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An International Perspective on Sexual Harassment Law

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I. Introduction

The Clarence Thomas confirmation hearings for the United States Supreme Court catapulted sexual harassment to the forefront of the American public consciousness and, to a lesser extent, the world's consciousness.[1] For many in the international community and within the United States, domestic sexual harassment law and publicity accompanying displays, such as the Thomas hearings, reflect radical American feminists' attempts to eradicate and repress the natural differences between men and women.[2] As public discomfort over the Thomas spectacle indicates, many would prefer to leave issues of sexual behavior in a realm protected from judicial

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1. For discussion of the Judge Clarence Thomas hearings see DAVID BROCK, THE REAL ANITA HILL (1993). This book is controversial because of its slant against Professor Anita Hill and the author's view that liberals conspired to block the nomination of Thomas by any means. Mr. Brock argues that Professor Hill, who was angry at Judge Thomas, was willing to be the vehicle for this derailment of the nomination. *Id.* at 335-81.

For a criticism of Mr. Brock's book see Jane Mayer & Jill Abramson, *The Surreal Anita Hill*, NEW YORKER, May 24, 1993, at 90 (arguing that Brock's central thesis that Anita Hill referred to another man harassing her, not Clarence Thomas, and that she never cleared up this mistaken impression is wild speculation); Nellie Y. McKay, *Remembering Anita Hill and Clarence Thomas, in* RACE-ING JUSTICE, ENGENDERING POWER 269, 272 (Toni Morrison ed., 1992); Christine A. Littleton, *Dispelling Myths About Sexual Harassment and How the Senate Failed Twice*, 65 S. CAL. L. REV. 1419 (1992); *see also* Alan Riding, *Harassment or Flirting? Europe tries to decide*, N.Y. TIMES, Nov. 3, 1992, at A8 (discussing how the Thomas hearings affected Europe).

2. Sarah Catchpole, *Paris Pooh Poohs L'Affaire Thomas*, BOSTON GLOBE, Nov. 7, 1991, at 93 (discussing foreign reaction to the Thomas hearings); Richard Gwyn, *From Europe American Dream Looks Like a Nightmare*, TORONTO STAR, Nov. 29, 1991, at A29 (referring to the U.S. as "bonkers" in an opinion column calling attention to political correctness and puritanism in Pennsylvania State University's decision to take down a Francisco Goya painting because it constituted sexual harassment).

inquiry.[3] However, contrary to popular speculation, a review of cases indicates that United States sexual harassment laws are neither extreme nor out of line with the views of other developed countries.

This article reviews international approaches to the issue of sexual harassment in the workplace. These approaches suggest a convergence of thought, acknowledging sexual harassment as actionable and compensable discrimination. Unique differences in domestic law, however, make sexual harassment more costly, as exemplified by the rare million dollar verdict.[4] While women are not the only victims of sexual harassment,[5] this article will focus on sexual harassment directed against women in the workplace.

Sexual harassment in the workplace is a pervasive problem, not only in the United States, but around the world. In the United States, in the fourth quarter of 1992, 1,608 plaintiffs registered sexual harassment complaints with the Equal Employment Opportunities Commission (EEOC).[6] This compares with 1,244 complaints in all of 1991, and 728 total complaints in 1990.[7] Incidents of sexual harassment vary by occupation. A 1980 survey of 23,000 federal employees reported that 10% of employees had been pressured for sex and 25% reported being touched or pinched.[8] Sixty percent of women lawyers in the Ninth Circuit report experiencing sexual harassment.[9] One study estimated that sexual harassment costs a large American company $6.7 million a year.[10]

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3. *See* Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 625-27 (1991) (discussing distinctions in international law between public and private law and public sphere and domestic sphere).

4. *Man Wins $1 Million Sex Harassment Suit*, N.Y. TIMES, May 21, 1993, at A15. In Minnesota, female employees of a mining company are bringing the first sexual harassment class action suit. *Harassment Class Suit Gets Nod*, NAT'L L.J., May 31, 1993, at 10. The suit may cost the mining company millions of dollars. *Id.* The suit, involving over 100 female miners who were subjected to nude photographs and graffiti, was initiated eight years ago at the state level and filed in federal court in 1988. *Id. See also Sex-Harassment Ruling*, WALL ST. J., May 17, 1993, at B8 (discussing the court's ruling in *Jensen v. Eveleth Taconite Co.*, U.S. Dist. Ct., Minn., 3rd Div., Civil No. 5-88-163).

5. *See, e.g., Man Wins $1 Million Sex Harassment Suit*, *supra* note 4 (describing a sexual harassment suit won by a male employee against his female supervisor); *Sex Complaint*, THE TIMES (LONDON), Jan. 17, 1992 (reporting that men in Swaziland complained to the union about women bosses harassing them).

6. *Sexual Harassment*, WALL ST. J., Mar. 16, 1993, at A1.

7. *Id.*

8. International Labour Office, *Combating Sexual Harassment at Work*, 11 CONDITIONS OF WORK DIGEST 160 (1992) [hereinafter DIGEST] (citing U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE - IS IT A PROBLEM? (1981)).

9. *See* Mark Hansen, *9th Circuit Studies Gender Bias*, 78 A.B.A. J. 30 (1992).

10. Susan Crawford, *A Wink Here, a Leer There: It's Costly*, N.Y. TIMES, Mar. 28, 1993, at F17.

Sexual harassment is not unique to the U.S. workplace. In Japan, 6,500 individuals responded to a sexual harassment survey. Of those responding, 70% said they had suffered sexual harassment at work, and 90% were bothered by "staring and groping on public transport. . . ."[11] An investigation at a Japanese employee's union concluded that 500 out of 800 women suffered sexual harassment.[12] In Sweden, 17% of about 2,000 women surveyed said they tolerated obscene language, sexual innuendoes, groping, lewd suggestions and outright rape attempts in the workplace.[13] With respect to Spain, one commentary reported that "with more than 8 out of 10 women regularly harassed at work, Spain is probably top of the European league for obnoxious male chauvinism."[14] In Germany, more than two-thirds of German women report being sexually harassed regularly, but nearly half of their male colleagues do not think their behavior is offensive.[15] In a poll of 9,000 women in Frankfurt, Germany, 25% of the respondents reported sexual harassment.[16]

Is sexual harassment simply a misunderstanding between the sexes or something more serious?[17] Some consider certain behavior as "natural" to men - reflecting the old adage that "boys will be boys."[18] In fact, sexual harassment has nothing to do with sex, and

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11. *See* Elisabeth Zingg, *Complaint highlights sexual harassment in Japan*, AGENCE FRANCE PRESSE, Dec. 23, 1991 *available in* LEXIS, Nexis Library, AFP File.

12. Elisabeth Zingg, *Japan's female employees rebel against making tea*, AGENCE FRANCE PRESSE, Oct. 27, 1991, *available in* LEXIS, Nexis Library, AFP File.

13. Lars Foyen, *Slur to Egalitarian Image; Sweden Decries Sex Harassment on Job*, L.A. TIMES, Mar. 20, 1988 § 1, at 8.

14. *See* Tim McGirk, *Tawdry Don Juan still stalks his prey in the cities of Spain*, INDEPENDENT, Feb. 20, 1990, at 12, *available in* LEXIS, Nexis Library, INDPNT File.

15. *Harassment A Problem, German Women Say*, L.A. TIMES, Jan. 14, 1992, at A21. In Germany a conviction for sexual harassment carries up to 10 years imprisonment or a fine, but sexual harassment is rarely prosecuted. *Id.*

16. *Frankfort Poll: On-the-Job Sexual Harassment Common*, WEEK IN GERMANY, Dec. 14, 1990, *available in* LEXIS, Nexis Library, WKGERM File.

17. A male managing law partner claimed misunderstanding in a case in which a young woman secretary resigned from a law firm alleging that he sexually harassed her. *See* John H. Kennedy, *Trouble in the Firm*, BOSTON GLOBE, Apr. 20, 1993 at 21. The plaintiff alleged that the partner fondled himself in her presence. *Id.* An internal investigation concluded "the unintentional act of scratching himself was not directed toward [the plaintiff] although, it could be embarrassing for anyone." *Id.* When interviewed, another partner at the firm pondered, "Is [he] guilty of making bad jokes? Yes. Is [he], as an almost 50-year-old man, not as attuned to these things as a 20-year-old, maybe so . . . . Which is not to say anyone is lying, but I think perceptions can be different, and people can have honest differences." *Id.* The Massachusetts Commission against Discrimination is considering the case. *Id.*

18. But see KATE MILLET, SEXUAL POLITICS 23 (1970), arguing that relationships between men and women are governed by "sexual politics." Ms. Millet states

> "politics" shall refer to power-structured relationships, arrangements whereby one group of persons is controlled by another . . . a relationship

everything to do with power. In 1979, Professor Catharine MacKinnon wrote that "[e]conomic power is to sexual harassment as physical force is to rape."[19] Other commentators dispute Professor MacKinnon's view, believing that sexual conduct is essentially private and the courts should not interfere.[20] Until recently, domestic violence and rape within marriage were legally tolerated and rarely prosecuted.[21] In this context of noninterference it is not surprising that less than twenty years ago no court either in the United States or abroad considered sexual harassment actionable, let alone a form of discrimination.[22] Viewing sexual harassment as a form of discrimination was a radical concept.

