BARBARA T. LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 478 (Supp. 1999) [hereinafter LINDEMANN SUPP.]. In 1991, women in the United States filed 6,883 sexual harassment complaints with the Equal Employment Opportunity Commission. *Id.* By 1998, the number of complaints filed reached 15,618. *Id.* Additionally, sexual

Sexual harassment began, and continues to occur, as a reaction to women's presence in the workplace, which challenged accepted gender roles and workplace interactions.[120] First, commentators note that women working in the public sphere undermined the traditional notion that a woman's jobs included only the roles of wife, mother, and homemaker.[121] Additionally, historians observe that the ideal Victorian woman was passive and discreet; she did not possess the aggressive personality and the strong, competent mind that workplace participation was thought to require.[122] Stereotypically, the traditional passive woman also symbolized a sexual object for men.[123] Finally, scholars

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harassment pervades both public—and private—sector jobs. *See generally* U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE (1995). For example, the U.S. Merit Systems Board administered a survey in 1995 to which forty-four percent of the female federal government employees surveyed reported experiencing sexual harassment in the previous two years. *Id.* at 13-14. Moreover, twenty-two percent of survey respondents who worked in the private sector believe women working in the private sector experience even more harassment. *Id.* at 19.

120. *See* FARLEY, *supra* note 113, at 28-29 (discussing women's workplace entrance); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1189 (1989) (recognizing that men enjoy hegemonic power over social meanings because they are dominant in society, and can therefore label as "different" qualities and characteristics of or associated with women); *see also* Schultz, *supra* note 116, at 1721-32, (describing women's entrance into traditionally male jobs and subsequent male reaction).

121. *See* FARLEY, *supra* note 113, at 30 (explaining that men in unions tried to confine women to traditional women's jobs upon their workplace entrance at turn-of-century); MOREWITZ, *supra* note 114, at 51 (stating that Victorian ideal of femininity viewed women as moral champions of home); SEGRAVE, *supra* note 105, at 42 (explaining that women who entered workplace during Industrial Revolution were sometimes considered lacking traditional female morality).

One expert notes that an argument about female propriety and the workplace can easily become a class-based argument, as well as a sexist one. *See* Schultz, *supra* note 116, at 1732. Working-class women are less likely to be perceived as "pure," and have often worked outside the home in jobs that are not considered lady-like. *Id.*

122. *See* FARLEY, *supra* note 113, at 34-35 (discussing Victorian ideals of womanhood); MOREWITZ, *supra* note 114, at 143 (comparing women's societally-dictated role with that of men, who are supposed to be aggressive in workplace); *see also* Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 72 (1995) (explaining that characteristics associated with women, like being unaggressive and unassertive, are considered inappropriate for certain jobs, especially traditionally masculine jobs); Nina L. Colwill, *Men and Women in Organizations: Roles and Status, Stereotypes and Power*, *in* WORKING WOMEN: PAST, PRESENT, AND FUTURE 97, 99 (Karen Shallcross Koziara et al. eds., 1987) (explaining relationship between traditional sex roles and traditional workplace roles for women and men).

123. *See* MACKINNON, THEORY OF THE STATE, *supra* note 100, at 122 (asserting that, in man's eyes, woman is sex object); FARLEY, *supra* note 113, at 171 (discussing woman's

conclude that women in the formerly-exclusively male work world represented both a threat to male workplace culture and interaction,[124] and greater competition for jobs.[125] Thus, women at work threatened many men.[126]

Sexual harassment functioned as a method through which men could confront this increasing "threat," and control female labor.[127] In her groundbreaking book,[128] *Sexual Harassment of*

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historical role as sex object and sexual slave to fulfill men's desire); Kim, *supra* note 11, at 50 (explaining feminism's goal to shift focus on woman as object to woman as subject); Schultz, *supra* note 116, at 1717 (recognizing that harassment plays on stereotypical role of woman as sex object).

124. *See* MOREWITZ, *supra* note 114, at 143 (explaining that male groups in work setting reinforced sex roles and that women's workplace presence affected and hindered male workplace interactions that contributed to development of these sex roles); *see also* FARLEY, *supra* note 113, at 32 (explaining that female workplace presence threatened male union members, who therefore tried to teach young boys, rather than adult women, necessary workplace skills); SEGRAVE, *supra* note 105, at 140-73 (describing male sexually harassing behavior towards women who entered traditionally male fields); Schultz, *supra* note 116, at 1729 (explaining that U.S. courts are more willing to apply sexual harassment protections to those women who are "proper" victims than to those women who fail to meet societal standards prescribing suitable behavior for women; stating that courts' sexual paternalism is deeply conservative because its benefits are limited to women perceived as sexually pure and deserving of protection).

A case that exemplifies how a woman who acted bolder, received less court protection because her attitude implied a level of welcomeness is *Reed v. Shepherd*, 939 F.2d 484 (7th Cir. 1991). In *Reed* the court denied the plaintiff relief because it interpreted her use of profanity, her off-color jokes, her flirting, and her failure to wear a bra as signifying her welcoming the behavior to which she was subjected. *See id.* at 486; Schultz, *supra* note 116, at 1730 (analyzing *Reed* case).

125. *See* FARLEY, *supra* note 113, at 33 (explaining early union efforts to enforce job sex-segregation, and curtail workplace competition from women); MOREWITZ, *supra* note 114, at 50 (recognizing that male workers feared economic competition from women workers); Colwill, *supra* note 122, at 104 (describing how men reinforce their workplace status and power when women intrude into workplace, which men perceive as their territory).

126. *See* FARLEY, *supra* note 113, at 29 (recognizing that men sought to weaken women's workplace position and acted to reinforce sex-segregation in job market); MOREWITZ, *supra* note 114, at 51 (acknowledging that women represented threat to U.S. family structure and values, as well as greater competition for jobs); Schultz, *supra* note 116, at 1687 (asserting that men put forth image that their jobs require masculine mastery to undermine women's ability to do same work).

127. *See* MACKINNON, *supra* note 115, at 1 ("Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another."); *see also* FARLEY, *supra* note 113, at 34 (asserting that sexual harassment of working women partially resulted from capitalism's rise and new methods developed to control female labor); MOREWITZ, *supra* note 114, at 50 (stating that male fear of economic competition from women represents factor accounting for sexual harassment in workplace).

128. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998) (noting that

Working Women: A Case of Sex Discrimination,[129] Professor Catharine MacKinnon[130] argued that sexual harassment is a form of employment discrimination in which a male imposes his authoritative and economic muscle to discriminate against women in the workplace.[131] Professor MacKinnon asserted that social power roles assigned to the sexes, including those found in the workplace, express an inequality between men and women that is constructed through sexual relations, asserting men's dominance and women's subordination.[132] Sexual harassment becomes a "normal" manifestation of society's sexual power inequalities, just in a different form.[133]

Professor MacKinnon recognized that a legislator crafting sexual harassment laws could truly help women in the workplace if she addressed the real source of sexual harassment: power disparities between men and women.[134] According to Professor

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terms "hostile work environment" and "quid pro quo" first appeared in Professor MacKinnon's book, *Sexual Harassment of Working Women: A Case of Sex Discrimination*); *see also* Madhavi Sunder, *In a "Fragile Space": Sexual Harassment and the Construction of Indian Feminism*, 18 LAW & POL'Y 419, 437 n.2 (1996) (acknowledging that Catharine MacKinnon wrote groundbreaking and most eminent work on subject of sexual harassment).

129. MACKINNON, *supra* note 115.

130. Professor MacKinnon, who is a lawyer, teacher, and activist, is a leading expert on sex equality. *See* http://www.law.uchicago.edu/faculty/mackinnon (describing Professor MacKinnon's education and career); *see also* http://cgi2.www.law.umich.edu/_FacultyBioPage/facultybiopage.asp?uniqname=kittytoo (describing Professor MacKinnon's career and detailing her publications).

131. *See* MACKINNON, *supra* note 115, at 208-13 (claiming that sexual harassment is workplace discrimination because it impacts fundamental employment decisions, such as hiring and promotions, as well as overall environment of workplace).

132. *See* MACKINNON, THEORY OF THE STATE, *supra* note 100, at 113 (stating that sexuality is linchpin of sexual inequality); *see also* Case, *supra* note 122, at 57 (arguing that in workplaces, entities considered feminine are systematically devalued); Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245, 1249 (1998) (recognizing that sexual harassment inscribes and enforces patriarchal gender norms and male power); Higgins, *Anti-Essentialism*, *supra* note 19, at 232 (recognizing that exercise of private power is apparent in workplace discrimination); Schultz, *supra* note 116, at 1705 n.101 (quoting Professor MacKinnon).

133. *See* MACKINNON, *supra* note 115, at 220 (claiming that society has defined situations of women's subordination, sexual and otherwise, as accepted societal norm); *see also* Tanya Kateri Hernandez, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 211 (2001) (asserting that desire constitutes mechanism to subordinate women in workplaces).

134. *See* MACKINNON, *supra* note 115, at 208-13 (explaining Professor MacKinnon's idea that power dynamic between sexes in workplace is cause of sexual harassment).

Professor MacKinnon recommended that lawmakers draft specific sexual harassment statutes, in addition to Title VII, to address this unequal power distribution among men and women in America. *Id.* at 220. According to Professor MacKinnon,

MacKinnon, sexual harassment stems from male-female power differentials, especially male exploitation of their economic power.[135] Professor MacKinnon noted men's ability to use sexual advances and aggression to exploit their economic power over their female workplace subordinates.[136] Forcing women to tolerate and comply with sexual advances, or, in the alternative, to endure economic and employment losses, strengthens the existing male-female power differentials, and further degrades women.[137] Thus, Professor MacKinnon asserted that men further embed their established workplace power when they sexually harass women.[138]

Responding to Professor MacKinnon's revolutionary work and the burgeoning docket of sexual harassment cases in the United States, other feminist legal theorists recognized the need to critically analyze and reconceptualize the U.S. legal definition of sexual harassment.[139] For example, some scholars explain that courts in the United States view sexual harassment through the lens of male heterosexual desire, placing sexual desire at the

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anti-discrimination law, including, but not limited to, Title VII, can potentially remedy these socially-constructed, relational disparities found in the workplace, as well as in the public sphere. *Id.* Professor MacKinnon asserted that instead of settling for Title VII's currently vague, broad protection against sexual harassment, anti-discrimination law should strive to address specifically the gender-based harassment that stems from the male-female power differential, resulting in an inequitable workplace. *See id.* (recognizing that people in United States are accustomed to thinking of themselves as freely choosing beings, rather than beings controlled by social imperatives).

135. *See id.* at 208-13, 217-18 (discussing male imposition of power in workplace setting).

136. *See id.* at 208-13, 220 (acknowledging existence of gender power dynamics).

137. *See id.* (noting that male-female power disparity is evident in workplace).

138. *See id.* (explaining how sexual harassment functions as sex discrimination). According to Professor MacKinnon, sexual threats, suggestions, or coercions influence both a woman's job definition and work atmosphere. *See id.* at 208. Sexual harassment singles women out for undesired sexual attention that negatively impacts their work product, regardless of their capacity to resist the harassment. *Id.* Thus, such treatment becomes a condition of work that distinguishes women from their male co-workers. *Id.* at 209.

139. *See generally* Schultz, *supra* note 116 (urging reformulation of sexual harassment law theory to recognize centrality of male heterosexual desire to sexual harassment law); *cf.* Abrams, *New Jurisprudence*, *supra* note 112 (urging reformulation of sexual harassment law theory around theories of women's subordination); Case, *supra* note 122 (urging reformulation of sexual harassment law theory to recognize difference between gender and sex); Franke, *supra* note 132, at 1245 (urging reformulation of sexual harassment law theory, including comparison between workplace sex harassment and sex harassment in other contexts, because no one-size-fits-all sexual harassment theory exists).

core of sexual harassment case analysis.[140] In a paradigmatic example, a heterosexual male supervisor makes sexual advances on his female subordinate, and thus gender-based harassment becomes coextensive with sexual advances.[141] Consequently, this male-desire model of sexual harassment evident in case law links male heterosexual desire to the male positions of power and authority, and therefore overshadows the real source of sexual harassment: the male-female power disparity and attempts to preserve that power differential.[142]

Similarly, commentators argue that news reports covering the Anita Hill-Clarence Thomas controversy emphasized, and even overplayed, the sexual aspects of the controversy, thereby illustrating popular U.S. culture's extremely narrow focus on the sexual advances and desire aspects of sexual harassment cases.[143]

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140. *See* Schultz, *supra* note 116, at 1686-87 (recognizing paradigm popularly used to examine sexual harassment cases); William D. Evans, Jr., *Tonight the Heartache's on Me: Employer Liability for Workplace Sexual Harassment*, 35 MD. B.J. 11, 14-15 (2002) (recognizing that recent scholarship in sexual harassment law calls attention to this paradigm); Tamanna Qureshi & Anthony Vaupel, *Should Sexual Orientation Be Covered by Title VII or Prohibited?*, 27 OHIO N.U. L. REV. 679, 684 (2001) (describing Schultz's desire-dominance paradigm); Rhonda Reaves, *"There's No Crying in Baseball": Sports and the Legal and Social Construction of Gender*, 4 J. GENDER RACE & JUST. 283, 302 (2001) (stating that sexual harassment law operates on assumption of sexual desire). *But see* Gregory v. Daly, 243 F.3d 687, 694-95 (2d Cir. 2001) (questioning whether, in particular case, pleading that expresses dominant paradigm sufficiently supports finding that alleged harasser conducted himself in certain manner because of plaintiff's sex).

141. *See* Schultz, *supra* note 116, at 1704 (explaining how quid pro quo cases helped entrench paradigm of sexual harassment cases); *see also* Kiren Dosanjh, *Calling on Oncale: Federal Courts' Post-Oncale Approach to the "Evidence Routes" to Discriminatory Intent in Title VII Same-Sex Harassment Claims*, 33 URB. L. 547, 547 (2001) (recognizing sexual desire motivates heterosexual harassers in traditional sexual harassment paradigms); Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 580 (2001) (describing sexual desire-dominance paradigm, and asserting that courts more easily find hostile work environment when sexual desire is present).

142. *See* Schultz, *supra* note 116, at 1688 (stating that prevailing sexual harassment paradigm defines unwanted heterosexual sexual advances as focal point of sex-based harassment); Qureshi & Vaupel, *supra* note 140, at 684 (explaining that preservation of male-dominated status quo motivates desire-centered sexual harassment).