Recognition of sexual harassment as a form of actionable discrimination in the U.S. and many other countries reflects progress.[23] However, the parameters of what constitutes actionable sexual harassment still need definition in the United States. The United Nations and other international groups have experienced similar difficultly in defining human rights to encompass the rights

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> of dominance and subordinance. What goes largely unexamined, often even unacknowledged (yet is institutionalized none-the-less) in our social order, is the birthright priority whereby males rule females . . . . However muted its present appearance may be, sexual dominion obtains never-the-less as perhaps the most pervasive idealogy of our culture and provides its most fundamental concept of power.

Id. at 23-25.

19. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 217 (1979). Professor MacKinnon states that "sexual harassment, so conceptualized, would be an abuse of hierarchical economic (or institutional) authority, not sexuality." *Id.* at 218.

20. *See generally* BROCK, *supra* note 1 and accompanying text.

21. *See generally* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991) [hereinafter Estrich, *Sex at Work*] (discussing perception of "real rape" — rape committed by two strangers with a weapon who jumped from the bushes — as compared with acquaintance rape); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); SUSAN ESTRICH, REAL RAPE (1987).

22. See Anita Diamant, *Sexual harassment on job widespread, 24-nation study says*, BOSTON GLOBE, Dec. 1, 1992, at 1.

Canadian Justice Bertha Wilson commented on the use of law to advance women's rights, noting that men have struggled "to assert their dignity and common humanity against an overbearing state apparatus." Morgenthaler v. The Queen, (1988) 1 S.C.R. 30 172 (Wilson J., concurring), *quoted in* Catharine A. MacKinnon, *Reflections on Sex Equality under the Law*, 100 YALE L.J. 1281, 1327 (1991). Justice Wilson contrasts women's rights as a

> struggle to eliminate discrimination to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men . . . *not* to define the rights of women in relation to their special place in the societal structure and in . . . distinction between the two sexes.

Id. at 1327-28.

23. For a discussion of the pervasive problem of sexual harassment, see Diamant, *supra* note 22.

of women.[24] Consequently, sexual harassment and other serious actions against women, including disfigurement, rape, torture and execution, are carried out with impunity within many countries.[25] The "radical" notion that women should be free from discrimination arguably interferes with national sovereignty, culture and religious autonomy.[26] Some countries use the doctrines of privacy, sovereignty and religious freedom as a shield to prohibit inquiry and remedies, and to perpetuate patriarchy.[27]

This article examines the international convergence of sexual harassment law in the United States, the European Community (EC) and several other countries. It recommends changes to U.S. law, and adoption of a European Community directive. The United States has led the development of sexual harassment law, resulting in the removal of many barriers for women in the workplace.[28] However, until women around the world have full civil rights, they will not enjoy true equal employment opportunity, and the "glass ceiling" will remain.[29]

II. United States Sexual Harassment Law: A Review

Although Title VII of the Civil Rights Act of 1964 outlawed sex discrimination,[30] the full ramifications of this prohibition continue to evolve. Title VII provides:

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

24. For a discussion of the problems confronting the United Nations and various countries in addressing women's rights see Charlesworth et al., *supra* note 3.

25. *See generally* AMNESTY INT'L, WOMEN IN THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN (1991) (discussing human rights violations against women around the world); Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944 (1993) (documenting female circumcision in Africa); Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (an) Other Vision*, 23 COLUM. HUM. RTS. L. REV. 249 (1992).

26. *See* Charlesworth et al., *supra* note 3, at 634.

27. *Id.*

28. *See*, Diamant, *supra* note 22; *see also* discussion *infra* part II.

29. The Glass Ceiling Act of 1991 established the Glass Ceiling Commission to investigate and recommend changes to reduce barriers to women in the workforce. Civil Rights Act of 1991, Pub. L. No. 102-166 § 203(a), 105 Stat. 1081 (1991).

30. 42 U.S.C. § 2000e-2(a) (1988). *See also* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1988) (defining the terms "because of sex" and "on the basis of sex").

> opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[31]

In interpreting this mandate against sex discrimination, the challenge is largely to define what constitutes sex discrimination. The absence of legislative history to Title VII complicates the search for an adequate definition.[32] The reason for the absence of legislative history provides a telling insight into the attitudes of many Americans toward gender discrimination. The framers of the Civil Rights Act of 1964 did not intend to outlaw sex discrimination until the last moment.[33] Sex was eventually included as a protected category by way of a last minute amendment proposed by Representative Smith who opposed passage of the entire legislation.[34] Smith intended to demonstrate how ludicrous the entire anti-discrimination law was by including, to his mind, a ridiculous prohibition against sex discrimination.[35] However, Representative Smith's colleagues passed the Civil Rights Act even with his "absurd" amendment.[36]

Representative Smith's blunder presaged the second difficulty with establishing a satisfactory definition of sex discrimination in the workplace. The difficulty is that Title VII prohibited conduct that many consider normal behavior. The struggle to find a satisfactory definition for sexual harassment, and to decide whether sexual harassment is a form of sex discrimination, paralleled a gradual cultural consciousness-raising about sex discrimination in the American workplace.[37]

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31. 42 U.S.C. § 2000e-2(a) (1988).

32. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-64 (1986) (describing the addition of sex discrimination as an amendment to Title VII which Congress adopted rapidly with little legislative history).

33. *See*, Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 1, 1 n.2 (1990) (citing 110 Cong. Rec. 2577 (1964)).

34. 110 CONG. REC. 2577, 2584 (1964).

35. *See*, Freeman, *supra* note 33, at 1.

36. 110 CONG. REC. 2577-84 (1964); *see also*, MacKinnon, *supra* note 22, at 1283-84 nn. 15-17 (sex discrimination in employment forbidden only because of a last minute joking "us boys" attempt to defeat Title VII's prohibition on racial discrimination).

37. *See generally* MacKinnon, *supra* note 22, at 1298 (citing "unequal pay with allocation to disrespected work" and "systematic sexual harassment" as among the many bases for the unequal status of women in society).

A. *Development of Sexual Harassment Law in the United States*

Quid Pro Quo Claims

As with most consciousness-raising, progress occurred incrementally. Not until 1976 did any district court recognize sexual harassment as actionable sex discrimination under Title VII.[38] Predictably, early cases establishing a cause of action for sexual harassment under Title VII involved egregious violations, not the subtle, pervasive discrimination experienced by many women.[39] The Equal Employment Opportunity Commission, the agency created by Congress to oversee enforcement of the Civil Rights Act of 1964, terms these blatant forms of discrimination "quid pro quo" harassment.[40] In quid pro quo cases, an employer conditions tangible job-related consequences on obtaining sexual favors from the employee. To prevail on a quid pro quo cause of action, a plaintiff must prove 1) that she was subjected to unwelcome sexual advances or requests for sexual favors; 2) that this harassment was based on sex; and 3) that her reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment.[41]

Hostile Environment Claims

Sex discrimination in employment was outlawed in 1964 and only expanded by the judiciary to include quid pro quo sexual harassment in 1976.[42] The EEOC did not amend its guidelines to include a working definition of sexual harassment until 1980.[43] The EEOC amendment adopted not only a definition of quid pro quo harassment, it also recognized a second kind of illegal sexual har-

38. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) (recognizing sexual harassment as sex discrimination within the meaning of Title VII).

39. For example, the federal courts have held that a plaintiff stated a cause of action if she alleged that she was disciplined or discharged for refusing the sexual advances of her supervisor. Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3rd Cir. 1977); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 465-66 (E.D. Mich. 1977); *Williams*, 413 F. Supp. at 657-51; *see also* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (holding that a superior who dismissed an employee because she repulsed his sexual advances violated the Equal Employment Opportunity Act of 1972).

40. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1992).

41. *See, e.g.*, Spencer v. General Electric Co., 894 F.2d 651, 658 (4th Cir. 1990).

42. *See supra* note 30 and accompanying text; *see also Williams*, 413 F. Supp. at 657-61 (holding that plaintiff, who alleged that she had been fired for declining her supervisor's sexual advances, had stated a cause of action under Title VII).