143. *See* CHAMALLAS, *supra* note 78, at 246-47 (asserting that, because of gender stereotypes, Hill's predicament resembled predicament of rape victim); Kimberle Crenshaw, *Gender, Race, and the Politics of the Supreme Court: The Import of Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1467, 1469-71 (1992) (understanding large role Hill's sexuality played in hearings, especially because of stereotypes about black women's sexuality); Schultz, *supra* note 116, at 1692-94 (discussing Hill-Thomas controversy); Anita Hill, *Sexual Harassment is Losing its Meaning*, BUFFALO NEWS, Mar. 22, 1998, at H5 (recognizing that popular culture deems all workplace sexual transgression sex-

At Thomas's judicial confirmation hearings, Hill testified that she felt Thomas's sexual advances reflected a need for power and domination.[144] The widespread media coverage of the event, however, focused on Thomas's sexual pursuit of Hill, ignoring the larger gender inequalities and non-sexual societal power disparities between Thomas and Hill.[145] Thus, the media disregarded sex-based power disparities, a primary source of sexual harassment.[146]

Finally, theorists observe that the lower courts in the United States sometimes refuse to find non-sexual conduct in violation of Title VII.[147] These theorists argue that such refusal is likely

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ual harassment, and therefore does not understand problem of, and protections available against, sexual harassment); *see also* Christo Lassiter, *Put the Lens Cap Back on the Cameras in the Courtroom: A Fair Trial is at Stake*, 67 N.Y. ST. B.J. 6 (Jan. 1995) (recognizing media's distorting influence on hearings, such as Hill-Thomas hearing); *cf.* Michael Comiskey, *Not Guilty: The News Media in the Supreme Court Confirmation Process*, 15 J.L. & POL. 1, 6 (1999) (stating that Hill-Thomas hearings riveted television viewers, who ignored other issues in Thomas' nomination).

Examination of newspapers from other countries demonstrates that the U.S. media is not alone in defining sexual harassment primarily in terms of male heterosexual desire. *See, e.g.*, Manktelow, *supra* note 1 (describing incidents of sexual acts or statements resulting in firing of employees in Australia); *Commander Suspended*, *supra* note 2 (describing sexual assaults on female Korean member of armed services); Oliver, *supra* note 3 (describing sexually explicit language students used to deface teachers' classrooms).

144. *See* Schultz, *supra* note 116, at 1693 (quoting Hill's testimony at Thomas's confirmation hearings).

145. *See id.* at 1692 (stating that most publicized harassment cases demonstrate sexual-desire and male-dominance view of sexual harassment); Helen Dewar, *Democrats Criticized For Strategy on Thomas; Approach in Hearings Called too Cautious*, WASH. POST, Oct. 20, 1991, at A11 (deeming Hill-Thomas hearings most sexually explicit Senate hearings); Steve Pond, *And Now, Here Comes 'Judge'*, WASH. POST, Oct. 25, 1991, at B9 (reporting that film mirroring events of Hill-Thomas hearings will focus on sexual charges, and not necessarily sexual harassment); *Bush Criticizes TV Trials, Condom Giveaways*, WASH. POST, Dec. 12, 1991, at A19 (explaining that President Bush complained that television viewers who watch television hearings are exposed to indecent material, such as discussions at Hill-Clarence hearings).

146. *See* Schultz, *supra* note 116, at 1695-96 (asserting that media sensationalizes sexual harassment as sexually centered); *see also* Charles B. Adams, *The Impact of Race on Sexual Harassment: The Disturbing Confirmation of Thomas/Hill*, 2 HOWARD SCROLL 1, 11-12 (1993) (recognizing that media and Senators focused on Hill and stereotypes about sexual conduct of harassed, rather than harasser's actions).

147. *See* Juliano & Schwab, *supra* note 141, at 555 (arguing that courts fail to acknowledge sexual harassment based on nonsexual behavior); Anne Lawton, *Tipping the Scales of Justice in Sexual Harassment Law*, 27 OHIO N.U. L. REV. 517, 537 (2001) (criticizing *Morris v. Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000), for disaggregating sexual and nonsexual conduct in hostile work environment case); Pope, *supra* note 119, at 292 (calling this practice "conceptual gerrymandering"); Schultz, *supra* note 116, at

due to the U.S. Supreme Court's and popular culture's intertwining of sex-based harassment and sexual desire.[148] Consequently, these commentators assert that some courts fail to include non-sexual acts of harassment or sex-based discrimination in their hostile work environment analyses.[149] Thus, commenta-

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1716-19 (describing courts' disaggregation of sexual and nonsexual conduct in sexual harassment cases).

148. *See* Juliano & Schwab, *supra* note 141, at 581 (asserting that courts do not view nonsexual harassment within scope of sexual harassment); Schultz, *supra* note 116, at 1708-09; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 470-71 (2001) (asserting that sex-based discrimination must be examined not just in terms of one sexist act, but in greater context of workplace culture and structures that may not be overtly sexual); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 136 (2002) (recognizing that courts disaggregate superficially different workplace behaviors, rather than considering overall environment hostility); *see, e.g.*, King v. Bd. of Regents of the Univ. of Wisc. Sys., 898 F.2d 533, 538-41 (7th Cir. 1990) (determining hostile work environment harassment claim on sexual conduct only, and analyzing nonsexual hostile conduct under separate discriminatory treatment claim). *But see* O'Rourke v. City of Providence, 235 F.3d 713, 730 (1st Cir. 2001) (stating that courts should not disaggregate sexual and nonsexual conduct alleged in hostile work environment claims); Gregory v. Daly, 243 F.3d 687, 694 (2d Cir. 2001) (requiring only that allegation permit inference that plaintiff suffered hostile work environment because of her sex); Williams v. Gen. Motors, 187 F.3d 553, 565 (6th Cir. 1999) (holding that conduct underlying sexual harassment does not need to be overtly sexual in nature).

149. *See* Juliano & Schwab, *supra* note 141, at 549 (basing this conclusion on findings that plaintiffs alleging individual conduct are more successful than plaintiffs alleging group conduct, and that plaintiffs alleging sexual harassment based on sexual comments or behavior are more successful than plaintiffs basing their claims on nonsexual, although sexist, behavior); Schultz, *supra* note 116, at 1709 (explaining that in some cases involving nonsexual actions, some courts may refuse to consider case under hostile work environment framework); *see, e.g.*, Morris v. Oldham County Fiscal Court, 201 F.3d 784 (6th Cir. 2000) (disaggregating overtly sexual conduct and nonsexual retaliatory conduct in deciding sexual harassment case); *King*, 898 F.2d at 538-41 (distinguishing supervisor's sexual conduct from his nonsexual misconduct in determining whether hostile work environment existed).

One commentator feels that court disaggregation of sexual and nonsexual workplace conduct further sexualizes the hostile work environment. Schultz, *supra* note 116, at 1709. The courts' distinctions exclude pervasive forms of workplace gender antagonism that are sex-based, yet may be nonsexual. *Id.* at 1709-10. Such gender-based, yet nonsexual, hostility is manifest in the nonsexual indignities that the plaintiff suffered in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and the courts' subsequent interpretation of sexual harassment law in relation to those indignities. *Id.* Ms. Harris did not enjoy the same work conditions as did her male counterparts. *See* Harris v. Forklift Sys., No. 3-89-0557, 1991 WL 487444 (M.D. Tenn. Feb. 4, 1991), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *rev'd per curiam*, 510 U.S. 17 (1993). For example, Ms. Harris's boss, Mr. Hardy paid Harris on a different basis than his male managers, denied Harris company perks, and forced Harris to bring coffee to meetings. *Id.* at *1-2. The lower courts deciding the *Harris* case found this ludicrous behavior insufficient to meet Title VII requirements, as opposed to strictly sexual advances. *Id.* at *9; *see also* Schultz, *supra* note 116,

tors argue that judicial decisions in the United States perpetuate the view of sexual harassment as purely sexual, and disregard the deeply embedded gender roles and power disparities that cause, and continue to fuel, the problem of workplace sexual harassment.[150]

2. Early stages

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment.[151] Specifically, a practice that injures a statutorily designated group in the workplace constitutes illegal discrimination.[152] Sex is a protected classification under Title VII.[153]

The U.S. courts failed to recognize that sexual harassment constituted a form of sex discrimination, however, until a district court decided a quid pro quo[154] case, *Williams v. Saxbe*,[155] in

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at 1711-12. Such an approach ignores the undermining effect that Hardy's treatment had on Harris's status as a manager, as well as the fact that Harris received this treatment because of her sex. *See id.* at 1711. The *Harris* case provided a clear opportunity to transcend the Court's unduly restrictive focus of the lower court's decision, yet none of the courts in front of which Harris appeared perceived the previous courts' or counsels' narrow obsession with the lack of direct sexual advances on Harris as problematic. *Id.* at 1712-13.

150. *See* Arriola, *supra* note 112, at 61 (hypothesizing that desire to preserve construction industry as male power bastion motivates male construction workers' sexual harassing actions); Schultz, *supra* note 116, at 1716-19 (criticizing courts' disregard for sexual harassment in form of nonsexual conduct); David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 510-12 (2000) (explaining phenomenon of disaggregation and arguing that disaggregation severely limits use of hostile work environment doctrine).

151. 42 U.S.C. § 2000e (1994). Title VII states that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color religion, sex, or national origin." *Id.*

152. *See* MACKINNON, *supra* note 115, at 208 (identifying "sexual harassment" as sex discrimination, and recognizing that practices that differentially damage statutorily designated group both in work and at work constitute employment discrimination); Pope, *supra* note 119, at 257-58 (quoting Professor MacKinnon's definition of sexual harassment); Schultz, *supra* note 116, at 1718 (citing Professor MacKinnon's definition of term "sexual harassment"); David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1270 (2001) (quoting Professor MacKinnon's definition of sexual harassment and stating that Professor MacKinnon coined term).

153. 42 U.S.C. § 2000e (1994).

154. *See* MACKINNON, *supra* note 115, at 32 (coining term "quid pro quo"). A complainant has a quid pro quo sexual harassment claim when a supervisor, usually a male, uses his position to persuade a subordinate employee, usually a female, to perform

1976.[156] The court in *Saxbe* held that Title VII applies to all forms of sex-based discrimination, regardless of whether the discrimination manifests itself as sexual advances or sex-based animus.[157] Therefore, sex-based discrimination that links job benefits to sexual favors parallels the imposition of any other non-sexual acts requested because of one's gender, such as a male boss's forcing a female subordinate to do his laundry, in addition to her other duties, in order to receive a raise.[158]

3. Recognition of Hostile Work Environment

In *Meritor v. Vinson*,[159] an influential case in the development of sexual harassment law, the Supreme Court interpreted Title VII and concluded that, in addition to quid pro quo harassment, the creation of a hostile work environment could be illegal.[160] The respondent in *Meritor*, a bank teller at Meritor Savings Bank, endured four years of lewd suggestions, sexual advances, and even rape.[161] Although the respondent's work environment was fraught with anxiety and pain, her harasser and her company did not take any tangible adverse employment ac-

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sexual favors. *See* BARBARA T. LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 7 (1992). Quid pro quo sexual harassment, which conditions a female employee's receipt of job benefits on her performance of the sexual activities that her male supervisor requests, is considered sex discrimination because the supervisor's requests are based on the sex of the person to whom they are directed. *See* MACKINNON, *supra* note 115, at 32-40 (describing quid pro quo cases).

155. Williams v. Saxbe, 413 F. Supp. 654, 654 (D.D.C. 1976).

156. *See* LINDEMANN & KADUE, *supra* note 154, at 7 (discussing *Saxbe* case).

A women's group in Ithaca, New York, called Working Women United, identified the term "sexual harassment" during a speak out on the issue, which they held in 1975. Schultz, *supra* note 116, at 1698-99; *see* FARLEY, *supra* note 113, at 74 (describing Ithaca Speak-Out on Sexual Harassment and some participants).

Further, until 1986, only blatant quid pro quo sex discrimination was recognized as constituting sexual harassment. *See* Meritor v. Vinson, 477 U.S. 57 (1986) (holding that creating hostile work environment constituted sexual harassment).

157. *See Saxbe*, 413 F. Supp. at 657 (recognizing that Title VII must be broadly construed to provide protection beyond discrimination based on sex stereotypes).

158. *See* LINDEMANN & KADUE, *supra* note 154, at 10 (presenting analogy that illustrates how quid pro quo cases easily fit within traditional notions of intentional disparate treatment: in addition to normal job duties, only female clerks would be required to take boss's children to school and pick up his laundry).

159. *Meritor*, 477 U.S. at 57.

160. *See id.* at 73.

161. *See id.* at 60 (detailing behavior to which respondent was subjected, including invitations to dinner, requests for sexual relations, fondling in public, and being followed into ladies' room).

tions against her, such as a demotion or a layoff.[162]

The *Meritor* Court found a Title VII violation, holding that Title VII protections extend beyond economic or other tangible discrimination to the creation of a "hostile work environment."[163] The Court stated that Title VII's language stretches beyond mere monetary or professional injuries, and applies to the "entire spectrum" of disparate workplace treatment.[164] Thus, sexual harassment includes conduct that has the purpose or effect of unreasonably interfering with a worker's environment or job performance.[165] In so concluding, the Court declared that employees who are members of a statutorily protected group have the right to work without suffering intimidation and abuse.[166]

While *Meritor* first recognized hostile work environment claims, *Harris v. Forklift Systems, Inc.*[167] advanced understanding of the concept. Theresa Harris served as one of two female managers at a company that sold forklift equipment.[168] During her tenure at Forklift, she was subject to work conditions much less favorable than those of her male counterparts.[169] For example, Harris's boss, Hardy, made disparaging comments about Harris and her work abilities, but did not make the same comments about male employees.[170] Further, Hardy paid Harris on a different basis than his male managers, denied Harris company

162. *See id.* at 64 (describing petitioner's argument that Title VII protections apply only in cases where plaintiff asserts tangible or economic losses).

163. *See id.* at 64-65 (rejecting petitioners' argument that Title VII protections apply only to cases where plaintiff can show tangible discrimination based on congressional intent and guidelines Equal Employment Opportunity Commission ("E.E.O.C.") authored).

164. *Id.*

165. *See id.* at 65 (citing 29 C.F.R. § 1604.11(a) (1985), E.E.O.C. guidelines stating that any conduct that has purpose or effect of unreasonably interfering with individual's work performance or creating hostile work environment is sexual harassment, whether or not it is linked to direct economic grant or denial).

166. *See id.* at 65 (basing idea that employees have right to work in environment free from discriminatory intimidation, ridicule, and insult on judicial decisions and E.E.O.C. precedent).

167. 510 U.S. 17 (1993).

168. *See id.* at 19.

169. *See id.* (describing Hardy's demeaning insults, suggestive behavior, and statements to Harris).

170. *See id.* (quoting Hardy's offensive statements, such as "You're a woman, what do you know," and "Dumb ass woman," and Hardy's suggestions that female employees retrieve coins from his front pants pockets).

perks, and forced Harris to bring coffee to meetings.[171] The lower courts deciding the case found this behavior insufficient to constitute a hostile work environment claim because Hardy's conduct, although insulting, was not severe enough to create an abusive environment.[172] In other words, the courts did not believe that Harris was so offended that she suffered harm to her psychological well-being or work performance.[173]

The *Harris* Court reversed the lower courts' decision.[174] The Court stated that in a hostile environment, the harassed employee continuously endures unwelcome conduct,[175] severe and pervasive enough to permeate the workplace and change the conditions of her employment.[176] To determine the existence of a hostile environment, courts must examine the complete workplace circumstances, including frequency and severity of conduct, physical threat or humiliation, and unreasonable interference with work.[177] According to the *Harris* Court, the investigation of these elements requires consideration of both the harassed employee's own subjective perception, and whether a reasonable person would perceive the harassment sufficiently severe and pervasive to create an abusive working environment.[178]

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171. *See* Harris v. Forklift Sys., No. 3-89-0557, 1991 WL 487444, at *1-2 (M.D. Tenn., Feb. 4, 1991), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *rev'd per curiam*, 510 U.S. 17 (1993).