43. 29 C.F.R. § 1604.11(a) (1992); *See also* Bonnie B. Westman, Note, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795, 798-99 (1992).

assment, termed "hostile environment" harassment.[44] The EEOC specified that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[45]

In acknowledging hostile environment sexual harassment, the EEOC recognized the subtle, and perhaps more destructive, biases impeding opportunities for women in the workplace. Issues of sex discrimination no longer focused on whether the discrimination was sufficiently serious to constitute a civil rights violation. Rather, the inquiry considered whether an employer's or co-worker's behavior interfered with another worker's right to a workplace free of harassment and thus became illegal. This development signaled the EEOC's recognition that an individual can be harmed by discrimination even if that discrimination does not result in economic deprivation.[46] Drawing on background court cases and EEOC precedent relating to Title VII, the EEOC served notice on the American public that a woman has a civil right to work in an environment where she will not suffer psychological harm because her employer allows an atmosphere which demeans or intimidates her because of her sex.[47]

Recognition of hostile environment claims seemed a battle won. However, the significance of this victory was limited by a time lag between the EEOC's formalization of the hostile environment cause of action and judicial recognition of the claim.[48] Ironically, although the EEOC took the lead in defining the hostile environment claim, the EEOC itself failed to recognize a blatant example of a hostile environment.[49] In 1986, in *Meritor Savings Bank v. Vinson*, the Supreme Court first recognized a hostile environment

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44. 29 C.F.R. § 1604.11(a).

45. *Id.*; *cf.* ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE 3-4 (1991) (Some feminist theorists assert that a better definition centers on the concept of power).

46. EEOC: Policy Guidance on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6681, 6682 (1990) [hereinafter Policy Guidance].

47. *Id.* at 6691-92; 29 C.F.R. § 1604.11(a)(3); *see also Vinson*, 477 U.S. at 65.

48. The EEOC formalized the hostile environment claim in 1980, and the United States Supreme Court first recognized hostile environment sexual harassment as actionable sex discrimination in 1986. *Vinson*, 477 U.S. at 65.

49. Estrich, *Sex at Work*, *supra* note 21, at 821 n.24 (noting that the EEOC failed to recognize the sexual harassment perpetrated against Mechelle Vinson and argued that there was no actionable claim in *Vinson*).

claim under Section 703 of Title VII.[50] The EEOC, in its amicus brief, argued that Vinson did not have an actionable claim because "sexual attraction is a fact of life" often playing a role in interactions between employees in the workplace.[51] The EEOC's contradictory position underscores the discrepency between theoretical recognition of misconduct, and recognition of actual misconduct endemic to the mores of a culture.

The facts and judicial history of *Vinson* neatly outline the problems inherent in pursuing a sexual harassment case under a hostile environment claim. Meritor's vice-president, Sidney Taylor, hired Mechelle Vinson and became her supervisor.[52] Taylor proceeded to request that Vinson sleep with him.[53] Initially, Vinson refused, but fearing she would lose her job, she eventually complied.[54] Taylor proceeded to demand sex repeatedly, and asserted his "sexual possession" of Vinson through lewd public behavior at work.[55] Vinson testified that Taylor forceably raped her several times.[56] Eventually, Vinson notified Taylor that she intended to take indefinite sick leave, and the bank fired her.[57] Vinson sued claiming constant sexual harassment.[58]

The district court rejected Vinson's claim, citing evidence that her promotions from teller to assistant branch manager were based on merit, rather than her sexual capitulation to Taylor.[59] Despite the EEOC guidelines promulgated in 1980, the district court failed to recognize the hostile work environment Taylor created.[60] Instead, the court required a quid pro quo cause of action but failed to find that tangible aspects of Vinson's employment were conditioned on acquiescing to Taylor's harassment.[61] The district court further refused to recognize the coercion inherent in the harassment situation because of the inequity of power between the parties, and con-

50. Meritor Savings Bank v. Vinson, 477 U.S. at 73, *aff'g and remanding* Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985). The district court opinion may be found at 22 Empl. Prac. Dec. (CCH) ¶ 30,708, at 14,691, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

51. Brief for the United States and the Equal Employment Opportunity Commission at 13, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979); *see also* Estrich, *Sex at Work*, *supra* note 21, at 821 n.24.

52. *Vinson*, 477 U.S. at 59.

53. *Id.* at 60.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Vinson*, 477 U.S. at 60.

58. *Id.*

59. *Id.* at 59, 61.

60. *Id.* at 61.

61. *Id.* at 61-62 (quoting the district court's statement that any sexual interaction between Taylor and Vinson had nothing to do with her continued employment).

cluded that Vinson's relationship with Taylor was voluntary.[62] Finally, the district court held that the bank was not liable even if Taylor was guilty of misconduct.[63] This finding conflicted with other Title VII precedents which held employers strictly liable for actions of their supervisors.[64]

In essence, the district court's ruling harkens back to the traditional status quo regarding sexual relationships in the workplace. The court focused on the woman's conduct, her acquiescence, her dress, and her past life, rather than on the man's behavior.[65] The court disregarded the power differential between the parties, and seemed to use the woman's competence against her.[66] Indeed, the district court's reasoning provides a clear example of the cultural assumptions which impede effective use of Title VII to obtain redress for sexual harassment.

In reversing the district court, the Court of Appeals for the District of Columbia Circuit emphasized the legitimacy of hostile environment causes of action.[67] The appellate court found that Taylor had indeed created a hostile work environment for Vinson, and that, as with all other Title VII cases, the bank was liable for the actions of its supervisor, actual knowledge of Taylor's misbehavior notwithstanding.[68] The court decided that a supervisor need not inflict economic damage to be guilty of sexual harassment.[69]

In 1986, twenty-two years after Title VII recognized sex discrimination,[70] the Supreme Court recognized hostile environment claims as bona fide causes of action under Title VII.[71] The Supreme Court stated that the gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome."[72] This "un-

62. *Vinson*, 477 U.S. at 61.

63. *Id.* at 62, 69.

64. *Id.* at 70-71 (citing Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723, 725 (6th Cir. 1972)). *See also* 29 C.F.R. § 1604.11(c) (1993) (EEOC guideline stating that employers should be strictly liable for acts of sexual harassment by their agents or supervisory employees).

65. Vinson v. Taylor, 753 F.2d 141, 146 n.36 (1985), *aff'd sub nom.* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

66. *See* Estrich, *Sex at Work*, *supra* note 21, at 824 (discussing the bind Vinson was in — her failure to testify in court that she "slept [her] way to the top" resulted in the district court finding her promotions were based on merit).

67. *Vinson*, 753 F.2d at 145.

68. *Vinson*, 477 U.S. at 62-63.

69. *Id.* at 64-65.

70. *See supra* note 30 and accompanying text.

71. *Vinson*, 477 U.S. at 63.

72. *Id.* at 68. The Court also affirmed that economic harm is not necessary for a Title VII cause of action, and thus ended de facto acceptance of this kind of sexual harassment. *Id.* at 71.

welcomeness" standard reflects the Supreme Court's recognition that the district court failed to understand the politics of power when it found that Mechelle Vinson voluntarily entered into a relationship with her boss. In fact, the Supreme Court stated that "voluntary" submission to sexual acts will not necessarily invalidate a subsequent sexual harassment claim.[73] The Court's statement supported the EEOC Guidelines which state that sexual harassment is "[u]nwelcome . . . verbal or physical conduct of a sexual nature."[74] The unwelcomeness test established by the Court, however, is not always easy to satisfy.

According to the *Vinson* Court, the determinant of unwelcomeness should be whether the victim "by her conduct indicated that the alleged sexual advances were unwelcome."[75] Unfortunately, this standard encouraged lower courts to focus on the victim's conduct, perhaps more intently than on the conduct of the accused.[76] As often happens in rape cases, a victim's manner of dress and speech became vindicators of an alleged harasser.[77] To resolve this problem, the EEOC Guideline recommends that courts evaluate "the record as a whole and the totality of the circumstances,"[78] giving more credence to cases where the victim has made a contemporaneous complaint.[79] Clearly, this EEOC Guideline, vague at best, did not simplify resolution of sexual harassment claims.

The *Vinson* decision significantly advanced Title VII's mandate to abolish sexual harassment by validating hostile environment claims, and by changing the criterion for judging a plaintiff's response to harassment from "voluntariness" to "unwelcomeness."[80] However, *Vinson* also presaged the difficulties which plaintiffs pressing hostile environment suits would encounter. Cultural biases die hard, and the same issues which befuddled the district court in *Vinson* became issues in later court cases which

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73. *Id.* at 68.

74. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1992); *see also* Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 785 (1993) (*Vinson* made clear that unwelcomeness is at the center of Title VII sexual harassment claims).

75. *Vinson*, 477 U.S. at 68 (stating that the gravamen of sexual harassment claims is unwelcomeness).

76. For example, the Supreme Court indicated that "provocative speech or dress" are not irrelevant factors in assessing a hostile environment claim. *Id.* at 69.

77. *See* Estrich, *Sex at Work*, *supra* note 21, at 826-29 (discussing focus centered on victim rather than on the perpetrator's conduct); *see also* Adler & Peirce, *supra* note 74, at 786-87 & n.n.74-81.

78. 29 C.F.R. § 1604.11(b).