172. *See id.* at *6-7 (finding that Hardy's behavior was offensive, to both Harris and reasonable woman, but did not rise to level of interfering with one's work performance).

173. *See id.* at *7 (finding that Hardy's comments were not so severe that they would seriously affect Harris' psychological well-being).

174. *See Harris*, 510 U.S. at 21-22 (describing standard adopted as "middle path" between mere offense and severe psychological harm).

175. *See* Meritor v. Vinson, 477 U.S. 57, 68 (1986) (explaining that voluntary conduct can be unwelcome, and that correct inquiry is whether harassed person's conduct indicated that sexual advances were unwelcome, not whether actual participation in sexual intercourse was voluntary).

176. *Id.* at 67.

177. *See Harris*, 510 U.S. at 23 (listing considerations for determining existence of hostile environment, but recognizing importance of examining totality of circumstances, rather than just one factor); *see also Meritor*, 477 U.S. at 68 (stating that "totality of circumstances" must be examined, including nature of sexual advances and context in which incidents took place; therefore, sexually provocative dress or speech is not irrelevant).

178. *See Harris*, 510 U.S. at 22-23 (stating that Title VII's prohibition is not limited to conduct that would affect reasonable person's psychological well-being).

4. Employer Liability

Although the Supreme Court had decided several momentous sexual harassment cases, few guidelines existed concerning employer liability for a supervisor's sexual harassment of a subordinate employee until 1998, when the Court decided *Faragher v. City of Boca Raton*[179] and *Burlington Industries, Inc. v. Ellerth.*[180] Until then, Equal Employment Opportunity Commission ("E.E.O.C.") guidelines on employer liability for sexual harassment, first promulgated in 1980, served as one of the only sources of guidance on the subject.[181] According to the E.E.O.C. guidelines, the employer was responsible for sexual harassment in the workplace if the employer knew or should have known of an employee's harassing behavior, unless the employer took immediate remedial action.[182]

In ruling that employers can be held liable for supervisors' conduct, the *Faragher* Court recognized that employers occupy the best position from which to prevent all forms of sexual harassment, a clear goal of Title VII.[183] Furthermore, the Court

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179. 524 U.S. 775 (1998). In *Faragher*, the U.S. Supreme Court discussed the lower courts' decisions about employer liability for sexual harassment, and demonstrated that the U.S. Supreme Court's only previous discussion of employer liability was found in *Meritor v. Vinson*, 477 U.S. at 57. *Faragher*, 524 U.S. at 785.

180. 524 U.S. 742 (1998).

181. E.E.O.C. Guidelines on Sexual Harassment, § 1604.11 (1980).

182. *Id.* § 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate correct action.").

183. *See Faragher*, 524 U.S. at 803 (stating that employer has greater opportunity to guard against supervisor misconduct than against common worker misconduct, and that employers have greater opportunity and incentive to screen, train, and monitor supervisor performance); *see also* LINDEMANN SUPP., *supra* note 119, at 477 (identifying two reasons why Court set forth employer liability standard: (1) employers are responsible for their supervisors' acts, and (2) employers should be encouraged to fight sexual harassment in their workplaces).

While the Court advocates employer responsibility for maintaining a discrimination-free work environment, the Court did not carry this position as far as those scholars who promote employer accountability would prefer. *See, e.g.*, MACKINNON, *supra* note 115, at 94 (arguing that since sexual harassment is employment discrimination, there should be little doubt that employer is accountable to some degree); Schultz, *supra* note 116, at 1729 (recognizing judicial promise for social change). Conversely, Professor MacKinnon would extend the employer's duty to include challenging workplace practices that hurt women. *See* MACKINNON, *supra* note 115, at 211-13 (criticizing lack of greater employer liability). Responsibility for sexual harassment exists, according to Professor MacKinnon, because the employer has an affirmative responsibility to eliminate discrimination, which may in fact stem from gender-based antagonism. *Id.*

stated that under an agency theory, an employer can be found responsible when a supervisor harasses a subordinate, and relies on his apparent authority to do so.[184] As a result, the Court in both *Faragher* and *Burlington* held that an employer can also be held vicariously liable for a supervisor-created hostile work environment.[185]

The Court, however, recognized an affirmative defense, thereby limiting employer liability.[186] Specifically, the *Faragher* Court stated that if an employer can prove that an employee did not take advantage of the safeguards the employer created to avoid preventable harms, then the employer can escape liability.[187] For example, if an employee does not report sexual harassment when a mechanism for making such reports exist, then she cannot assert a successful harassment claim.[188] This defense gives employers credit for taking the preventative efforts that policymakers and politicians envisioned when creating workplace anti-discrimination law,[189] and provides incentives for employers to implement and enforce strong anti-sexual harassment policies.[190]

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184. *See Faragher*, 524 U.S. at 801 (recognizing supervisors' special authority that enhances their ability to harass, and employers' ability to guard against such harassment).

The *Faragher* and *Burlington* decisions demonstrate that many traditional tort arguments fail to support vicarious liability claims, even though the concept is otherwise widely accepted outside the context of sexual harassment law. *See Faragher*, 510 U.S. at 798-802; *Burlington*, 524 U.S. at 756-57. The Court rejected the claim that a supervisor's sexual harassment of a subordinate constitutes conduct inside the scope of one's employment. *See Faragher*, 510 U.S. at 799; *Burlington*, 524 U.S. at 757. This finding extends to courts' traditional refusal to impose vicarious liability for intentional torts, deeming them beyond the scope of employment, because a master would have no means of controlling a servant's deliberate actions. *Burlington*, 524 U.S. at 756. Similarly, the Court stated that an employer facing the issue of sexual harassment in her workplace may escape liability because she had no control over a supervisor demonstrating "gender-based animus" or a longing to satisfy sexual urges. *Id.*

185. *See Faragher*, 524 U.S. at 807; *Burlington*, 524 U.S. at 765.

186. *See Faragher*, 524 U.S. at 804 (stating that limitation on sexual harassment requires liability to be squared with *Meritor* holding that employer is not "automatically" liable for supervisor-created harassment).

187. *See id.* at 805 (providing employer with affirmative defense in supervisor sexual harassment case where subordinate employee failed to take advantage of employer-provided safeguards).

188. *See id.* (explaining that employee must act with reasonable care to utilize employer's safeguards and prevent further harm).

189. *See* LINDEMANN SUPP., *supra* note 119, at 478.

190. *Id.* at 498.

B. *Sexual Harassment Law in India*

Like women in the United States, women in India experience objectionable workplace conditions, often resulting from the power differential between men and women.[191] Sexual harassment of Indian women is attributable to factors that are particular to Indian culture as well.[192] The Indian Supreme Court, recognizing the nation-specific and universal influences that shape workplace sexual harassment of Indian women, created guidelines to address the problem that Indian law-makers had long ignored.[193]

1. Origins

Gender bias is evident in the Indian workplace, just as in the workplace in the United States.[194] In fact, sexual harassment exists throughout India.[195] The magnitude of the Indian sexual

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191. *See* Franke, *supra* note 132, at 1249 (recognizing sexual harassment as tool to enforce patriarchal power); Menon & Kanekar, *supra* note 25, at 1942 (basing 1992 investigation of sexual harassment in India on Western feminist theory that men's aggression against women reflects male expression of power over, and contempt for, women, and not their sexual urges); Schultz, *supra* note 116, at 1705 n.101 (quoting Professor MacKinnon's views on gender and power); *see also* Case, *supra* note 122, at 57 (noting systemic devaluation in workplace of things considered feminine and related to women).

192. *See generally* Menon & Kanekar, *supra* note 25 (conducting study about workplace sexual harassment in India); Sunder, *supra* note 128 (detailing development of Indian feminist movement's fight to develop sexual harassment prohibitions).

193. *See Vishaka, supra* note 4 (creating guidelines to fight workplace sexual harassment and fill legislative void).

194. *See* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 24-30 (discussing difference between guaranteed formal sex equality and Indian women's reality); SEGRAVE, *supra* note 105, at 160-61 (detailing great number of professional Indian women who reported suffering sexual harassment at work); Afra Afsharipour, *Empowering Ourselves: The Role of Women's NGOs in the Enforcement of the Women's Convention*, 99 COLUM. L. REV. 129, 132-33 (1999) (describing invidious violations of Indian women's rights); Kim, *supra* note 11, at 72-73 (explaining that laws designed to protect women in India, such as those prohibiting dowry deaths, are laxly enforced); Menon & Kanekar, *supra* note 25, at 1940 (asserting that gender bias is evidenced in many areas of Indian life, and recounting Indian Supreme Court rape decisions evidencing this bias); Besant Nager, *The Status of Girls and Women in India*, WOMEN'S INTERNATIONAL NETWORK NEWS, Spring 1991, at 1 (identifying India's discriminatory perceptions and treatment of female children).

195. *See* Apparel Export Promotion Council v. A.K. Chopra, 1999 S.C. 759 (India), *available at* http://www.lawinc.com [hereinafter *Chopra*] (describing workplace sexual harassment of women as growing social menace); Premjit Singh, *The Global Employer: Global Labour, Employment, and Employee Benefits Bulletin, Supreme Court Decision Expands Definition of Sexual Harassment, at* http://www.bakerinfo.com/Publications/Documents/1074/india.htm (recognizing increasing sensitivity toward sexual harassment that Supreme Court's decision in *Chopra* demonstrates); *Vishaka, supra* note 4 (asserting

harassment problem[196] is attributable to several factors.[197] Some of these factors are universal, and some are exclusively Indian.[198]

First, although gender roles may differ in India and the United States, commentators note that the treatment of women who dare to deviate from their assigned roles is correspondingly derogatory.[199] Those women who fail to meet their countries' respective standards of the ideal and proper woman are more susceptible to harassment.[200] The case of Bhanwari Devi, a social

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that there is urgent need for safeguards against workplace sexual harassment); Laxmi Murthy, *Sexual Harassment: Who Will Slay the Dragon?*, BUSINESS LINE (THE HINDU), Sept. 15, 1997 (stating that most employed women have experienced some amount of sexual harassment during their working lives).

Sexual harassment differs between the urban centers and the rural areas in India. *See* Menon & Kanekar, *supra* note 25, at 1940 (recognizing that while feminism has reached urban India, it has had little impact on rural Indian population). Also, in one study, researchers stress that the sample body they used for their study was comprised of Indian college students, who were much more progressive than many Indians in rural areas. *Id.* at 1950 (describing their research participants as "elite").

196. *See* Bhandare, *supra* note 5 (quoting survey in which sixty percent of working women and fifty-five percent of female students said they have faced sexual harassment; adding that non-verbal overt sexual conduct was reported in fifty-four percent of those cases and uninvited sexual remarks were reported in thirty-nine percent); *see also* Singh, *supra* note 195 (stating that sexual harassment is extremely prevalent based on survey of working women, in which forty-seven percent said that they had been sexually harassed at work).

197. *See* Sunder, *supra* note 128, at 420 (questioning how sexual harassment in India is uniquely experienced and explained); *see also* Nussbaum, *Women and Work*, *supra* note 32 (discussing different reasons for gender inequality in India). *See generally* Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 35 (explaining factors in Indian legal system that contribute to gender inequality).

198. *See* Sunder, *supra* note 128, at 436 (concluding that Indian feminist mobilization around sexual harassment may seem in some ways non-culturally specific, but also embodies struggle for authentic Indian identity, differentiated from Western feminism); *see also* Nussbaum, *Women and Work*, *supra* note 32 (comparing lives of two Indian women who come from different castes and have different levels of financial support, and stating that these women's problems are recognizable globally).

199. *See* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 25 (describing Indian Penal Code's view of women as "Victorian"); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1050 (1992) (asserting that more sexually available woman appears, less likely she will be to receive legal protection against offenses involving sexual conduct); Menon & Kanekar, *supra* note 25, at 1948-49 (recognizing that divorced Indian women are much more likely to suffer harassment than unmarried and married women, and that men have less sympathy than women for female victims of male sexual harassment); Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 49 (recognizing that Indian courts consider traditional ideals about women as fragile and motherly in deciding sex discrimination cases).

200. *See* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 44 n.21 (noting that women in India can only achieve certain feminist goals, such as anti-sexual harassment protections, using Victorian notions of female modesty because legal protections are legacies

worker in a Rajasthani village, serves as a salient example.[201] A forty-year old social activist, Devi was a non-traditional Indian woman: she was bold; politically active; and therefore, incredibly offensive to many.[202] Devi endured months of sexual harassment at the hands of some men who lived in the village because of her political work campaigning against child marriages.[203] The harassment grew increasingly severe, culminating in a brutal gang rape.[204]

While workplace harassment of Indian women includes experiences that women in the United States and many other nations and cultures share, scholars comment that sexual harassment in the Indian workplace is also the result of uniquely Indian cultural beliefs and practices.[205] Although formally Indian

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of Victorian British law-making); Sunder, *supra* note 128, at 429 (emphasizing that most Indian women she interviewed experienced sexual harassment most when they consciously or unconsciously challenged preexisting ideas of proper behavior or identity for Indian women); *see also* Rasheeda Bhagat, *India: Village Health Nurses Allege Harassment*, BUSINESS LINE (THE HINDU), Dec. 8, 1997 (quoting Indian woman, who felt especially targeted for harassment because she was not yet married); Murthy, *supra* note 195 (explaining that public disapproves less of sexual harassment of women in professions considered more "dubious" and "loose," such as jobs in entertainment or airline industry, than they do of sexual harassment of women at university).

201. *See* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 31 (describing beginning of Devi's case); Sunder, *supra* note 128, at 424 (describing rape of Bhanwari Devi, social worker employed by State-sponsored women's development program); *see also* Rasheeda Bhagat, *Checking Sexual Harassment: A Long Overdue Measure*, BUSINESS LINE (THE HINDU), Sept. 2, 1997, (identifying Devi's case as catalyst for petition seeking enforcement of working women's fundamental rights); Bhandare et al., *supra* note 5 (recognizing that brutal gang rape of Devi inspired unprecedented Supreme Court sexual harassment decision); Sudhish Kamath, *India: When a True Story Inspires a Film*, THE HINDU, Aug. 27, 2001, (recognizing importance of Devi's story, which was made into film).

202. *See* Sunder, *supra* note 128, at 425 (quoting article in *Hindustan Times*); Kamath, *supra* note 201 (describing Devi as lower caste, grass roots social worker who spoke out about prevalent social ills and appeared powerful in person); Pinki Virani, *Long Wait for Justice*, THE HINDU, Mar. 4, 2001 (describing Devi as women in her mid-50s, living in same Rajasthan village as her rapists, and publicly asking her country to be just).

203. *See* Sunder, *supra* note 128, at 424; *see also* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 30 (describing Devi's rape as male weapon against woman crusading for political change).

204. *See* Sunder, *supra* note 128, at 424; *see also* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 30 (describing Devi's case and explaining that Devi's rapists were influential men in their community, and therefore police delayed registration of her case).

205. *See* Sunder, *supra* note 128, at 420 (stating that term "sexual harassment" originated in West, but is not limited to describing Western phenomenon); Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 40-48 (explaining plural systems of religious personal law impacting Indian legal system and efforts at achieving gender equality);

women are equal to men, scholars assert that the genesis of the gender power disparity in India is in many ways distinctly Indian.[206] Scholars contend that Indian women are expected to conform to an inequitable social role that Indian texts and traditions have influenced, and, in some cases, mandated.[207]

First, experts note that ancient and contemporary rules of law governing Indian life conflict.[208] Article 15 of the Indian Constitution, which prohibits sex-based discrimination,[209] stands

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Nussbaum, *Women and Work*, *supra* note 32 (introducing two Indian women who come from different castes and have different levels of financial support to determine similarities and differences of those women's situations; asserting that such evaluation is necessary to develop "normative theory of social justice in today's interlocking world.").

206. *See* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 24 (describing situation of women in India as difficult, unique, and complex); Sunder, *supra* note 128, at 425 (detailing distinct "analytic paradigm" Indian feminists can use to analyze sexual harassment specifically in context of India, in which analysis centers on Indian national and cultural women's gender roles); *see also* Menon & Kanekar, *supra* note 25, at 1950 (assuming that survey findings, consistent with Western feminist power differential perspective, would appear even greater had the researchers obtained their sample population from more traditional, rural Indian population, rather than urban college students).

207. *See* Sunder, *supra* note 128, at 430 (stating that Hindus submit to dictates of religious texts that prescribe women's social roles); *see also* Ritter, *supra* note 31, at 80-81 (explaining derivation of traditional Hindu view of human rights and that one must fulfill her socially prescribed duties on earth to receive rights).

208. *See* Gita Gopal, *Gender and Economic Inequality in India: The Legal Connection*, 13 B.C. THIRD WORLD L.J. 63, 67 (explaining that constitutional promise of equality is not achieved, in part because personal laws govern each religious group in India); Menon & Kanekar, *supra* note 25, at 1940 (explaining that in rural India, where citizens are tradition-bound and less educated, traditional texts prescribing women's subservience to men are obeyed, even in face of global gender equality); Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 38-47 (explaining different sources of Indian law, including Indian Constitution and various religious sources); Ritter, *supra* note 31, at 80 (arguing that sacred Hindu texts do not articulate universal principles of fundamental human rights).

209. INDIA CONST. pt. III (Fundamental Rights), art. 15. Article 15 states:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially

in opposition to other non-governmental texts that negate the intended equalizing effect of the Article.[210] For example, Manusmriti, an ancient code of laws the Indian sage, Manu, authored, orders the absolute subservience of women to men.[211] Additionally, Brahmanical religious texts dictate that women embody the positive characteristics of a nation, acting in a benevolent, religious, and self-sacrificing manner.[212] Scholars explain that these historical texts, which have contributed in large part to current nationalistic political discourse and to Indians' religious beliefs, wield strong influence in Indians' decisions regarding way of life, formulations of proper moral ideology, and, thus, treatment of women.[213]

As scholars have noted, the image of women these texts present emphasizes women's spiritual and traditional qualities, attributes that stand in direct opposition to the popular conceptions of aggressive, sexually liberated Western women.[214] Thus, prevalent ideas about the comportment of the ideal Indian wo-

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> and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Id.

210. *See* Menon & Kanekar, *supra* note 25, at 1940 (citing writings of ancient Indian sage, Manu, and stating that worst examples of women's inequality are found in "tradition bound" societies); *see also* Gopal, *supra* note 208, at 67 (stating that traditional Hindu law reflects gender biases that contravene constitutional gender equality guarantees).

211. *See* Menon & Kanekar, *supra* note 25, at 1940 (explaining that unmitigated subservience of women to men mandated in Manusmriti is evident in modern India, especially in rural areas); *see also* Narasimhan, *supra* note 210, at 47 (explaining that Code of Manu states that wife's duty to husband never ends, even if husband sells or abandons her).

212. *See* Sunder, *supra* note 128, at 430 (detailing Indian women's identity in ancient Indian text); *see also* Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex and Nation in India*, 10 COLUM. J. GENDER & L. 333, 337 (2001) (describing nationalistic behavioral norms women are expected to embody, such as chastity, submission, self-sacrifice, and patience); Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 49 (asserting that Indian Supreme Court equates being Indian woman with being mother, and puts woman on pedestal because of her supposed fragility).

213. *See* Sunder, *supra* note 128, at 429-30 (describing nationalist discourse and traditional texts that help shape women's social roles in India); *see also* Ritter, *supra* note 31, at 80-84 (explaining how Hindu texts dictate what constitutes proper behavior necessary to acquire rights).

214. *See* Sunder, *supra* note 128, at 430 (contrasting ideal Indian woman with popular stereotypes of Western women, who are considered vulgar, sexually promiscuous, and possessing little common sense); *see also* Kapur, *supra* note 212, at 356 (explaining that Indian feminism has positioned itself as anti-Western to increase acceptance); Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 49 (asserting that Indian Supreme Court views woman as sacred creature).

man downplay Indian women's sexuality, at least in the public sphere,[215] and particularly in contrast to her counterparts in the United States.[216]

Second, scholars explain that cultural mores also influence, and stifle, public interactions between Indian men and women.[217] Scholars explain that traditional Indian norms proscribe Indian women from freely dating or dancing with men.[218] Social rules direct that Indian women are expected to communicate with men in a reserved manner.[219] Further, Indian-pre-

215. *See, e.g.*, MACKINNON, THEORY OF THE STATE, *supra* note 100 (arguing that private and public spheres of women's lives are conflated because to know women's political situation is to know women's personal lives, including their sexual lives, as women suffer in their personal lives under pervasive male power); *see also* Haddon, *supra* note 17, at 379-80 (explaining that private issues, such as domestic violence, are international human rights issues); Higgins, *Regarding Rights*, *supra* note 19, at 232 (criticizing international human rights framework for ignoring male private power); Kim, *supra* note 11, at 66-69 (explaining that private sphere is often viewed as beyond State's reach when issue involves cultural practices that harm women and describing debate in international human rights law about what role of State should be regarding private sphere). Thus, it can be argued that Indian women's expression is suppressed in the private sphere as well, because of the male-dominated power structure under which women live. *See, e.g.*, Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 40 (explaining role of religious personal law in India, and accompanying sex inequalities).

216. *See* Sunder, *supra* note 128, at 430 (explaining that Indian women whom author interviewed were conscious of pressure to conform to widely-accepted notions of Indian women's identity to avoid workplace harassment, especially because those notions about Indian women stand in direct contrast to ideas about Western women); *see also* Kapur, *supra* note 212, at 342 (explaining that increasing pervasiveness of sexual imagery in Indian culture and greater openness of different sexual orientations are targeted as Western contaminants of Indian culture).

217. *See* Menon & Kanekar, *supra* note 25, at 1941 (citing traditional view of women's status and expected behavior in Indian society); Sunder, *supra* note 128, at 431 (explaining that working women expressed need to refrain from outgoing behavior at work because of propriety and caution that outgoing behavior would send wrong signals to men); *see also* Martha Nussbaum, *"Whether from Reason or Prejudice": Taking Money for Bodily Services*, 27 J. LEG. STUDIES 693, 699-700 (1998) [hereinafter *Reason or Prejudice*] (explaining cultural anxiety existing around female body).

218. *See* Menon & Kanekar, *supra* note 25, at 1941 (attributing sexual harassment in part to low status of women and lack of free interaction between men and women, including dating and dancing); Nussbaum, *Reason or Prejudice*, *supra* note 217, at 699 (explaining that in some parts of India it is still considered inappropriate for women from good families to dance in public); Radhika Parameswaran, *Feminist Media Ethnography in India: Exploring Power, Gender, and Culture in the Field*, QUALITATIVE INQUIRY, Feb. 2001 (stating that as Indian woman, author experienced curtailment of her mobility and freedom).

219. *See* Sunder, *supra* note 128, at 431 (describing sentiments of woman interviewed, who explained that Indian women must not talk too freely or boldly with everybody at work).

scribed manner of dress emphasizes propriety.[220] For example, employers prefer that their female employees wear the traditional sari, as opposed to the salwar kameez, a long shirt and loose pant.[221] Cultural practices therefore dictate women's public actions, and thus, according to scholars, strengthen the power differential between women and men, to whom rules of public conduct do not apply as strictly.[222]

Finally, scholars assert that factors such as caste, class, religion, and region combine and conflict with gender, and each other, to influence the magnitude and type of discrimination Indian women face.[223] Sexual harassment initially appeared in Indian discourse as a Western topic that was fashionable to discuss, and sexual harassment was therefore perceived to affect only the Indian elite.[224] This perception meant that upper- and middle-class women found greater support for their complaints, while lower-class women received less attention and encouragement.[225] Sexual harassment persists, however, in all strata of In-

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220. *See id.* at 430–31 (asserting that emphasis on women's workplace dress manifests conflation of gender and national identity in workplace); Parameswaran, *supra* note 218 (including dressing immodestly on list of activities that could bring family dishonor).

221. *See* Sunder, *supra* note 128, at 430-31 (explaining that traditional sari is viewed as more Indian and proper, and that some women think that dressing in "improper" fashion will provoke their male co-workers to misbehave).

222. *See id.* (recounting interviewee's statement that women must behave and dress appropriately at work or men will be provoked to misbehave); Menon & Kanekar, *supra* note 25, at 1941 (asserting that men can act as aggressive and predatory as desired, while women are expected to be bashful and submissive objects of male prey); Nager, *supra* note 194, at 1 (asserting that bias favoring male children is result of cultural, religious, and economic factors); Parameswaran, *supra* note 218 (stating that author's brother's mobility and freedom were not curtailed in same manner that author's movement and liberty was stifled).

223. *See* Nussbaum, *Women and Work*, *supra* note 32 (examining lives of two Indian women to determine root of deprivations they suffer, and concluding that both suffer deprivations that arise not only as result of their sex, but also because of their respective castes and their residence in particular Indian regions); *see also* Anita Krug, *One by One*, 7 HARV. HUM. RTS. J. 278, 278 (1994) (stating that deeply entrenched social attitudes and religious tradition influence Indian women's status); Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 40-47, 49 (explaining that religion and caste influence gender equality, and recognizing that Indian Court recognizes combination of progressive and traditional elements in deciding gender issue cases).

224. *See* Sunder, *supra* note 128, at 427 (asserting that many Indian women viewed sexual harassment as problem that only Indian elite faced, and therefore did not want to discuss issue); *see also* Kapur, *supra* note 212, at 337 (explaining that Indian middle-class nationalism was elaborated in one's home, and therefore traditional social forces shaped sexual norms).

225. *See* Menon & Kanekar, *supra* note 25, at 1950 (acknowledging "elitist" nature

dian society, affecting women across social and caste lines.[226] Thus, women throughout India need assistance in protecting against, and preventing, such harassment, like women in the United States, and elsewhere.[227]

2. Early Stages

In her article, *In a "Fragile Space": Sexual Harassment and the Construction of Indian Feminism*, Madhavi Sunder[228] explores how sexual harassment came to be distinctly experienced and theorized in India.[229] Despite sexual harassment's persistence, country-wide sexual harassment legislation does not exist in India.[230]

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of study that focused on urban college students); Sunder, *supra* note 128, at 427-28 (noting that early articles about problem of sexual harassment focused on upper- and middle-class women); Rasheeda Bhagat, *An Officer, Yes: A Gentleman, No*, BUSINESS LINE, Jan. 13, 1998 (recognizing that recent Indian Supreme Court sexual harassment decisions, especially the *Bajaj* case, embolden middle-class women to take action against workplace harassment).

226. *See* SEGRAVE, *supra* note 105, at 160-61 (describing sexual harassment of Indian women teachers, nurses, and State social workers); *see* Han, *supra* note 6, at 787 (including Indian women in discussion among women lawyers from different countries who experienced workplace sexual harassment and other gender-based indignities); Menon & Kanekar, *supra* note 25, at 1940 (acknowledging that sexual harassment has existed throughout history, and affects all Indian women, regardless of whether feminism has influenced them); Nussbaum, *Women and Work*, *supra* note 32 (declaring that woman's body that gets beaten is experienced similarly all over world).

227. *See* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 25 (recognizing inadequacy and gender-related stereotypes of protections against problem of sexual harassment in India); Sunder, *supra* note 128, at 437 (asserting necessity of legislation and legal attention to sexual harassment of Indian women); *see also* SEGRAVE, *supra* note 105, at 1 (stating commentator's sentiment that all women working outside home do so with expectation of sexual harassment). *See generally* Han, *supra* note 6 (discussing different women's experiences with terrible workplace conditions throughout world, including sexual harassment).

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229. *See* Sunder, *supra* note 128, at 420 (stating purpose of her paper).

230. *See Vishaka*, *supra* note 4 (noting lack of legislative measures to combat sexual harassment in Indian workplace); *see also Supreme Court Quasi-Law on Sexual Harassment*, BUSINESS STANDARD, Aug. 14, 1997, at 1 (stating that there is "legal vacuum"); Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 57 (acknowledging that sexual harassment legislation binding on non-governmental actors does not yet exist and current political climate does not seem favorable for such legislation to pass).

While the unified Indian government has not yet passed anti-sexual harassment legislation, several state governments have enacted such legislation. *See After Four Years, Bihar Heed Supreme Court Order on Sexual Harassment*, THE STATESMAN, Aug. 19, 2001 (stating that state of Bihar took four years to implement Supreme Court's sexual harassment

This void continues, in part, because, for many years, Indian feminists did not consider anti-sexual harassment protections relevant to Indian women's lives.[231] In 1979, when the issue briefly surfaced within Indian feminist circles,[232] many Indian women involved in that country's feminist movement criticized it as a "bourgeois" issue lacking importance.[233] In a personal interview, Madhu Kishwar, the editor of the Indian feminist magazine, *Manushi*, explained that, compared to dowry deaths, custodial rape, communal riots, child marriages, and overwhelming poverty, sexual harassment seemed too trivial an issue to concern Indian women.[234] She further suggested that Indian women, in contrast to sexually immoral Western women, could tolerate sexual harassment because of the more extreme problems with which Indians had to contend.[235] Many lawmakers and citizens of the Indian public shared this sentiment.[236] Facing the

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decision in *Vishaka*); C. Antony Louis, *Kerala Lags Behind*, THE HINDU, July 19, 2001 (stating that nine states have not amended civil services rules to prohibit sexual harassment, including supposedly progressive state of Kerala); *see also Eveteasing to be Made Non-Bailable Offence*, THE HINDU, Sept. 11, 2001 (explaining that Chennai state government made all sexual harassment offenses non-bailable).

231. *See* Sunder, *supra* note 128, at 422 (explaining why Indian feminists did not rally around issue of sexual harassment).