79. Adler & Peirce, *supra* note 74, at 786 & n.73.

80. See *supra* text accompanying notes 70-73.

wrestled with the question of when sexual harassment in the workplace is sufficiently hostile to constitute a Title VII violation.[81]

B. EEOC Position: Reasonable Person Modified

Two primary issues dictate whether a work environment is sufficiently hostile to violate Title VII. The first issue concerns the appropriate standard for determining when a work environment is sufficiently hostile to constitute sex discrimination. The second consideration focuses on how harmful the environment must be in order for an employee to have an actionable Title VII claim. The EEOC's position is important to the question of an appropriate standard. In its guidelines, the EEOC suggests a three-part test to establish an actionable sexual harassment claim.[82] The first two elements refer to the more established quid pro quo harassment claims, and thus provoke less discussion about the appropriate judgment standard and necessary degree of harm:

> Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.[83]

The third part of the EEOC test describes the necessary conditions for an actionable hostile environment claim.[84] To establish a hostile environment claim, the EEOC provides that sexual harassment becomes actionable when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."[85] This third prong of the EEOC test has proven problematic for courts evaluating sexual harassment claims.[86] The language of this third prong reveals the basis for subsequent judicial discussions of appropriate standard and degree of harm, be-

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81. *See, e.g.*, Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (holding that co-employee's obscenity and sexually-oriented posters failed to sufficiently interfere with plaintiff's work environment or cause psychological harm).

82. 29 C.F.R. § 1604.11(a).

83. *Id.*

84. 29 C.F.R. § 1604.11(a)(3).

85. *Id.*

86. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1198-99 (1989) ("Recent cases reflect judicial confusion about the meaning of hostile environment sexual harassment, uncertainty about how to evaluate it, and discomfort about the transformative potential of the new claim.").

cause what constitutes "unreasonable interference" to one person may be merely an annoyance to another.[87] Inherently, then, this condition requires a subjective judgment which must be made as objectively as possible by the courts.

In an attempt to create an objective standard as to when interference is unreasonable, the EEOC recommends evaluating the circumstances of each claim from the viewpoint of a reasonable person.[88] The reasonable person standard is meant to protect employers from frivolous actions.[89] Thus, the EEOC suggests, by way of example, that a reasonable person would not be seriously offended by "invitations to join a group of employees who regularly socialized at dinner after work."[90] In fact, the EEOC implies that, without more, the employee who considered such invitations to be illegal "advances" would be considered unreasonable.[91]

Even the judgment of who constitutes a reasonable person is subjective, especially when evaluating the conduct of a sex traditionally accustomed to dominance. Thus, the EEOC elaborated the "reasonable person" standard.[92] According to the EEOC, the perspective should be that of the victim in her particular context, not that of a stereotypical female.[93] Here, the EEOC attempted to adapt the "reasonable person" standard to account for inherent bias against women. The EEOC's attempt to define an "androgynous" reasonable person apparently resulted both from a perceived misuse of the reasonable person standard and a resistance to the subsequent evolution of the reasonable woman standard. The EEOC sought to shield decisions from cultural bias without adopting different standards for men and women.

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87. The EEOC Policy Guidance provides an example, for it states, "sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment." Policy Guidance, *supra* note 46, at 6689. Surely, for some employees, working in an atmosphere where her coworkers engage in constant sexual innuendos and vulgar language would interfere with their ability to perform their work.

88. *Id.* at 6689 (stating that the harasser's conduct should be evaluated from the objective standpoint of a reasonable person). The EEOC cautioned, however, that the objective standard should not be applied in a vacuum, and courts should consider the context and the victim's perspective. *Id.* at 6689-90. *See generally* Adler & Peirce, *supra* note 74, at 773-74 & n.2 (discussing the confusion surrounding the standard of review for such cases). Some courts have adopted a "reasonable woman" standard, while others favor a "reasonable person" standard. *Id.*

89. Policy Guidance, *supra* note 46, at 6689 ("Title VII does not serve 'as a vehicle for vindicating the petty slights suffered by the hypersensitive.'" (citation omitted)); *see also supra* note 87.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 6689-90 & n.20. *See generally* Adler & Peirce, *supra* note 74, at 798-802 (discussing application of the reasonable person standard).

In *Rabidue v. Osceola Refining Co.*, the Court of Appeals for the Sixth Circuit applied the reasonable person standard improperly.[94] The plaintiff, Rabidue, was fired ostensibly for job-related reasons.[95] She sued, alleging hostile-environment sexual harassment.[96] Rabidue's boss "routinely referred to women as 'whores,' 'cunt,' 'pussy,' and 'tits,'" and sometimes directed these epithets at Rabidue.[97] The Court of Appeals for the Sixth Circuit focused on Rabidue's personality, characterizing her as "intractable and opinionated," while minimizing the offensiveness of her boss' behavior.[98] The court's apparently sex-biased assessment of the parties resulted in a sexist application of the reasonable person standard. The court decided that the obscenities routinely employed by Rabidue's supervisor "although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."[99] The court elaborated that because such behavior was routine in American culture, it would not offend a reasonable person.[100] The reasoning of the majority in *Rabidue* illustrates an inherent problem with the reasonable person standard. The *Rabidue* court's sexist application of the reasonable person

94. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). *See generally* Adler & Peirce, *supra* note 74, at 791 (characterizing *Rabidue* as a "much criticized" opinion).

95. 805 F.2d at 615.

96. *Id.* at 614. Under the hostile environment theory of sexual harassment law, the court rejected the plaintiff's claims, notwithstanding the *Vinson* Court's statement that the gravamen of such complaints is unwelcomeness. *Vinson*, 477 U.S. at 68. The *Rabidue* court clearly failed to appropriately define unwelcomeness even as it acknowledged that the plaintiff was "annoyed" at the defendant, an "extremely vulgar and crude individual who customarily made obscene comments about women . . . ." *Rabidue*, 805 F.2d at 615. *Accord* Scott v. Sears, Roebuck & Co. 798 F.2d 210, 213-14 (7th Cir. 1986).

97. *Rabidue*, 805 F.2d at 624 (Keith, J., dissenting).

98. *Id.* at 615. Ms. Rabidue's co-workers called her "irascible" and "rude." *Id.* The court concluded that while Ms. Rabidue was a capable employee, she was "troublesome." *Id.*

99. *Rabidue*, 805 F.2d at 622. The court added that the "vulgar language, coupled with the sexually oriented posters, did not result in a working environment that could be considered intimidating, hostile, or offensive . . . ." *Id.*

100. *Id.* at 620-21. *But see id.* at 623-28 (Keith, J., dissenting). Judge Keith wrote:

> I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American society. In fact, pervasive societal approval thereof and of other stereotypes stifles female potential and instills the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norm by which women are primarily and contemptuously valued as objects . . . .

Id. at 627.

standard perpetuates the very culturally accepted behavior which Title VII was meant to root out.

Reasonable Woman Standard

Judge Keith dissented from the *Rabidue* majority with respect to the sexual harassment claim, advocating a "reasonable woman" standard as an alternative to the reasonable person standard.[101] Judge Keith declined to modify the "reasonable person" standard by incorporating the victim's perspective, the position ultimately adopted by the EEOC.[102] Instead, Judge Keith argued that the view of a reasonable man might indeed differ from the view of the reasonable woman due to "sociological differences."[103] Thus, he argued, when a woman is subjected to sexual harassment, the appropriate standard for judging the egregiousness of the offense is that of a reasonable woman.[104] Judge Keith's dissent highlights the fact that the experiences of men and women in American culture are very different.[105] Men are often brought up to believe that behavior now defined as sexual harassment is their birthright.[106] Women have long been conditioned to accept this abuse as inevitable, in spite of its effects upon them.[107] Given this present sociological reality, it appears that the judgment of the reasonable man might be different from that of a reasonable woman. Thus, synthesizing the two perspectives into a single objective standard might be impossible.

Following Judge Keith's dissent, several courts adopted a "reasonable woman" standard for hostile environment cases with a female plaintiff.[108] In *Ellison v. Brady*, the Court of Appeals for the

101. *Id.* at 626 (Keith, J., dissenting). Judge Keith concurred with the majority as to the issue of successor liability. *Id.* at 623.

102. *Id.* at 626-27 (Keith, J., dissenting).

103. *Id.* at 626.

104. *Rabidue*, 805 F.2d at 626. Judge Keith warned that "unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders . . . ." *Id.* *See also* Vermett v. Hough, 627 F. Supp. 587, 605 (W.D. Mich. 1986) (apparently the first federal court to adopt the reasonable woman standard); Nadine Taub, *Keeping Women in their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980).

105. *Rabidue*, 805 F.2d at 626.

106. *See generally* Abrams, *supra* note 86 (exploring the idea that men view harassing behavior differently than women).

107. *Id.* at 1202-09.

108. *E.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3rd Cir. 1990) (applying a reasonable woman standard, the court required that the discrimination detrimentally affect "a reasonable person of the same sex in that position . . . ."); Carrillo v. Ward, 770 F. Supp. 815, 822 (S.D.N.Y. 1991) (applying, without comment, a reasonable woman standard); *Vermett*, 627 F. Supp. at 605 (adopting a standard

Ninth Circuit emphatically adopted the reasonable woman standard.[109] The *Ellison* court emphasized that the victim's perspective must be considered in such cases because men perceive sexual conduct in the workplace differently than women.[110] Thus, the *Ellison* court adopted "the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[111]

In *Robinson v. Jacksonville Shipyards*,[112] the court also emphasized sex-based differences in perception of sexual conduct in the workplace. In *Robinson*, an expert for the plaintiff, Dr. Susan Fiske, a Professor of Psychology, explained how the atmosphere at Jacksonville Shipyards contributed to stereotyping female employees as sex objects.[113] Dr. Fiske pointed to research that reveals dramatic differences between men and women relative to sexual attention in the workplace.[114] When asked how they would respond to sexual comments and behavior at work, "two-thirds of the men responded that they would be flattered; only fifteen percent would feel insulted. For the women, the proportions are reversed."[115] These results suggest that adoption of the reasonable woman standard might indeed be an appropriate way to insure equitable disposition of hostile environment cases.

The *Rabidue* decision was called into question by subsequent Sixth Circuit decisions applying the "reasonable woman" standard.[116] The Sixth Circuit court deciding *Yates v. Avco Corp.* concluded that in hostile environment cases, "it seems only reasonable that the person standing in the shoes of the employee should be the reasonable woman."[117]

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under which "the average female employee would find that her overall work performance is substantially and adversely affected by the conduct.").

109. Ellison v. Brady, 924 F.2d 872, 878-81 (9th Cir. 1991).

110. *Id.* at 878-79. "A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women." *Id.* at 878. *Accord* Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) (observing that a male employee may believe female co-workers are flattered when they hear comments about their figures, but the women may find this offensive).

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

112. 760 F. Supp. 1486 (M.D. Fla. 1991).

113. *Id.* at 1502-05.

114. *Id.* at 1505.

115. *Id.* The court characterized Dr. Fiske's testimony as "sound" and "credible," providing "an evidentiary basis for concluding that a sexualized working environment is abusive to a woman because of her sex." *Id.*

116. *See*, Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Kauffman v. Allied Signal Corp., 970 F.2d 178 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 831 (1992).

117. 819 F.2d at 637. The *Yates* court barely mentions *Rabidue* which it decided only one year earlier. *Id.* The court cited, with approval Judge Keith's dissent in

Reasonable Woman Revisited

One problem with the reasonable woman standard is that employers may be vulnerable to claims filed by hypersensitive sexual harassment plaintiffs. While the word "reasonable" appears to provide this protection, nevertheless, the EEOC advocates combining an objective standard (the reasonable person) with a subjective standard (emphasizing the victim's perspective).[118] Following this approach, the Third Circuit in *Andrews v. City of Philadelphia* called its standard a reasonable woman standard, and emphasized the need for subjectivity to protect the plaintiff and a concomitant objectivity to protect the employer.[119] The Seventh Circuit also combined an objective and subjective approach.[120] Like the EEOC, however, the Seventh Circuit termed its objective standard a "reasonable person" standard.[121]

The resistance of the EEOC and the Seventh Circuit to the term "reasonable woman" should be examined. There are several potential problems with the approach of the Seventh Circuit and the EEOC. Men and women are socialized differently, and consequently perceive sex in the workplace differently.[122] Other areas of the law involving women's issues, such as rape and pregnancy, take account of this fact.[123] Professor MacKinnon asserts that an ap-

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Rabidue. *Id*. at n.2. *But cf.* Highlander v. K.F.C. Nat'l Mgmt. Co., 805 F.2d 644, 649-50 (6th Cir. 1986) (citing *Rabidue* with approval).

118. Policy Guidance, *supra* note 46, at 6689-90.

119. *Andrews*, 895 F.2d 1469, 1483 (3rd Cir. 1990). The *Robinson* court articulated this same need. Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1523-25 (M.D. Fla. 1991).

120. Dockter v. Rudolf Wolff Futures, Inc., 913 F.2d 456, 459 (7th Cir. 1990) (stating that a trial court should employ both an objective and subjective analysis); King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) (looking at harassment "from both the objective and subjective viewpoint of the plaintiff: in order to find discrimination, the court must conclude that 'the conduct would adversely affect both a reasonable person and the particular plaintiff . . . .'"); Brooms v. Regal Tube, 881 F.2d 412, 418-19 (7th Cir. 1989) (asserting that a trial court must employ a dual standard, considering the likely effect of conduct upon a reasonable person's ability to work, as well as the actual effect on the plaintiff).

121. *Dockter*, 913 F.2d at 459.

122. *See generally*, Abrams, *supra* note 86, at 1203-09.

123. *See, e.g.*, J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980) (analyzing rape shield statutes in 46 American jurisdictions); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1988). Congress, by enacting the Pregnancy Discrimination Act, overturned the Supreme Court's ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that exclusion of disabilities caused by pregnancy from an employer's general coverage disability plan did not constitute discrimination based on sex. *See* Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983). Congress also rejected the Court's reasoning that differential treatment of pregnancy is not gender-based discrimination because only women can become pregnant. *Id*. at 684. The Pregnancy Discrimination Act makes it clear that

proach which considers these differences is the only way to assure women equality under the law since any other approach judges women by inherently male standards.[124] Clearly, since Title VII is meant to eliminate discrimination resulting from firmly entrenched social behavior, adjudicating Title VII cases with standards which simply reflect those entrenched behaviors is pointless.

On the other hand, there are legitimate arguments against adoption of a "reasonable woman" standard. Although Title VII is not a fault-based tort scheme,[125] there seems something inherently unfair in holding a man responsible for an offense he did not realize he was committing. This concern is particularly relevant since passage of the Civil Rights Act of 1991, with its provisions for increased recovery for damages.[126] Moreover, the acknowledgement of gender difference under the law may not result in only benign consequences. Acknowledging women's differences from men may ignore women's differences from each other, and result in the assumption that all reasonable women will perceive a situation similarly, regardless of differences in race, age, class or sexual orientation.[127] Thus, the reasonable woman standard may encourage gender stereotyping and focus on the victim's behavior rather than on the perpetrator's actions.

Moreover, the reasonable woman standard seems to hark back to the days when women were perceived as needing special treatment in the workplace because of their allegedly more delicate natures.[128] Such notions of special treatment impeded women's

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the exclusion of pregnancy coverage from an otherwise inclusive benefits plan is discriminatory. *Id.*

124. MacKinnon, *supra* note 22, at 1286-89. Professor MacKinnon cited instances when this difference theory is workable, but also when it is not. *Id.* at 1288-89.

125. *See* Adler & Peirce, *supra* note 74, at 814-15 & n.238.

126. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). In particular, under § 102 of the Act, a plaintiff may recover punitive damages upon demonstrating that the defendant engaged in practices with malice or reckless indifference. 105 Stat. at 1073.

127. *See generally* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (acknowledging that there exists "a broad range of viewpoints among women as a group", but that women do share "common concerns which men do not necessarily share"); Cheryl L. Dragel, Note, *Hostile Environment Sexual Harassment: Should the Ninth Circuit's "Reasonable Woman" Standard Be Adopted?*, 11 J. L. & COMM. 237, 254 (1992) (noting that a reasonable woman standard risks reinforcing notions of sexual difference and of women needing special treatment).

128. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (upholding the conviction of an employer who violated a state statute prohibiting employment of women for more than ten hours a day). The Supreme Court wrote, "[W]oman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil." *Id.* at 420. "[I]t is still true that in the struggle for subsistence she is not an equal competitor with her brother." *Id.* at 422.

struggle for equality in employment in the past because of the patronizing assumptions underlying them. Although current cultural consciousness might prevent open assertion of such patronizing attitudes, many commentators prefer an androgynous reasonable person standard.[129] Under this standard, the basic definition of personhood is expanded to include either male or female perspectives, considered on an equal footing.[130] This is apparently the approach of the EEOC in its most recent policy guidance.[131]

Requiring Psychological Harm

The degree of harm needed to constitute an actionable sexual harassment claim is closely tied to the problem of finding an appropriate standard for assessing those claims. In *Harris v. Forklift Systems, Inc.*, the United States Supreme Court recently took a major step toward resolving the degree of harm necessary to constitute an actionable Title VII claim.[132] Until *Harris*, the only guidance from the Supreme Court on this issue came in *Vinson*, where the Court carefully noted that trivial claims are not actionable.[133] The *Vinson* Court adopted the reasoning of *Henson v. City of Dundee*, which held that an actionable sexual harassment claim must be sufficiently severe or pervasive "to alter the conditions of employment and create an abusive working environment."[134]

The *Harris* decision resolved the issue of whether a plaintiff must demonstrate that she suffered psychological harm in order to establish a cause of action under Title VII.[135] In *Harris*, the Court held that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[136] The facts of *Harris* fit a classic hostile environment pattern. The plaintiff, Teresa Harris, was a rental manager at Forklift Systems, Inc.[137] Her boss and president of the company, Charles Hardy, directed sexist slurs at Harris and other female employees and requested that they perform humiliat-

129. *See, e.g.*, Dragel, *supra* note 127, at 253-54 (preferring a reasonable person standard which fully encompasses the experiences of both men and women).