232. *See id.* (describing cover story on sexual harassment detailed in *Manushi*, Indian feminist magazine).

233. *See id.* (quoting Indian feminist critics' disdainful categorization of sexual harassment as "bourgeois issue"); *see also* Bhagat, *supra* note 225 (recognizing that Supreme Court sexual harassment decisions empower primarily middle-class Indian women).

234. *See* Sunder, *supra* note 128, at 421 (asserting that sexual harassment was too frivolous to be considered "Indian" issue).

235. *See id.* at 421-422 (comparing "predicament" of Indian and Western women); Krug, *supra* note 223, at 278 (listing legal services provided to Indian women at legal division of All India Democratic Women's Association, such as helping victims of dowry-related crimes, child custody, and domestic violence). *See generally* Gopal, *supra* note 208 (discussing Indian women's economic dependence because of Indian property laws); Subrata Paul, *Combating Domestic Violence Through Positive International Action in the International Community and in the United Kingdom, India, and Africa*, 7 CARDOZO J. INT'L & COMP. L. 227, 237-40 (1999) (describing domestic violence problems of Indian women).

236. *See* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 30 (noting male disregard towards Devi after her suffering of sexual harassment and rape); Menon & Kanekar, *supra* note 25, at 1947 (noting male subjects in study concerning workplace sexual harassment in India blamed victim for causing problem); Sunder, *supra* note 128, at 420 (describing derisive reaction that Indian lawmakers and Indian public have to Indian feminists attempting to reform sexual harassment laws); *Harassment at Work*, THE HINDU, Mar. 4, 2001 (recounting demeaning responses women received to their workplace sexual harassment complaints); *Of Lawyers and the Law*, THE HINDU, July 9, 2000

adverse conditions of Indian women's lives, combined with anti-feminist Indian sentiment, Indian feminists needed to adopt a new, non-Western method for framing the problem of sexual harassment in a manner that would garner public support for protections against behavior that some Indians do not consider problematic.[237]

Indian feminists finally addressed the problem of sexual harassment after a long battle to redefine rape law in the Indian courts.[238] These feminists recognized that traditional rape law focused on male penetration and patriarchal control of women, and therefore did not adequately protect women.[239] Thus, Indian feminists posited a woman-centered attitude towards rape law, lobbying for a legal analysis of rape that begins with the woman's experience of violation.[240] In 1992, in order to challenge what they felt were false distinctions drawn between rape and sexual harassment, after the gang rape of a social worker who had been harassed for her work, Indian social activists and non-governmental organizations ("NGOs")[241] placed the controversial issue of sexual harassment at the forefront of the Indian women's movement.[242] To distinguish their crusade against sexual

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(describing negative response of fellow lawyers, male and female, to Sangeeta Sharma's complaints of workplace sexual harassment, and Sharma's ultimate suicide, which is attributed to sexual harassment she suffered).

237. *See* Sunder, *supra* note 128, at 421 (asserting that Indian women need to create new identities, merging older nationalistic and cultural loyalties, and newer individual identities and ways of life); *see also* Kapur, *supra* note 212, at 342 (explaining that Indians with sexual ideas and orientations radical for India are surfacing and trying to include themselves in traditional Indian culture and nationalism).

238. *See* NUSSBAUM, DEVELOPMENT, *supra* note 8, at 30 (arguing that rape is used to fight women's progress, and citing Devi case as example); Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 55-56 (explaining how Indian feminists equated Devi's brutal gang rape with unsafe working conditions and sexual harassment at work); Sunder, *supra* note 128, at 423 (crediting nearly ten-year long feminist campaign to reform rape laws with successfully effecting significant changes in Indian rape law).

239. *See* Sunder, *supra* note 128, at 423 (explaining why traditional approach to rape law disturbed many Indian feminists, who felt that this focus did not move rape beyond realm of conventional patriarchal definition).

240. *See id.* (describing 1990 report from meeting of Forum Against the Oppression of Women).

241. *See Vishaka*, *supra* note 4 (stating that social activists and non-governmental organizations ("NGOs") filed class action to address "societal aberration" of sexual harassment).

242. *See* Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 55-56 (detailing women's group and NGOs' successful efforts to persuade Court of great dangers, including rape, that sexual harassment holds for women at work); Sunder, *supra* note 128, at 424 (explaining that Indian feminists sought to challenge distinction between sexual

harassment from those battles U.S. feminists fought, Indian feminists attempted to expand their conception of sexual harassment beyond the U.S. feminist focus on sex-based power differentials, and the U.S. popular culture's obsession with sexual advances in sexual harassment cases.[243] Instead, Indian feminists identified the reasons that Indian women experience sexual harassment as not only attributable to their sex, but also particular to their culture.[244] With sexual harassment becoming a heated public debate, the stage was set for the government to respond to the pressures of the Indian women's movement.[245] Indian lawmakers, however, remained silent on this issue of increasing importance.[246]

3. Recognition of Workplace Sexual Harassment

In *Vishaka v. State of Rajasthan*, the Indian Supreme Court recognized that women in the workplace needed protection from such harassment.[247] News of Bhanwari Devi's having suffered sexual harassment so severe that it culminated in a brutal

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harassment and rape in order to develop contemporary legal notions of women's violation, reaching beyond act of male penetration to include power dynamics between men and women).

243. *See* Sunder, *supra* note 128, at 424 (recognizing difficult task of differentiating Indian feminist fight against sexual harassment as distinctly Indian movement).

244. *See generally* Nussbaum, *Women and Work*, *supra* note 32 (discussing cultural norms and roles that affect sexual harassment in India); Sunder, *supra* note 128 (discussing uniquely Indian experience and explanation of sexual harassment in India). Sunder's assertion that this Indian feminist focus is a specifically Indian approach to a women's issue is inaccurate in light of recent anti-essentialist feminist developments in the United States that stress the importance of examining a woman's contrasting and intersecting identities. *See, e.g.*, Abrams, *Complex Female Subject*, *supra* note 94, at 2479 (surveying recent U.S. judicial decisions to determine whether courts acknowledge, and respect, complex nature of woman as subject); *see also* Crenshaw, *supra* note 113 (explaining how different oppressive forces shape black women's experience of discrimination); Harris, *supra* note 113 (criticizing liberal feminist theory as essentialist and explaining unique experiences of oppression among women of colors); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988) (describing essentialist nature of liberal feminist theory).

245. *See* Sunder, *supra* note 128, at 424 (describing sexual harassment as issue ripe for legal reform after Devi's rape).

246. *See Vishaka*, *supra* note 4 (noting that legislative measures did not exist to combat sexual harassment in Indian workplace); Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 57 (acknowledging that sexual harassment legislation binding on nongovernmental actors does not yet exist); *Supreme Court Quasi-Law*, *supra* note 230 (recognizing legal vacuum).

247. *See Vishaka*, *supra* note 4 (stating that guidelines set forth in decision function to fill absence of legislative measures and acknowledging urgent need to find effective

gang rape spurred women's groups and NGOs to file a non-adversarial claim with the Indian Supreme Court to enforce working women's rights in 1992.[248] In 1997, a three-judge bench of the Supreme Court, including the Chief Justice,[249] ratified guidelines that these women's groups had authored to both prevent sexual harassment and protect working women in the absence of appropriate legislation.[250] Thus, the Indian Supreme Court, relying on international and domestic sources of law, issued a decision that prohibited workplace sexual harassment, and provided instructions and a mechanism for harassed women to report and resolve sexual harassment at work.[251] The Court's decision was an unusually proactive, affirmative measure.[252]

a. Sources of Law in *Vishaka v. State of Rajasthan*

The Indian Supreme Court relied upon domestic and international documents, intertwining the two sources of law to reach its decision.[253] The opinion began with a discussion of the relevant Indian constitutional provisions.[254] The Court condemned sexual harassment because it violates the fundamental rights of

alternative mechanism to these guidelines); Rasheeda Bhagat, *supra* note 201 (asserting that governmental action on major problem of sexual harassment was long overdue).

248. *See* Murthy, *supra* note 195 (listing Indian women's groups that drew up guidelines and filed petition). The women's groups and NGOs used Article 32 of the Indian Constitution to petition the Court. *See* Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 55 (explaining how citizens may directly appeal to Court to secure rights). Article 32(1) provides that through petition, citizens may appeal directly to the Supreme Court to secure enforcement of their rights. INDIA CONST. art. 32(1).

249. *See Vishaka*, *supra* note 4 (identifying Chief Justice Verma as opinion's author).

250. *See* Murthy, *supra* note 195 (emphasizing that *Vishaka* decision is especially significant because of absence of civil and penal laws adequately protecting women from sexual harassment).

251. *See generally Vishaka*, *supra* note 4.

252. *See Supreme Court Quasi-Law*, *supra* note 230 (stating that Court's decision was "rare affirmative action"); *see also* Murthy, *supra* note 195 (quoting Indian women's rights activist and petitioner in *Vishaka* case, Urvashi Butalia, who rejoiced at extremely broad definition of sexual harassment provided by decision).

253. *See Vishaka*, supra note 4 (relying upon international conventions, such as Beijing Statement on the Independence of Judiciary in LAWASIA region ("Beijing Statement") and CEDAW, in conjunction with domestic documents, such as Indian Constitution, to decide case); *see also* Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 56 (recognizing that *Vishaka* decision demonstrates interaction between international treaties and domestic courts).

254. *See Vishaka*, *supra* note 4 (stating that Court will refer to those constitutional provisions, which envision judicial intervention for eradication of social evil of sexual harassment).

gender equality and the right to life and liberty that the Indian Constitution guarantees.[255] Concentrating on Part III, the fundamental rights section of the Indian Constitution, the Court detailed the Articles that sexual harassment violates: Article 14 mandates equal treatment and protections for all Indian citizens;[256] Article 15 prohibits discrimination based on religion, race, caste, sex, or place of birth;[257] Article 19(1)(f) states that all Indian citizens are permitted to practice any profession;[258] and Article 21 protects life and personal liberty.[259] Furthermore, under Article 32 of Part III, the Court has the power to enact guidelines providing remedies to those women who have suffered harassment.[260] The Court therefore used its Article 32 powers to ratify the fundamental right of working women to gender equality, which the Indian Constitution's provisions encompass.[261]

After establishing the basic constitutional rights that sexual harassment violates, the Court turned to international human rights law.[262] First, the Court acknowledged Article 51(c)[263] and

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255. *See id.* (recognizing that gender equality means that woman has right to life with dignity).

256. INDIA CONST. art. 14. Article 14 provides that "[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." *Id.*

257. *Id.* art. 15.

258. *Id.* art. 19(1)(g). Article 19(1) states that "[a]ll citizens shall have the right . . . (g) to practice any profession, or to carry on any occupation, trade or business." *Id.* art. 19(1).

259. *Id.* art. 21. Article 21 states that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law." *Id.*

260. *Id.* art. 32. Article 32 provides:

> Remedies for the enforcement of rights conferred by this Part:
>
> (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this part.
>
> (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the power exercisable by the Supreme Court under clause (2).
>
> (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Id.

261. *Id.*

262. *See Vishaka, supra* note 4 (stating that in absence of domestic anti-sexual har-

Article 253[264] of the Indian Constitution as permitting the State to adopt any international treaty that promotes fundamental rights.[265] To further promote the objectives of the constitutional guarantees, the Court read applicable international conventions into the Constitution.[266] Thus, the Court asserted that international conventions help guard against sexual harassment.[267]

The Court also found support for its action under international law, both from treaty-based and customary law.[268] In its analysis, the Court first cited principles from the 1995 Beijing Statement of the Independence of the Judiciary in the LAWASIA region ("Beijing Statement") to establish the propriety of its actions.[269] Specifically, the Court noted the importance of the Beijing Statement's Article 10, which imposes duties on the judiciary to promote human rights and ensure equal protection

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assment law, Court will create effective measures to check evil of sexual harassment of working women in all workplaces, and that international conventions and norms are significant for purpose of interpreting guarantee of gender equality); *but see* Sunder, *supra* note 128, at 421-22 (explaining that Indian feminists wanted to address women's issues in India through measures unique to India, as opposed to international human rights mechanisms).

263. INDIA CONST. pt. IVA, art. 51(c). Article 51 provides: "[p]romotion of international peace and security: The State shall endeavour to . . . (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another." *Id.*

264. INDIA CONST. pt. XI (Relations Between the Union and the States), ch. I (Legislative Relations), art. 253. Article 253 states:

> Legislation for giving effect to international agreements:
> Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association, or other body.

Id.

265. *Vishaka, supra* note 4 (claiming ability to observe international treaties that promote fundamental rights).

266. *See id.* (reading international conventions consistent with Indian Constitution fundamental rights section into that section to "enlarge" meaning of constitutional mandates contained therein).

267. *See id.* (acknowledging that gender equality includes, at minimum, protection from sexual harassment and right to work with dignity).

268. *See id.* (using treaty-based and customary law to decide case).

269. Beijing Statement, Aug. 19, 1995, *available at* http://www.law.murdoch.edu.au/icjwa/beigst.htm. The Beijing Statement contains the standards that chief justices throughout Asia agreed represent the minimum necessary for the independent and effective functioning of the judiciary. *See Vishaka, supra* note 4 (explaining creation and function of Beijing Statement).

under the law.[270] Thus, the Beijing Statement provided a justification for the Court's issuance of guidelines in the human rights field.[271]

Once the Court established that international agreements supported the issuance of sexual harassment guidelines, it relied on provisions in human rights conventions specifically addressing women's rights and sexual harassment.[272] The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") mandates State action to eliminate gender-based discrimination in employment and to ensure the rights to work and to work in safe working conditions.[273] The Court recognized that sex-based violence, including sexual harassment, impairs the goal of equality in employment.[274]

Finally, the Court relied on international customary law, in addition to international conventions and domestic sources.[275] International customary law represents one of the main sources of international law recognizing the right to gender equality.[276]

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270. Beijing Statement, *supra* note 269, art. 10. Article 10 provides:

The objectives and functions of the Judiciary include the following:

(a) to ensure that all persons are able to live securely under the Rule of Law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.

Id.

271. *See Vishaka*, *supra* note 4 (relying on Beijing Statement).

272. *See id.* (relying on international documents, such as CEDAW, that address women's issues).

273. Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 34/180, art. 11, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1980) [hereinafter CEDAW], *available at* http://www.un.org/womenwatch/daw/cedaw/. Article 11 provides that:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

   a. The right to work as an inalienable right of all human beings;

   . . .

   f. The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction

Id.

274. *See Vishaka*, *supra* note 4 (citing CEDAW provisions that declare sexual harassment gender specific violence, and therefore hindrance to workplace equality).

275. *See id.* (relying on international custom).

276. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (stating that customary law is rule of international law when it has been accepted by international community of States); *see also* LILLICH & HANNUM, *supra*

To qualify as international customary law, laws proscribing sexual harassment must enjoy general application and States must enact these laws out of a sense of legal obligation.[277] States' practice of condemning workplace sexual harassment as antithetical to gender equality is general and consistent, and therefore qualifies as customary.[278] Further, countries prohibit sexual harassment out of a sense of legal obligation, thereby also making the practice customary.[279] Thus the Indian Court, recognizing the significance of international norms, stated that the right to gender equality, as it is globally accepted, includes sexual harassment protections and the opportunity to work with dignity.[280]

b. *Vishaka* Guidelines

The Court concluded its opinion by setting forth mandatory guidelines designed to prevent the sexual harassment of working women.[281] First, the Court set forth a broad definition of sexual harassment at work.[282] Second, the Court imposed an affirmative duty on the employer to prevent the commission of workplace sexual harassment and the creation of a hostile work environment.[283]

i. Defining, and Combating, Sexual Harassment

Sexual harassment, as the *Vishaka* Court defined it, can take many different forms.[284] Specifically, sexual harassment is any

note 31, at 93 (explaining that international custom, which evidences general practices of accepted law, and general principles of law that civilized nations recognize are two of three major sources of international law).

277. *See* RESTATEMENT, *supra* note 276, § 102 (1)-(2) (describing what constitutes customary international law).

278. *See id.* § 102 cmt. b (explaining that generality does not require universal acceptance among States, but rather only wide acceptance among States is necessary).

279. *See id.* cmt. c (describing "opinio juris," State's sense of legal obligation).

280. *See Vishaka, supra* note 4 (acknowledging that global community includes protections from sexual harassment in basic human right of gender equality).

281. *See id.* (detailing 12 guidelines against sexual harassment in workplace).

282. *See id.* (defining workplace sexual harassment).

283. *See id.* (imposing affirmative duty on employer to prevent workplace sexual harassment).

284. *Id.* Guideline 2 provides:

> sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as: a) physical contact and advances; b) a demand for sexual favors; c) sexually colored remarks; d) showing pornography; e) or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

unwelcome sexual behavior that a harassment victim reasonably perceives may negatively impact one's health and safety in the workplace.[285] Employees are free to raise complaints of any such behavior in any appropriate forum.[286] To combat sexual harassment, workplaces must create a complaint mechanism, complete with a woman-headed complaints committee, which has NGO representation, and at least half of which is comprised of women.[287] Although these provisions may be sufficient to combat sexual harassment of women in the workplace, the Court urged the government to adopt legislation ensuring the observance of these guidelines.[288]

ii. Employer Liability

The Court also imposed an affirmative duty on the employer to prevent sexual harassment in the workplace.[289] An employer, in both the public and private sectors, must provide procedures for deterring workplace sexual harassment and the creation of a hostile work environment, resolving sexual harassment claims, and prosecuting acts of sexual harassment.[290] Upon the

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Id.

285. *Id.* Guideline 2(e) states that sexual harassment occurs when any of the above-defined conduct is:

> committed in circumstances whereunder the victim of conduct has a reasonable apprehension that in relation to the victim's employment or work[,] whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise[,] such conduct can be humiliating and may constitute a health and safety problem.

Id.

286. *Id.* Guideline 8 provides that "[e]mployees should be allowed to raise issues of sexual harassment at workers' meeting[s] and in other appropriate forum[s], and it should be affirmatively discussed in Employer-Employee Meetings." *Id.*

287. *See id.* Guideline 7 establishes a complaint committee to help administer the complaint mechanism established in Guideline 6. *Id.* This guideline is essentialist, because it assumes that women will all react the same way to sexual harassment complaints. *See, e.g.*, Abrams, *Complex Female Subject*, *supra* note 94 (critiquing judicial treatment of female subject as singular entity, rather than as complex subject with many factors influencing identity). Further, it does not take into account the biases of NGOs. *See* LILLICH & HANNUM, *supra* note 31, at 452-64 (highlighting methodological and credibility problems of NGOs).

288. *See Vishaka*, *supra* note 4 (explaining that vacuum is present in existing legislation, and deeming sexual harassment protections "urgent social need").

289. *See id.* Guideline 1 imposes a duty on the employer and/or any other person responsible in the workplace and other institutions. *Id.*

290. *See id.* Guideline 1 includes an express prohibition against sexual harassment. *Id.* Guideline 9 contains the duty to notify workers of that express prohibition in

creation of such workplace rules, the employer must notify all workers of the anti-sexual harassment policy.[291] The employer also has a duty to initiate appropriate criminal and/or disciplinary action when necessary.[292] This employer-provided protection extends to shield workers from third-party harassment.[293]

C. *Post-Vishaka Developments*

Even though the Indian Supreme Court in the *Vishaka* decision strongly urged governmental action banning sexual harassment, Indian lawmakers have yet to take action.[294] Responding to this lack of legislation, the Indian Supreme Court continues to decide sexual harassment cases in accordance with the *Vishaka* guidelines.[295] In a 1999 case, *Apparel Export Promotion Council v. Chopra*,[296] the Indian Supreme Court reiterated its guidelines and definition of workplace sexual harassment, demonstrating its sensitivity to workplace gender issues.[297]

The differences between the facts of the *Chopra* case and those leading to the *Vishaka* decision are critical to the Court's further explanation of sexual harassment law in *Chopra*.[298] Chopra, Chairman of the Apparel Export Promotion Council,

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Guideline 1. *Id.* Guideline 3(d) imposes the duty to provide appropriate work conditions to ensure that a hostile work environment does not exist at work. *Id.*

291. *See id.* Guideline 9 states that employers must create awareness regarding sexual harassment protections among all workers, notifying them of the guidelines, as well as any anti-sexual harassment legislation that may be enacted. *Id.*

292. *See id.* Guidelines 4 and 5 provide employers with remedial power. *Id.*

293. *Id.* Additionally, and similar to Title VII's retaliation provision, the Indian employer must ensure that the complainant is not victimized or harassed when initiating and participating in disciplinary and legal proceedings against her harasser. *Id.*

294. *See* Nussbaum, *Implementing Sex Equality*, *supra* note 58, at 57 (acknowledging lack of sexual harassment legislation binding on non-governmental actors and finding current political climate unfavorable for such legislation to pass); Singh, *supra* note 195 (explaining that despite *Vishaka* decision, little has changed for Indian working women, especially because Indian government has not enacted any legislation on sexual harassment issue, and few sexual harassment cases have been filed); *Supreme Court Quasi-Law*, *supra* note 230 (stating that lack of sexual harassment legislation represents legal void).

295. *Chopra*, *supra* note 195.

296. *Id.*

297. *See id.*; Singh, *supra* note 195 (stressing that *Chopra* decision demonstrates Court's increasing sympathy toward sexual harassment, and interpreting *Chopra* decision as sending message to lower courts that they are obliged to protect women's fundamental rights).

298. *See* Vishaka, *supra* note 4; *cf.* *Chopra*, *supra* note 195.

sexually harassed his private secretary.[299] Disregarding her objections, Chopra tried to sit too close to her, and to touch her on several occasions.[300] Despite his repeated efforts, however, Chopra never actually succeeded in his attempts to molest his secretary.[301] After the secretary complained, Chopra was fired.[302]

The Indian Supreme Court overturned the Delhi High Court's decision that Chopra's dismissal was unwarranted.[303] The Delhi High Court had based its decision on the fact that Chopra never made physical contact with his secretary, and therefore never actually molested her.[304] Conversely, the Indian Supreme Court held that sexual harassment can occur even when physical contact does not.[305] Employing a strict interpretation of the *Vishaka* guidelines, the Court found Chopra's acts to constitute sexual harassment, even though they did not fit the exact dictionary meaning of "molestation" or "physical assault."[306]

In deciding the *Chopra* case, the Court relied on the *Vishaka* guidelines, and the legal documents cited therein.[307] Additionally, the *Chopra* Court cited the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[308] as another source of relevant law.[309] Article 7 of the ICESCR recognizes a

299. *Chopra, supra* note 195 (describing attempts at physical contact and statements Mr. Chopra made to his secretary).

300. *See id.* (listing incidents when Mr. Chopra invaded plaintiff's personal space, attempting to sit too close to plaintiff, even after she objected).

301. *See id.* (describing lengths to which plaintiff had to go in order to avoid Chopra's advances, including pressing elevator emergency button).

302. *See id.* (detailing complaint mechanism plaintiff used, and subsequent investigation findings, that resulted in Chopra's dismissal).

303. *Id.*

304. *See id.* (quoting Division Bench of High Court, which found it completely impossible to conclude that Chopra attempted to molest plaintiff because there was no physical contact between Chopra and plaintiff).

305. *See id.* (explaining that harasser's failure to establish any physical contact with woman he harassed does not mean that he had not made any objectionable overtures containing sexual overtones).

306. *See id.* (criticizing Delhi High Court for being persuaded by narrow technicalities and insignificant discrepancies).

307. *See id.* (relying on *Vishaka* guidelines, Indian Constitution, Beijing Declaration, and CEDAW).

308. International Covenant on Economic, Social and Cultural Rights, 999 U.N.T.S. 3 [hereinafter "ICESCR"].

309. *See Chopra, supra* note 195 (stating that ICESCR contains provisions particularly important for women's rights).

woman's right to fair work conditions and freedom from sexual harassment, which can impair the working environment.[310] Furthermore, the *Chopra* Court held that Chopra violated Indian Code, Section 354, which prohibits outraging the modesty of a woman.[311]

The Court's unprecedented decisions in the *Vishaka* and *Chopra* cases surprised Indian feminists, who praised these recent developments.[312] Urvashi Butalia, a leader of the Indian women's group, Kali, stated that Indian women should enjoy these progressive and useful decisions, especially considering the usually anti-woman decisions of the Supreme Court.[313] Reporters covering the decision noted the Court's growing sensitivity towards the issue of sexual harassment, as well as the extremely important power given to women in the workplace to remedy difficult situations of gender-based discrimination.[314] Finally, some Indians expressed the view that pro-woman sexual harassment decisions were positive steps, because it was simply time for the matter to be addressed.[315]

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310. ICESCR, *supra* note 308, art. 7. Article 7 states:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> . . .
>
> (b) . . . safe and healthy working conditions;
>
> (c) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

Id.

311. *See Chopra*, *supra* note 195 (emphasizing that Chopra's behavior offended plaintiff's modesty and stood in opposition to morality and decency); *see also* Rupan Deol Bajaj and Another v. Kanwar Pal Sign Gill and Another, *available at* http://www.lawinc.com (using English dictionaries to determine meaning of "modest," and then analyzing definition in relation to women).

312. *See* Murthy, *supra* note 195 (describing positive reaction to decisions from women's groups).

313. *See id.* (quoting Urvashi Butalia, Indian women's rights activist, about overall anti-woman character of Indian Supreme Court).

314. *See* Bhandare, *supra* note 5 (quoting statements of Delhi bureaucrat who suffered sexual harassment, concerning great power for redress that guidelines provide); Singh, *supra* note 195.

315. *See* Bhagat, *supra* note 201 (stating that *Vishaka* guidelines represent measure long overdue, as is open discussion of prevalent sexual harassment problem). For a discussion of why this problem was often hushed, see Sunder, *supra* note 195 (explaining that sexual harassment was viewed as Western problem, not Indian issue).

III. *A VIBRANT CONTRAST: AN ANALYSIS*

While the Indian Supreme Court's pro-woman measures represent progress, one must not be too quick to claim absolute success for the Indian women's movement. After all, as discussed throughout this Part, U.S. sexual harassment cases, which also appear incredibly progressive, are replete with sexist assumptions and paternalistic attitudes. Instead, one must critically examine both Indian and U.S. legal decisions, both by themselves and in relation to the advances and flaws of other systems. This Part of the Comment compares and evaluates the sexual harassment laws in India and the United States. Particularly examined are the flaws in the earlier-established system in the United States, and whether the Indian Court adopted or ameliorated those flaws in its guidelines.

A comparison of the U.S. and Indian Supreme Courts' approaches to deciding sexual harassment cases permits examination of the respective judicial doctrines, as well as the sex-based social roles and norms upon which both Courts rely. A doctrinal comparison reveals the different sources the Courts cite in deciding sexual harassment cases, the Courts' similar definitions of workplace sexual harassment, and the Courts' views and applications of employer liability. Analysis of the Courts' sexual harassment cases also exposes the gender roles and societal perceptions concerning "appropriate" women's behavior that informed the Courts' decisions.

A. *Doctrinal Comparison*

A doctrinal comparison of the U.S. and Indian Supreme Court sexual harassment decisions demonstrates important differences and similarities in each Court's approach to defining sexual harassment and deciding sexual harassment cases. First, the two Courts look to different sources of law to decide sexual harassment cases.[316] Second, both Courts set forth a broad definition of sexual harassment.[317] Finally, both Courts impose em-

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316. *See supra* notes 157, 159, 163 and accompanying text (discussing U.S. Supreme Court cases in which courts relied on Title VII); *cf. supra* 253-75, 309-11 and accompanying text (discussing sources on which Indian Supreme Court relied in *Vishaka*).

317. *See supra* notes 152-56 and accompanying text (stating U.S. Supreme Court's definition of sexual harassment); *cf. supra* notes 284-85 and accompanying text (stating Indian Supreme Court's definition of sexual harassment).

ployer liability for workplace sexual harassment, but the level of employer responsibility entailed varies.[318]

1. Sources of Law and Their Effect

In defining sexual harassment, and determining what behavior meets that definition, the U.S. and Indian Supreme Courts look to different legal sources. The U.S Supreme Court relies on only one source, Title VII, to prohibit sexual harassment in the workplace.[319] As evidenced in the *Meritor* decision recognizing the hostile work environment conception of sexual harassment,[320] and with the quid pro quo opinions,[321] the Court reads Title VII's language to include sexual harassment as a form of sex discrimination because the statute explicitly forbids any form of discrimination based on sex.[322]

The Court's expansive reading of Title VII provides women suffering from workplace harassment with recourse. The Court's complete reliance on a singular statutory source, however, implies that that source of law alone is sufficient to combat sexual harassment, even though other sexual harassment prohibitions, such as international conventions, may exist. This implication departs from Professor MacKinnon's ideals regarding legislators' potentially ongoing role in creating anti-discrimination laws that address the power disparity between men and women.[323]

Unlike the U.S. Court's sexual harassment decisions, which rely on a single statutory tool, the Indian Supreme Court bases its sexual harassment decisions on several documents, both domestic and international.[324] The Indian Court may need to cite a greater variety of legal sources because no country-wide legisla-

318. *See supra* notes 179-80, 183-85, 289-92 and accompanying text (describing imposition of employer liability).

319. *See supra* notes 157, 159, 163 and accompanying text (discussing cases in which courts relied solely on Title VII).

320. *See supra* notes 159-66 and accompanying text (describing "hostile work environment" concept and *Meritor* decision).

321. *See supra* notes 154-58 and accompanying text (explaining "quid pro quo" concept and relevant decision).

322. *See supra* notes 157-58 and accompanying text (explaining holding in *Saxbe*).

323. *See supra* note 134 and accompanying text (describing Professor MacKinnon's ideal legislative approach to sexual harassment law).