130. *See* Policy Guidance, *supra* note 46 and accompanying text.

131. *Id.* at 6690.

132. Harris v. Forklift Systems, Inc., 62 U.S.L.W. 4004, 4005 (U.S. Nov. 9, 1993), *rev'g and remanding* 976 F.2d 733 (6th Cir. 1992).

133. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1985) (requiring sexual harassment to be "sufficiently severe or pervasive" to be actionable).

134. *Id.* at 66-67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

135. *Harris*, 62 U.S.L.W. at 4005.

136. *Id.*

137. Harris v. Forklift Systems, Inc., 60 Empl. Prac. Dec. (CCH) ¶ 42,070, at 74,246 (M.D. Tenn. 1990) (magistrate's report after trial and recommendation to the district judge).

ing, sexually-related acts on a regular basis.[138] His comments included calling Harris a "dumb ass woman," and stating that the company needed a male rental manager.[139] He asked Harris and other female employees to retrieve coins from his front pocket, and, on other occasions, would drop objects on the floor and ask Harris to pick them up while he made lewd comments about her attire.[140] Harris testified that after two years of this harassment, she did not want to go to work, cried frequently, began drinking heavily, and her family relationships deteriorated as a result of this job-related stress.[141] Harris eventually informed Hardy that his behavior upset her greatly and that she felt she had to quit.[142] Hardy promised to change his behavior and Harris agreed to stay.[143] Two weeks later, Hardy insinuated, in front of fellow employees, that Harris had acquired a new account by promising sexual favors to the client.[144] At this point, Harris quit and filed a sexual harassment charge.[145]

The Magistrate of the district court rejected Harris' claim, holding that a sexually hostile environment did not exist at Forklift Systems, and that Harris was not seriously psychologically harmed by Hardy's behavior.[146] The Sixth Circuit Court affirmed the district court's ruling without opinion.[147]

The basis on which the district court decided *Harris* reveals the cultural biases still affecting the adjudication of sexual harassment claims today. The Magistrate found that Charles Hardy was a vulgar man who demeaned the female employees of his company.[148] He found further that Harris, like any reasonable woman manager, was offended by Hardy's unwelcome conduct.[149] The Magistrate found that Hardy was not a credible witness and that his version of events was suspect.[150] Nevertheless, he concluded that Hardy's conduct was no more than "annoying and insensitive"

138. *Id.* at 74,247.
139. *Id.*
140. *Id.*
141. *Id.* at 74,246.
142. *Harris*, 60 Empl. Prac. Dec. (CCH) ¶ 42,070, at 74,246.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 74,250. Magistrate Sandridge implied that Ms. Harris's claim may have been actionable in a reasonable woman jurisdiction. *Id.*
147. Harris v. Forklift Systems, Inc., 976 F.2d 733 (6th Cir. 1992) (affirmed without opinion). *Accord Rabidue*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).
148. Harris v. Forklift Systems, Inc., 60 Empl. Prac. Dec. (CCH) ¶ 42,070, at 74,248.
149. *Id.* at 74,250.
150. *Id.* at 74,248.

and was certainly not so severe as to seriously affect Harris' psychological well-being.[151]

The *Harris* court invoked *Rabidue* as the basis for its decision.[152] The district court declined to follow the Ninth Circuit, the Third Circuit or the EEOC's recommendations, all of which suggested that proof of psychological harm was not necessary to prevail in a hostile environment action.[153] Instead, the *Harris* court followed *Rabidue*, holding that lack of demonstrable psychological harm defeated the plaintiff's sexual harassment claim.[154]

The central problem with the district court's analysis in *Harris* was that, while the Magistrate apparently applied a reasonable woman standard to judge the defendant's conduct, the court's comments indicate that the standard was not applied objectively. Rather, the court appears to consider Hardy's behavior merely adolescent in nature rather than actively discriminatory.[155] For example, the court rationalized Hardy's insinuation that Harris traded sexual favors for accounts. According to the court, while that statement was "truly gross and offensive," it was not, however, made in front of clients, only in front of fellow employees.[156] Clearly, the Magistrate evaluated Hardy's conduct from a perspective other than that of a reasonable victim - man or woman.

The court's lack of understanding also manifests itself in the Magistrate's refusal to recognize that behavior like Hardy's can cause psychological harm, notwithstanding a plaintiff's testimony to the contrary. This lack of understanding is also reflected in the *Harris* court's reliance on the fact that other employees were aware of Hardy's offensive behavior but were not as disturbed by it as Harris.[157] The Magistrate cited the lack of complaints by other female employees as evidence that the environment was not sufficiently hostile to cause psychological harm.[158] At best, this analysis reflects an incomplete understanding of the politics of sex and power in the American workplace.

The Supreme Court decided that psychological harm is not a prerequisite to a hostile environment claim under Title VII, rejecting the position of three circuits which, at least prior to the *Harris* decision, required proof of psychological harm. In the Eleventh

151. *Id.* at 74,250.
152. *Id.* at 74,249-50.
153. See *infra* notes 166-167 and accompanying text.
154. *Harris*, 60 Empl. Prac. Dec. (CCH) ¶ 42,070, at 74,250.
155. *Id.*
156. *Id.*
157. *Id.* at 74,247-50.
158. *Id.*

Circuit, an actionable claim required that the behavior in question seriously affected the psychological well-being of the plaintiff.[159] As suggested above, in *Rabidue*, the Sixth Circuit also maintained that, for a claim to be actionable, the charged sexual harassment must have had a serious negative psychological effect on the plaintiff.[160] The Sixth Circuit followed *Rabidue* in *Highlander v. K.F.C. Nat'l Management Co.*[161] The Seventh Circuit Court of Appeals cited *Rabidue* with approval in *Swanson v. Elmhurst Chrysler Plymouth*.[162]

Perhaps the circuits which required psychological harm to establish a Title VII claim intended to guard against trivial complaints. Similarly, the EEOC seeks to guard against trivial complaints by insisting on a standard which is at least partially objective. The EEOC stated that, except in a particularly severe instance of sexual harassment, one instance of abuse will not suffice to create an actionable hostile environment claim.[163] According to the EEOC, actionable claims generally arise from a pattern of abusive behavior.[164] The EEOC concludes that an abusive work environment may be actionable under Title VII without concrete evidence of psychological harm.[165] "[I]t is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the work environment of a reasonable person."[166] The Third and Ninth Circuits followed the EEOC's lead,[167] adopting Judge Keith's dissenting position in *Rabidue,* wherein Judge Keith asserted that anti-female language and behavior *per se* affect the psychological well-being of a reason-

159. *See* Sparks v. Pilot Freight Carriers Inc., 830 F.2d 1554, 1561 (11th Cir. 1987); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

160. *Rabidue*, 805 F.2d at 619-20.

161. *Id.* at 649-50 (citing with approval *Rabidue* standard).

162. 882 F.2d 1235, 1238 (7th Cir. 1989) (citing with approval *Rabidue* standard). Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213-14 (7th Cir. 1986), is less definitive than *Swanson*, but the Seventh Circuit inferred that without psychological harm a hostile environment claim is not actionable. The Seventh Circuit evaluated Scott's hostile environment claim with the observation that "there is no evidence whatsoever [that] these 'hints' were so . . . psychologically debilitating that they affected Scott's ability to perform on the job," suggesting that debilitation is necessary to prove a hostile environment claim. *Id.* at 214.

163. Policy Guidance, *supra* note 46, at 6690 (stating that hostile environment claims generally require a pattern of offensive conduct, but a single incident is actionable if unusually severe).

164. *Id.*

165. *Id.*

166. *Id.* at 6690 n.20 (EEOC explicitly rejected *Rabidue's* requirement that plaintiffs must additionally show that they suffered some degree of psychological injury).

167. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3rd Cir. 1990).

able woman.[168] Judge Keith considered it redundant to insist upon proof of subjective psychological harm after the "reasonable woman" standard is met.[169] Thus, in the Third and the Ninth Circuits, if conduct was objectively abusive and unwelcome, a reasonable victim had an actionable claim.

There is a body of psychiatric literature which asserts that psychological harm does result from job-related sexual harassment.[170] Persistent harassment in the workplace can produce "three categories of symptoms: decline in work performance and attitude, psychologic symptoms, and physical symptoms."[171] Psychological symptoms include fear, humiliation, lack of concentration and loss of self-esteem.[172] Physical symptoms can include anorexia, loss of sexual interest and insomnia.[173] These symptoms affect both a woman's motivation for and quality of work, as well as affecting personal relationships.[174]

The Supreme Court, in its decision to reverse and remand *Harris*, implied that Teresa Harris did not have to tolerate her employer's abuse.[175] The Court clarified the appropriate standard for judging conduct of a sexual nature, applying the reasonable person/victim's perspective amalgam suggested in *Vinson* and in the EEOC Guidelines, rather than the reasonable woman standard.[176] Again, the Court made it clear that a woman need not prove she suffered psychological harm to prevail in a hostile environment claim.[177]

In clarifying the appropriate standard for judging hostile environment claims, the Supreme Court reiterated its position in *Vinson*, that to distinguish frivolous claims from legitimate claims, a court should evaluate claims from the victim's viewpoint and the viewpoint of an objective reasonable person.[178] Thus, to be actionable, a claim must involve abuse behavior which a reasonable person, as well as the victim, deems pervasive enough to create a

168. Rabidue v. Osceola Refining Co., 805 F.2d 611, 627 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (Keith, J., dissenting).

169. *Id.* at 627 (Keith, J., dissenting).

170. *See generally* Ben Bursten, *Psychiatric Injury in the Women's Workplace*, 13 BULL. AM. ACAD. PSYCHIATRY & L. 399, 405-06 (1985).

171. *Id.* at 403.

172. *Id.*

173. *Id.*

174. *Id.*

175. Harris v. Forklift Systems, Inc., 62 U.S.L.W. 4004 (U.S. Nov. 9, 1993), *rev'g and remanding* 976 F.2d 733 (6th Cir. 1992).

176. *Id.* at 4005.

177. *Id.* Even the respondent, Forklift, conceded that "a requirement that the conduct seriously affect psychological well-being is unfounded." *Id.*

178. *Id.*

discriminatory work environment.[179] By declining to espouse the reasonable woman standard, ostensibly used by the lower courts in this case, the Supreme Court may have sought to avoid the dangers inherent in a separate standard. Instead of establishing a separate standard based on sex, the Court attempted to strike a balance between objective and subjective viewpoints by stressing that, if the victim's perspective differs too radically from that of a reasonable person, a claim may not be actionable.[180] Thus, if the victim is considerably more sensitive than an objectively reasonable person, the Court might infer that the environment was not sufficiently hostile to maintain a sexual harassment claim. A successful claim arises when the sensitivities of the victim and an objectively reasonable person are similar.

This standard is too vague to be easily applied in every case. Consequently, the Supreme Court makes it clear that courts must consider all the circumstances in a given case, including the "frequency of the offending conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."[181] Psychological harm is a relevant factor, but not the sole factor or even a necessary factor.[182] Thus, the district court in *Harris* misread Title VII and *Vinson* when it considered psychological harm a necessary factor in the face of the other factors present in that case.

Stressing that a sexual harassment plaintiff need not sustain psychological harm to prevail in a hostile environment claim, Justice O'Connor delivered the unanimous opinion of the Court, asserting "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[183] In fact, Title VII was intended to prevent the infliction of psychological harm because of one's membership in a protected category. An abusive environment which does not produce visible psychological harm can still "detract from employees' job performances, discourage employees from remaining on the job, or keep them from advancing in their careers."[184] Furthermore, work environments which can be classified as abusive, whether they actually produce psychological harm or not, may violate "Title

179. *Id.* As Justice O'Connor pointed out, the standard enunciated "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause tangible psychological injury." *Id.*

180. *Harris*, 62 U.S.L.W. at 4005.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* This is an important part of the opinion because the Court rejects the requirement that a plaintiff's job performance must actually suffer.

VII's broad rule of workplace equality."[185] The Supreme Court unequivocally stated that Title VII does not require concrete proof of psychological harm.

In *Harris*, the Supreme Court suggested that the parameters of actionable hostile environment claims are more expansive than suggested by *Vinson*, where the environment was permeated by physical as well a psychological abuse.[186] Teresa Harris, unlike Mechelle Vinson, was not subjected to physical harassment. Nevertheless, the Supreme Court found that a reasonable person would perceive the work environment at Forklift Systems as an impediment to optimal and equal job performance. This is sufficient to sustain a hostile environment sexual harassment claim. Sidestepping the issue of whether psychological harm is endemic to such a work environment, the Supreme Court decided that proof of psychological harm is not the linchpin on which an actionable claim hangs. In *Harris*, the Supreme Court elucidated definitively that Title VII was meant to prevent psychological harm from occurring rather than merely compensating the victim after it occurs.[187] Indeed, with this ruling, the national consciousness about what constitutes sexual harassment appears to have passed another threshold.

Remedies

Until recently, remedies for actionable claims under Title VII of the Civil Rights Act of 1964 allowed successful plaintiffs to obtain injunctive relief as well as back pay, front pay, attorney's fees and costs.[188] Unlike remedies for racial harassment under the Civil

185. *Harris*, 62 U.S.L.W. at 4005.

186. *See supra* notes 53-56 and accompanying text.

187. Justice Scalia, in a concurring opinion, wrote that the test for an actionable claim is "whether working conditions have been discriminatorily altered." *Harris*, 62 U.S.L.W. at 4006 (Scalia, J., concurring). His concurrence reinforces the notion that the analysis should focus primarily on the defendant's behavior rather than the victim's psychological state. Despite his dissatisfaction with the list of factors set forth by Justice O'Connor, Justice Scalia lamented that he "know[s] of no alternative to the course the Court today has taken." *Id.* Justice Scalia expressed discomfort with the court's analysis since it adds "little certitude." *Id.*

Justice Ginsburg offered her insight in a separate concurring opinion by characterizing the issue as, "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed . . . ." Using this approach, an actionable claim would lie if "the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'" *Id.* (Ginsburg, J., concurring) (quoting Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988)). Justice Ginsburg's approach makes an analogy with equal protection jurisprudence where "'an exceedingly persuasive justification' for a gender-based classification" must exist. *Id.* (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

188. 42 U.S.C. § 2000-5(g) (1988) (equitable relief was available, while compensatory and punitive damages were not); *see also* Estrich, *Sex at Work*, *supra* note 21,

Rights Act of 1866,[189] however, Title VII did not allow a plaintiff to recover punitive damages or compensation for emotional distress. Nor did Title VII allow for a jury trial — a distinct disadvantage at a time when many magistrates perceive sexual harassment claims as not quite legitimate.[190] The redress available under this statute, then, implied that the harm was insufficient to warrant the same compensation granted to victims of racial harassment.

With the growing awareness of the effects of sexual harassment on a victim came a concomitant awareness of the need for expanded remedies. When the Civil Rights Act of 1991[191] amended various antidiscrimination statutes,[192] including Title VII, it granted sex discrimination plaintiffs the right to a jury trial[193] and to recovery of compensatory and punitive damages.[194] The Act limits compensatory damages to "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . ."[195]

This amendment to Title VII clearly reflects an increased awareness of how sexual harassment can be emotionally and financially destructive. However, sex discrimination claims apparently still lack the legitimacy of race discrimination claims. For example, the 1991 Civil Rights Act placed a cap on the amount a plaintiff can recover in compensatory and punitive damages.[196] Thus, a sex discrimination plaintiff, forced to sue under Title VII as amended by the 1991 Act, faces statutory limitations on recovery which do not apply to a race discrimination plaintiff suing under the Civil Rights Act of 1866.[197] These damage limits vary with the size of an employer's business.[198]

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at 855-58 (explaining that equitable relief was available under Title VII, while compensatory and punitive damages were not).

189. 42 U.S.C. § 1981 (1988).

190. *See* Harris v. Forklift Systems, Inc., 60 Empl. Prac. Dec. (CCH) ¶ 42,070, at 74,246 (M.D. Tenn. 1990) (magistrate's report after trial and recommendation to the district judge); Edward J. Costello, Jr., *Sexual Harassment After the Civil Rights Act of 1991*, 23 U. WEST L.A. L. REV. 21, 33-34 (1992).

191. Pub. L. No. 102-166, 105 Stat. 1071 (an omnibus statute codified as amended in scattered sections of 42 U.S.C.).

192. Costello, *supra* note 190, at 31.

193. Civil Rights Act of 1991, § 102(c) (making jury trials available if plaintiffs seek compensatory or punitive damages).

194. *Id.* § 102(b) (allowing punitive damages, though only upon evidence that the respondent acted with "malice or reckless indifference").

195. *Id.* § 102(b)(3).

196. *Id.* § 102(b)(3)(A),(B),(C),(D).

197. *Compare* Civil Rights Act of 1991, § 102(b)(3) *with* 42 U.S.C. § 1981 (1988).

198. A company with 15 to 100 employees is liable for no more than $50,000 in compensatory and punitive damages; a company with 101 to 200 employees is liable for no more than $100,000; a company with 201 to 500 employees is liable for no

Congress placed these damage limits on all sex discrimination claims brought under the Civil Rights Act of 1991.[199] These caps reflect the reluctance of the legislative and judicial establishment to view sex discrimination as an offense with an unlimited ability to adversely affect a victim. Thus, the increased potential for recovery available to sex discrimination victims today represents only the current stage of consciousness about sexual harassment and its effects, rather than the ultimate evolution of societal consciousness about the adverse effects of sex discrimination.