324. *See supra* notes 253-74, 308-10 and accompanying text (discussing domestic and international documents that Indian Supreme Court cited in sexual harassment cases).

tion exists in India specifically addressing the issue of sexual harassment.[325] However, the Indian Court bases its sexual harassment decisions not only on other sources of national law, but also on international conventions and international customary law.[326]

First, the Indian Court grounds its analysis in the Indian Constitution,[327] thus recognizing the need for an Indian solution to a problem that is, in part, specific to Indian women as Indians.[328] Women in India inhabit a complex space because of their many intersecting identities[329] and identifications,[330] cultural uniqueness, and national pride, and therefore experience a reality distinct from their Western counterparts.[331] This distinct and complex identity may conflict with Western ideas of feminism and policies designed to help women.[332] For example, Indian feminists' experience includes the impact of Western colonialism and imperialism, and is thus different from that of white feminists in the United States.[333] Therefore, the Court's reliance on sources that reflect the importance of Indian women's cultural and national identifications both demonstrates respect for those identifications and increases the relevance and acceptability of the Court's initial solutions to the problem of sexual harassment in the Indian workplace.

Professor Sunder explains that Indian women, when re-

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325. *See supra* note 247 and accompanying text (recognizing that *Vishaka* guidelines function to fill legal void that lack of sexual harassment protection creates).

326. *See supra* notes 253-80, 309-11 and accompanying text (discussing all sources that Indian Supreme Court cited in sexual harassment cases).

327. *See supra* notes 254-61, 263-67 and accompanying text (noting relevant provisions in Indian Constitution).

328. *See supra* notes 229, 231-37 and accompanying text (presenting concern that many Indian feminists face as to appropriate response to issue of sexual harassment).

329. *See supra* notes 206, 229, 244 and accompanying text (explaining how multitude of factors combine to form complex Indian female subject, which Title VII does not adequately address).

330. *See supra* notes 205, 223 and accompanying text (addressing different forces influencing Indian woman's life and identity-formation).

331. *See supra* notes 205-26 and accompanying text (explaining unique aspects of sexual harassment problem in India, and acknowledging that Indian women have difficulty articulating problem of sexual harassment because they face conflicting alliances and models).

332. *See supra* notes 214-16 and accompanying text (comparing views held in India and United States about women's traditional roles and women's problems).

333. *See supra* notes 205-27 and accompanying text (mentioning aspects of Indian history that differentiate experience of Indian women from that of certain Western women).

sponding to women's issues like workplace sexual harassment, struggle with often conflicting ideals concerning loyalty to Indian traditions and equality for women.[334] To tackle sexual harassment, Indians must articulate and address the problem in a manner specific to their realities.[335] Professor Sunder asserts that Indian feminists want protections against sexual harassment that integrate old nationalistic loyalties with new, Western-influenced thought and theory to shape their movement.[336]

The Indian Court's deliberate reliance on Indian sources of law helps construct a nation-specific solution to problems of sexual harassment, as Professor Sunder advocates.[337] Such an approach recognizes the identity of women in India as Indians, and the problems specific to the experience of being a woman in Indian society. For example, the Court cites Article 15 of the Indian Constitution, which prohibits discrimination based on, among other categories, religion, caste, and birthplace.[338] These particular identities, in addition to gender, influence how Indian women are treated, or mistreated, in the workplace and beyond.[339] Thus, the Court addresses factors that influence Indian women's experiences, revealing a sensitivity to the fact that sexual harassment in the Indian workplace is a problem with distinctly Indian characteristics.

Second, distinct from the American approach, the Indian Court also relied on international human rights conventions and norms.[340] Initially, critics may disparage the Court for depend-

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334. See *supra* notes 197-98, 216 and accompanying text (recognizing many cultural and political factors influence Indian women's responses to issue of sexual harassment).

335. *See supra* note 237 and accompanying text (stating need for Indian-specific response to problem of sexual harassment).

336. *See supra* note 237 and accompanying text (stating that Indian women create new identities through combining old loyalties with new ways of life and forms of imagining themselves as women, individuals, and Indians).

337. *See supra* note 237 and accompanying text (noting that this looks different from earlier feminist movements in Third World countries, where feminists often used international human rights discourse to argue their cause, as opposed to nation-specific arguments).

338. *See supra* note 209 and accompanying text (detailing Article 15 of Indian Constitution).

339. *See supra* note 205 (asserting that problems Indian woman faces are particular to social situation of that woman because of her caste and region in which she lives).

340. *See supra* notes 269-80 and accompanying text (describing international documents and customs that Indian Supreme Court cited).

ing on non-Indian legal sources in crafting Indian law.[341] The Court, however, used the applicable international human rights covenants and norms as a supplement to the Constitution.[342] The deference the Court displayed to domestic constitutional provisions when interpreting and applying international conventions demonstrates that the Court viewed Indian constitutional guarantees as being of primary importance.[343] This interpretation of international legal sources in light of Indian law is a nation-specific approach, for which Indian feminists advocated.[344] The Indian Court's decision represents a middle ground between universalism and relativism, emphasizing and relying on rights found in the Indian Constitution, as well as international documents.

At the same time, the Indian Court's citation of international conventions affords an admirably great amount of deference to the international community's mandates for gender equality. The Court cites international human rights documents and international customs that view gender equality as a fundamental human right. The international sources the Indian decision relies upon include women's rights provisions in international conventions, such as CEDAW and the ICCPR,[345] and international custom.[346]

In comparison, the United States Supreme Court disregards legal sources outside of Title VII, thereby failing to acknowledge the United States' obligation as a member of the global community to strive for equality in the workplace. Such an omission by

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341. *See supra* note 128 (contrasting Indian women's movement with earlier Third World women's movements that eschewed nationalist approaches for international human rights discourse, and stating that many Indian feminists disparage feminist concerns about sexual harassment as Western).

342. *See supra* notes 263-67 and accompanying text (explaining how international conventions can be harmonized with Indian Constitution).

343. *See supra* notes 264-66 and accompanying text (maintaining that any international convention that is consistent with fundamental rights that Indian Constitution guarantees must be read into Constitution's provisions in order to enlarge their meaning and further promote their objectives).

344. *See supra* notes 197-98 and accompanying text (explaining unique Indian experience of sexual harassment, and subsequent need for unique approach to problem of sexual harassment).

345. *See supra* notes 269-74, 309-11 and accompanying text (describing relevant sections of international human rights documents that Indian Supreme Court cited).

346. *See supra* notes 276-80 and accompanying text (explaining role of custom in international law).

the U.S. Supreme Court, combined with its failure to explore the issue of sexual harassment beyond a Title VII perspective, implies that the U.S. legal system does not value workplace gender equality as highly as international human rights conventions demand.

2. Definitions of Sexual Harassment

The U.S. and Indian Courts both posit a similar definition of sexual harassment. U.S. courts define sexual harassment as the sex-based imposition of an unwanted condition on a person's employment.[347] Similarly, the Indian Court defines sexual harassment as unwelcome sexually-determined behavior, reasonably perceived to negatively impact one's workplace environment.[348] Therefore, according to both definitions, unwelcome behavior inflicted because of the harassed person's sex is sexual harassment. As such, the U.S. and the Indian Courts define sexual harassment broadly.

Both the U.S. and Indian Courts recognize that sexual harassment can occur through physical incidents and threats, but is not limited to such events.[349] Rather, both entities acknowledge that an employee may reasonably[350] perceive the creation of a "hostile work environment."[351] The Courts demand a comprehensive review of the total workplace circumstances to determine whether the offensive behavior qualifies as sexual harassment.[352] Further, both Courts realize that sexual harassment can take several forms. For example, in both countries, sexual harassment can exist when a supervisor continuously makes off-

347. *See supra* notes 152-56 and accompanying text (stating U.S. Supreme Court's definition of sexual harassment).

348. *See supra* notes 284-85 and accompanying text (stating Indian Supreme Court's definition of sexual harassment).

349. *See supra* notes 154, 158, 284 and accompanying text (explaining U.S. and Indian Supreme Courts' definitions of what conduct constitutes sexual harassment).

350. *See supra* notes 178, 285 and accompanying text (describing U.S. and Indian Supreme Courts' reasonable person standard).

351. *See supra* notes 159-78, 296-306 and accompanying text (describing U.S. and Indian Supreme Courts' recognition of hostile work environment).

352. *See* Meritor v. Vinson, 477 U.S. 57, 69 (1986) (explaining that complainant's sexually provocative speech or dress relevant in determining whether he or she found particular sexual advances unwelcome); *see supra* note 195 and accompanying text (stating that courts are required to examine everything material to determine genuineness of complaint, including victim's statement, in relevant context).

color comments, even if actual physical contact never occurs.[353]

The United States Court's sexual harassment definition may be more limited than the Indian Court's definition given the U.S. Supreme Court's requirement that sexual harassment be "severe or pervasive."[354] The Court requires that unwelcome behavior be sufficiently "severe or pervasive" so as to alter the workplace environment and the conditions of the harassed worker's employment.[355] According to U.S. courts, isolated instances of "non-severe misconduct" and merely offensive comments do not create an abusive environment.[356] Therefore, a harassed worker may not have a claim against her harasser if he engaged in the offensive behavior only once.

In comparison, the Indian Court's definition of sexual harassment does not explicitly require that harassing behavior persist over time. Instead, the guideline language implies that an incident, or only a few incidents, can constitute harassment. For example, the Indian Court asserts that a "request" for sexual favors or the "showing of pornography" constitutes sexual harassment.[357] The Court does not refer to these instances in the plural, thereby indicating that harassing incidents do not have to be persistent to constitute a valid sexual harassment claim. Moreover, the Court declares that sexual harassment includes any single act that outrages the modesty of a woman.[358] Again, one offensive act is sufficient to meet the definition.

3. Employer Liability

Employers in both the United States and India are held lia-

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353. *See supra* notes 163-65, 284 and accompanying text (defining sexual harassment to include hostile work environment). For example, the Indian guidelines include showing pornography or making any sexually colored remarks. *See Vishaka, supra* note 4.

354. *See supra* notes 175-76 and accompanying text (citing U.S. Supreme Court's severe or pervasive requirement).

355. *See supra* notes 177-78 and accompanying text (discussing U.S. Supreme Court's decision of what constitutes hostile work environment).

356. *See supra* notes 175-78 and accompanying text (discussing severe and pervasive requirement).

357. *See supra* notes 284-85 and accompanying text (noting Indian Supreme Court's definition of sexual harassment set out in *Vishaka* guidelines).

358. *See supra* note 311 and accompanying text (describing Indian Code Section 354).

ble for their employees' harassing behavior.[359] More importantly, both the Indian and U.S. Courts recognize that the employer occupies a powerful position from which to prevent sexual harassment.[360] Theorists, policymakers, and judges share this opinion.[361] For example, Professor MacKinnon urged legislative action that would force employers to work towards workplace equality, emphasizing the promise for change that the employer's role holds.[362] Similarly, the United States Supreme Court in *Faragher* noted that Title VII's authors and enforcers clearly intended that the statute encourage employer prevention of sexual harassment.[363] Besides providing redress for or elimination of sexual harassment, employers have the ability to enforce reasonable rules for workplace behavior.[364] Employers can therefore take positive action, prescribing workplace standards that challenge excuses given to support practices that hurt women.[365]

Although U.S. and Indian judicial reasoning for employer involvement in sexual harassment complaints is similar, the employer's role differs in the two countries. While both countries' approaches present employers as active participants in the fight against sexual harassment, the U.S. Supreme Court employer liability decisions imply that the employer's role in the United States is reactionary, as opposed to proactive.[366] First, although the threat of liability may convince employers to take preventative action against sexual harassment, this important suggestion

359. *See supra* notes 179-80, 183-85, 289-92 and accompanying text (explaining decisions concerning employer liability).

360. *See supra* notes 183, 289 and accompanying text (imposing employer liability because of employer ability to prevent workplace sexual harassment).

361. *See supra* notes 183-85, 289-92 and accompanying text (asserting employer's affirmative role and ability to prevent workplace sexual harassment).

362. *See supra* note 183 and accompanying text (explaining Professor MacKinnon's ideal employer role in comparison with Court's assignation of employer liability). Note, however, that the Court did not take any action in accordance with Professor MacKinnon's suggestion until it decided *Faragher* and *Burlington* in 1998.

363. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (recognizing that finding employer liability for supervisor action helps implement Congress's Title VII statutory policy and complements Government's Title VII enforcement efforts).

364. *See supra* note 184 and accompanying text (recognizing employer ability to prevent and/or punish sexual harassment in workplace).

365. *See supra* note 183 and accompanying text (explaining Professor MacKinnon's ideal for employer roles regarding workplace sexual harassment).

366. *See supra* notes 183-86 and accompanying text (describing employer role in preventing sexual harassment at work).

is only explicitly evident in the *Faragher* and *Ellerth* requirements that employers establish a complaint mechanism.[367] Second, excepting liability for an employer's failure to create a complaint mechanism, the Court imposes liability on an employer only after its employee creates a hostile work environment and the harassed employee complains.[368] Thus, a court cannot hold the employer liable for the harassment that occurred if the employee never complained.[369]

Finally, an employer in the United States can establish an affirmative defense against the imposition of liability.[370] Therefore, while the Court advocates employer responsibility for maintaining a discrimination-free work environment, the Court did not carry this position as far as those scholars who promote employer accountability would prefer.[371] For example, Professor MacKinnon suggests that there should be some degree of employer accountability in every sexual harassment case regardless of the employer's knowledge of, or acquiescence to, the sexually harassing conduct.[372] Instead, the affirmative defense to liability limits employer responsibility, permitting a discrimination-infused environment to persist without employer intervention simply because an employee failed to complain.

Instead of providing an affirmative defense, the Indian approach mandates affirmative employer action. Like employers in the United States, Indian employers in both the public and private sectors must create measures for resolving sexual harassment claims.[373] According to the Indian Court, Indian employers have an affirmative duty to prevent sexual harassment in the workplace.[374] Unlike the United States Court's interpretation of

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367. *See supra* note 187 and accompanying text (explaining that employee can avail herself of complaint mechanism).

368. *See supra* notes 183-85 and accompanying text (explaining that employer is vicariously liable for supervisor's harassing of subordinate).

369. *See supra* notes 186-88 and accompanying text (explaining that employee who fails to use employer's complaint mechanism cannot seek redress).

370. *See supra* notes 186-90 and accompanying text (describing employer's affirmative defense).

371. *See supra* note 183 and accompanying text (explaining rule regarding employer liability and noting Professor MacKinnon's criticism).

372. *See supra* note 183 and accompanying text (explaining Professor MacKinnon's ideal for employer liability).

373. *See supra* notes 289-92 and accompanying text (describing employer responsibility and liability under *Vishaka* guidelines).

374. *See supra* note 289 and accompanying text (stating employer's duty).

Title VII's employer responsibility provision, this duty extends beyond the creation of an express prohibition against sexual harassment, and subsequent worker notification of that prohibition.[375] Instead, an Indian employer must provide a procedure for resolution of the problem, not just a mechanism through which to register a complaint.[376] Also, an Indian employer is expected to provide appropriate work conditions to ensure that a hostile work environment does not exist at the workplace.[377] Even though it is unclear what exactly constitutes non-hostile conditions, this mandate is important because it forces employers to take preventative action beyond mere censure of such acts. Compared with the United States Court's implication that employers must react only to sexual harassment complaints, the Indian Court's decisions describe the employer's role as explicitly preventative, and therefore proactive.

Similarly, the *Vishaka* guidelines providing for employer legal action stress the importance of a proactive employer. An employer's duty includes her initiation of appropriate criminal action, under the Indian Penal Code, and/or disciplinary action, under any other appropriate law.[378] Thus, the Indian employer must aid in the punishment of employees who commit sex-based harassment, outside the narrow confines of workplace complaint mechanisms. Mandating the launch of such action external to the workplace demonstrates a view that sex-based harassment is inappropriate and intolerable.[379]

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375. *See supra* note 291 and accompanying text (describing *Vishaka* requirement that employer notify workers of complaint procedure). Professor MacKinnon, however, may agree with the extent to which the Indian Court enforces employer responsibility. *See supra* notes 362, 365, and 372 (describing Professor MacKinnon's ideal concerning employer's role in preventing sexual harassment).

376. *See supra* note 290 and accompanying text (describing *Vishaka* Guidelines that requires employer provide procedure to resolve sexual harassment problem, not just complaint procedure).

377. *See supra* note 305 and accompanying text (explaining that harassment can occur in workplace, even without physical contact).

378. *See supra* note 292 and accompanying text (explaining employer's duty to initiate appropriate action, and that *Vishaka* Guidelines grant employers remedial powers).

379. *See, e.g.*, *supra* 293 and accompanying text (explaining further that employers must ensure that complaining female employee is not harassed in complaint process). Not only does this encourage employees to report harassment, but it also protects the complainant against the creation of a hostile environment throughout the disciplinary process.

B. *Power and Gender Roles, Compared*

Unfortunately, the U.S. and Indian Courts' sexual harassment decisions fail to address power disparities and gender roles that serve to oppress women in both the United States and India. Both Courts disregard the role male economic and societal power plays in sexual harassment cases, focusing instead on the sexual aspect of sexual harassment.[380] Moreover, the Indian and U.S. Courts' approaches to the problem of sexual harassment at work reflect ideas in each country about women's proper roles in their respective societies, especially in relation to men and male sexuality.[381]

1. Power

Both the U.S. and Indian Supreme Courts analyze sexual harassment cases through the lens of heterosexual male desire, with the sexual advance or act as the focal point of the analysis. The U.S. Supreme Court's application of Title VII disregards women's non-sexual workplace experiences because courts do not center hostile work environment analyses around the male-female power disparity, and the conduct resulting from that disparity, in which the harasser would not engage if not for the female sex of the harassed.[382] Instead, U.S. courts focus on men's reaction to, and desire for, women.[383] These courts ignore both the male position of power that enables men to harass women, at work and in general, and the sexualized view of women that such application of the law presents.[384] Thus, the prevailing model found in U.S. sexual harassment case law does not address sexual harassment as a male's imposition and exploitation of his economic clout, but rather considers sexual harassment as an

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380. *See supra* notes 140-50, 248, 300 and accompanying text (recognizing sexual focus of sexual harassment decisions).

381. *See supra* notes 121-26, 199-204, 217-21 and accompanying text (describing gender roles manifest in sexual harassment case decisions).

382. *See supra* notes 140-50 and accompanying text (explaining and critiquing dominant paradigm for examining sexual harassment cases in United States).

383. *See supra* note 140 and accompanying text (explaining male, heterosexual-centered view of sexual harassment cases); *see also* CHAMALLAS, *supra* note 78, at 13 (arguing against male-centered view and objective standards, because listening to women's subjective experience is important for identifying exclusions in law, as well as remedies either not recognized or minimized).

384. *See supra* notes 131-50 and accompanying text (discussing sexual harassment as imposition of male power and authority).

expression of male sexuality. Because the Court's analyses emphasize sexual desire instead of the underlying gender roles that enable sexual harassment, the Court does not fully take into account the power differentials between men and women that MacKinnon claims motivate sexual harassment.[385]

The Indian Court's examination of workplace sexual harassment also demonstrates a sexual harassment model that revolves around male sexual desire. The few reported Indian workplace sexual harassment cases involve sex-based discrimination that is sexual in nature.[386] The fact patterns of these cases, which involve inappropriate sexual contact, or attempts at such contact, present male heterosexual desire as the force compelling the workplace harassment of women.

The Indian Court's guidelines for the resolution of sexual harassment claims, however, acknowledge the power differential between men and women. One can interpret the Court's requirement that employers establish a woman-headed complaints committee, at least half of which is comprised of women,[387] as considering both the power dynamics between men and women, at work and otherwise,[388] and the value of women's subjective experiences.[389] Instead of permitting men to control and judge women's sexual harassment complaints, this committee make-up requirement places Indian women, who may share common experiences of sex-based oppression, in a position to help other

385. *See supra* notes 191-204 and accompanying text (reflecting this observation by noting that women who are perceived as sexually bold are less likely to receive legal remedy).

386. *See supra* notes 248, 300 and accompanying text (explaining that *Vishaka* case involved brutal rape and *Chopra* case involved attempts at physical contact). *But see Vishaka, supra* note 4 (providing protection against sexual behavior that is both direct or implied).

This may not be directly attributable to any action of the Indian Court because the Court cannot influence who decides to bring a complaint. However, the facts found in the existing cases reveal the same patterns as those found in cases in the United States, and thus raise a point for comparison.

387. *See supra* notes 113, 244 and accompanying text (discussing essentialism in women's issues). This guideline raises several concerns. First, it is essentialist, assuming that women will all react the same way to sexual harassment complaints. Second, it does not take into account the biases NGOs hold. *See also supra* note 287 and accompanying text (highlighting methodological and credibility problems of NGOs).

388. *See supra* notes 131-33 and accompanying text (discussing power dynamics between men and women).

389. *See supra* note 383 and accompanying text (stressing value of women's subjective experience).

Indian women.[390] Further, the Court respects Indian feminists' wish for a shift in the focus of sexual harassment law.[391] Rather than viewing sexual harassment solely in terms of sex-based acts, the Court's complaint mechanism remedy acknowledges the influence that gender-related cultural norms have on sexual harassment.

2. Gender Roles

Both the U.S. and Indian Court decisions reveal implicit opinions about what constitutes appropriate behavior for women.[392] Subsequently, this "proper" behavior helps the courts determine who deserves protection from sexual harassment. As such, sexual harassment decisions in both the United States and India reflect a judicial paternalism, which is itself a product of the male-female power disparities that exist in U.S. and Indian society.[393]

The sexual paternalism of the U.S. judiciary is obvious in the application of certain statutory language concerning sexual harassment and court-determined conditions for redress. First, U.S. case law is designed to protect women from sex-related injuries, and therefore associates sexual harassment with sexual advances.[394] This association rests upon the stereotypical view of females as sexual objects.[395] Sexual harassment rules grant or deny protection based on a woman's perceived sexuality and sexual promiscuity.[396] For example, the "unwelcomeness" requirement forces women to act wholesome and chaste, in accordance with socially-prescribed gender roles, in order to have a valid sex-

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390. *See supra* notes 206, 223 and accompanying text (noting many intersecting identities that influence Indian women).

391. *See supra* notes 237-44 and accompanying text (tracing evolution of Indian feminists' approach to problem of sexual harassment).

392. *See supra* notes 121-26, 199-204, 217-21 and accompanying text (discussing stifling behavior that women in both United States and India are expected to meet).

393. *See supra* notes 120-26 and accompanying text (noting traditional women's roles).

394. *See supra* note 199 (describing Frug's theory on relationship between legal discourse and women's bodies).

395. *See supra* note 123 and accompanying text (recognizing that women's traditional roles include that of male sexual object).

396. *See supra* notes 122-24, 200 and accompanying text (explaining that women are expected to act within traditional female gender role in order to receive adequate legal protection).

ual harassment claim.[397] The courts protect the "proper" victim, who appears to be a sexually pure and passive victim of a sexual predator.[398]

Second, employers can escape liability if an employee who suffered harassment failed to use complaint mechanisms.[399] This requirement implies a false comparison, because a woman's failure to complain does not amount to her welcoming sexually abusive behavior. Thus, a hostile work environment may persist, but a woman who worked in such an environment is denied remedy once she fails to complain.[400] The irony of this situation is frustrating: because raising a sexual harassment complaint requires a great deal of strength, a woman who complains may appear too strong to be perceived as a "proper" victim.[401]

The courts' focus on the sexual advance as the quintessential act of sexual harassment promotes improper paternalistic motivations for bestowing anti-harassment protections to women.[402] Instead of promoting empowerment, the courts' decisions can be read as using sexual harassment law to ensure the historical ideal of women's sexual purity, virtue, and sensibility.[403] Furthermore, protecting women through the emphasis on sexual acts in sexual harassment cases permits judges to evade their responsibility to address broader gender-based forms of work disadvantage.[404] Thus, the present legal regime and its enforcers serve to reinforce society's views regarding sexual conduct and supposedly proper female deportment because they deny remedy to those women who step outside societal conven-

397. *See supra* note 124 and accompanying text (explaining that women who do not act within prescribed gender roles do not always receive adequate legal protection).

398. *See supra* note 124 and accompanying text (citing instances where courts did not protect woman who did not meet standards of propriety).

399. *See supra* notes 186-88 and accompanying text (explaining affirmative defense).

400. *See supra* notes 187-88 and accompanying text (explaining how affirmative defense works against employee).

401. *See supra* notes 124-26 and accompanying text (explaining traditional women's role and difficulties that women who defy that role face).

402. *See supra* note 124 and accompanying text (demonstrating that U.S. courts are more likely to assist women who fit ideal of "proper" victim).

403. *See supra* notes 121-24 and accompanying text (describing traditional women's roles and asserting that not all women meet those ideals, especially women who are not white and upper-middle class).

404. *See supra* note 183 and accompanying text (recognizing judicial promise for social change).

tions.[405]

Whereas the United States courts' decisions imply that women need protection, the Indian Court's words and actions are much more explicit on this point. Initially, it seems that paternalism motivated the Indian Court's *Vishaka* decision. The Court's ratification of the anti-harassment guidelines suggests a motive beyond preventing sexual harassment. The rare proactive nature of the Court's action suggests that the Court thought it had to *protect* women at work in the absence of appropriate legislation.[406]

More explicitly, the language the Indian Court employed in both setting forth the anti-sexual harassment guidelines and writing its decision is rife with paternalistic suggestions. The guidelines refer to the harassed woman as a "victim," implying her subordinated position.[407] The Indian Court finds unwelcome behavior in any attempt to "outrage the modesty of a woman," an offense under the Indian Penal Code.[408] This Indian legal concept resembles U.S. courts' decisions that determine unwelcomeness in relation to female demeanor, yet the Indian law is obviously more explicit. Instead of focusing on the men who do not control their sexual desire, the Court's interpretation of this provision centers on the behavior of the women whose modesty has been "outraged."[409] The Court's definition of sexual harassment in a criminal context, which specifically relates modesty to womanhood,[410] places a burden on women, who are expected to behave in accordance with socially accept-

405. *See supra* notes 121-24 and accompanying text; *see also* Frug, *supra* note 199, at 1063 (claiming that changing current legal regime would weaken current societal models of female sexual behavior).

406. *See supra* notes 250, 313-15 and accompanying text (stating that Court's decision was "rare affirmative action").

407. *See supra* notes 281-92 and accompanying text (summarizing *Vishaka* guidelines). For example, Guideline 4, on criminal proceedings, states that, "[the employer] should ensure that *victims*, or witnesses, are not *victimized* or discriminated against while dealing with complaints of sexual harassment." (emphasis added). *See generally Vishaka*, *supra* note 4. Guideline 6, on complaint mechanisms, states that, "an appropriate complaints mechanism should be created in the employer's organization for redress of the complaint made by the *victim*." (emphasis added). *Id.*

408. *See supra* note 311 and accompanying text (explaining Chopra's Indian Penal Code violation).

409. *See supra* note 311 and accompanying text (explaining penal code violation concerning woman's modesty).

410. *See supra* note 311 and accompanying text (discussing Court's determination of definition of "modest," and implications of such meaning).

able gender standards and roles. The Court's definition includes chastity of thought and conduct, decency, delicacy, propriety of dress, and an aversion to lewdness.[411] If a woman does not act appropriately, protections against harassment may not apply to her.

The paternalistic approaches of both the U.S. Court and the Indian Court fail to recognize the complex nature of the female subject that anti-sexual harassment measures supposedly protect. Tangible factors, such as race and social class, and intangible factors, such as the distribution of power between the sexes, intersect with gender, and each other, to construct the identity of the subject of the harassment.[412] Both Courts' paternalistic approaches are one-dimensional.

The United States Supreme Court focuses on biology, in the form of male sexual desire for women, as the reason for sexual harassment.[413] This focus demonstrates an approach to sexual harassment that does not acknowledge the myriad of other forces that shape harassment. The Indian Court's response to Indian women's sexual harassment complaints also evidences a one-dimensional attitude. Indian Court guidelines fail to recognize the differing regional, religious, and class identities of Indian women.[414] While the Indian Court, as discussed above, acknowledges that gender power disparities exist and that gender equality is a fundamental human right, that Court relies on a stereotypical view of women to reach those seemingly progressive conclusions. For example, the complaint review board formation provision requiring that a certain number of women sit on the board relies on stereotypes;[415] women must act as judges for other women's complaints because Indian women will understand each other's situations, and will be more sympathetic to each other's needs. Similarly, the stereotypical idea that modest women need protection from male sexual advances motivates

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411. *See supra* note 311 and accompanying text (citing English dictionaries).

412. *See supra* notes 113, 223, 244 and accompanying text (criticizing essentialist approaches to examining women's situations, and emphasizing many different influences that contribute to women's identities).

413. *See supra* notes 139-50 and accompanying text (explaining view that sexual harassment analysis is linked to male biological desire).

414. *See supra* notes 281-92 and accompanying text (summarizing *Vishaka* guidelines).

415. *See supra* note 287 and accompanying text (describing complaint review board).

the Indian Court's treatment of sexual harassment claims. Thus, the Court's impetus for establishing the preventative guidelines rests upon a singular conception of the Indian woman, rather than a recognition of her complexity.

CONCLUSION

The fight against sexual harassment in the workplace, both in the United States and India, represents an opportunity for feminists to work together in order to confront a pressing problem. Valuable comparisons educate feminists in both India and the United States about their respective sexual harassment protections and how those protections function simultaneously to help and hurt women in the workplace. Moreover, self-reflection in this combined effort at advocacy facilitates non-imperialist, non-hierarchical cross-cultural comparisons. Feminists in the United States and India with presuppositions about other cultures are forced to examine the culture in which they live, and the gender roles encoded within the laws that govern their daily lives. U.S. and Indian feminists can consider the forces shaping their experiences, and how they differ from and resemble those of women elsewhere. This self-reflective approach to cross-cultural comparison provides feminists and advocates in both cultures with insight into successful and unsuccessful tactics and approaches to problems that women face everywhere.