A further limit on recovery imposed by the 1991 Act is its ban on compensatory and punitive damages for victims asserting disparate impact claims.[200] However, the cap described here does not apply to damages recoverable under section 706(g) of Title VII such as back pay, or to past pecuniary losses such as medical expenses.[201] Whether these caps apply to front pay is unclear from the wording of the Act.[202]

Despite its caps on remedies, the 1991 Civil Rights Act has increased the legitimacy of sexual harassment claims by creating a Glass Ceiling Commission.[203] This commission, made up of twenty-one appointed members, is authorized to make recommendations designed to eliminate "artificial barriers to the advancement of women and minorities . . . ."[204] Concomitant with the creation of this committee, the Act creates an annual award for employers who make exceptional progress in eliminating these barriers.[205] These provisions clearly reflect increased Congressional resolve to grant legitimacy to sex discrimination claims, including claims of sexual harassment.

III. International Laws of Sexual Harassment

Surveys conducted around the globe document the pervasiveness of sexual harassment.[206] From Nairobi to Stockholm, sexual harassment in the workplace is an issue for women and, to a lesser

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more than $200,000; and a company with over 500 employees is liable for no more $300,000. Civil Rights Act of 1991, § 102(b)(3)(A),(D).

199. *Id.* § 102(b)(3).

200. *Id.* § 102(a)(1).

201. *Id.* § 102(b)(2).

202. *Id.* § 102(a),(b).

203. *Id.* §§ 201-210.

204. *Id.* § 202(a) & (b).

205. *Id.* § 205.

206. Gloria Gorden, *A Worldwide Look at Sexual Harassment*, 12 COMM. WORLD 15 (1991). For surveys of reported sexual harassment in countries around the world see DIGEST, *supra* note 8, at 65-173.

extent, men.[207] Studies show that harassers do not victimize women on the basis of their physical attractiveness, but rather harass individuals who are the most vulnerable.[208] While some commentators criticize United States law as reflecting puritan notions of sex,[209] governments around the world are realizing that sexual harassment is not about sex, but about sex as a vehicle to discriminate, to subjugate women, and to assert power.[210]

The sexual harassment regulations developed in the United States and subsequent case law clearly influenced legal developments in other countries.[211] In 1991, the European Community adopted a nonbinding code of practice on sexual harassment.[212] Some individual countries have gone beyond this Code. Both France and the United Kingdom have enacted legislation or adjudicated cases on the subject.[213] Other EC countries, as well as Australia, Canada and New Zealand, have legal mechanisms for the redress of sexual harassment claims.[214] Even in Japan, a society known for its respect for authority rather than litigiousness, a court found that crude remarks by a boss to his employee, which caused her to leave the job, warranted payment of approximately $12,500.[215]

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207. *See generally* DIGEST, *supra* note 8, at 65-173. A British survey, of 1000 workers found that sexual harassment is overwhelmingly directed at women, and perpetrated by men. *See* Fiona Thompson, *Running the Gauntlet of Going to Work*, THE FIN. TIMES (LONDON), Mar. 16, 1989, at 13 (discussing a London School of Economics study which found that the age of the victim was not a factor in the incidence of sexual harassment, and three quarters of all incidents went unreported).

208. Michael Rubenstein, *Dealing with Sexual Harassment at Work: The Experience of Industrialized Countries*, DIGEST, *supra* note 8, at 8; *see also* MICHAEL RUBENSTEIN, THE DIGNITY OF WOMEN AT WORK: A REPORT ON THE PROBLEM OF SEXUAL HARASSMENT IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES 15 (1988) [hereinafter RUBENSTEIN, DIGNITY OF WOMEN AT WORK] (citing studies conducted in Belgium and the Netherlands which found sexual harassment was linked to work status, and most likely to be directed towards young women, unmarried, divorced or separated women, and women working in traditionally male jobs).

209. *See* Alan Raybould, *Europeans Amused by U.S. Prurience Over Clinton Scandal*, Reuter, Jan. 28, 1992, *available in* LEXIS, Nexis Library, LBYRPT File.

210. *See* discussion *infra* part IV.

211. *See Sex Harassment at Work Grows as Global Concern*, WALL ST. J., Dec. 1, 1992, at A5 (attributing influence to the United States). Ms. Constance Thomas, an International Labor Office attorney, noted that "no longer can government, trade unions, workers or employers say, 'It's an issue that we don't have to deal with' and call it a U.S. problem." *Id. See also* DIGEST, *supra* note 8, at 165-70 (discussing the role of the EEOC guidelines).

212. Commission Recommendation on Protecting the Dignity of Women and Men at Work, 1992 O.J. (L 49) 1, 3-8, *reprinted in* DIGEST, *supra* note 8, at 31-39.

213. *See infra* text accompanying notes 278-319.

214. *See generally* discussion *infra* part IV; *see also* DIGEST, *supra* note 8, at 65-173.

215. Steven R. Weisman, *Landmark Harassment Case in Japan*, N.Y. TIMES, Apr. 17, 1992, at A3 (discussing "seku hara", the term for sexual harassment in Japan).

A. *United Nations*

The United Nations, though a leader in many areas, has never been a leader in women's rights.[216] Concerns over international boundaries, war, and peace have consumed the young organization and left to the periphery concerns of women.[217] The legal status and treatment of women raise difficult issues that cross into the "private" realm within state sovereignty.[218] The 1948 Universal Declaration of Human Rights included women when it guaranteed rights to "everyone."[219] Sex is specifically mentioned in Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[220]

Despite this language, women are accorded second class status in many countries. Gender-based violence, such as female infanticide, genital mutilation, rape and murder continues to violate women's human rights.[221] Former United States vice presidential candidate Geraldine Ferraro succinctly identified the difficulties women have convincing the international community to address women's rights:

> Although the 1948 Universal Declaration of Human Rights nominally includes women, the icon of human rights abuse has been a man behind bars, tortured for speaking his mind. Abuse unique to women has been dismissed — as traditional practice, as too common to worry about, as less important than other things. These are family problems, men say, and the family lies beyond international jurisdiction.[222]

The report quotes lawyer Yukiko Tsunoda as stating that "[s]exual harassment is a big problem in Japan, and we hope this will send a signal to men that they have to be more careful." *Id.* The report also notes two previous harassment cases which the plaintiffs won because the male defendants did not appear in court. *Id.*

216. Even within the United Nations sexual harassment is a fact of life for UN employees like so many other workers. A sexual harassment case against a high ranking UN official, the first such claim under the UN internal justice system, was reported in *The New York Times*. Tamar Lewin, *UN Furor: Harassment is Investigated*, N.Y. TIMES, Dec. 20, 1992, at 37.

217. Charlesworth et. al., *supra* note 3, at 615 (employing a feminist analysis of international law).

218. *Id.* at 625-27. The "public" sphere is generally regarded as the province of international law, whereas matters "private" to states are considered within their domestic jurisdiction. *Id.*

219. *Universal Declaration of Human Rights*, U.N. G.A. Res. 217(III), art. 2 (1948), *reprinted in* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 352 (1991) [hereinafter DOCUMENTS].

220. *Id.*

221. *See supra* note 25.

222. Geraldine Ferraro, *Human Rights For Women*, N.Y. TIMES, June 10, 1993, at A27.

In 1979, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("Convention") was enacted, although the United States has not ratified this Convention.[223] Forty of the 105 ratifying countries expressed reservations to the Convention based primarily on religious objections.[224] By contrast, only four countries registered reservations to the Convention on the Elimination of All Forms of Racial Discrimination.[225] As several feminist Australian professors commented, even at the UN, "discrimination against women is somehow regarded as more 'natural' and acceptable than racial discrimination."[226]

Sexual harassment as a form of sex discrimination was specifically mentioned in the 1985 draft of The Nairobi Forward Looking Strategies for The Advancement of Women.[227] The draft states, "[a]ppropriate measures should be taken to prevent sexual harassment on the job and sexual exploitation in specific jobs."[228] Subsequently, the Committee on the Elimination of All Forms of Discrimination Against Women, the committee responsible for implementing the Convention, examined gender-specific violence including the mental harm associated with sexual harassment.[229] The Committee suggested "penal sanctions . . . compensatory provisions [and] . . . preventative measures."[230]

Yet, this Convention, and women's issues generally, receive remarkably little attention internationally. A feminist critique of international law suggests this reflects a deliberate concern for

223. *Convention on the Elimination of all Forms of Discrimination Against Women*, U.N. G.A. Res. 280 (XXXIV 1979), 19 I.L.M. 33 (1980), *reprinted in* DOCUMENTS, *supra* note 219, at 399 (adopted by General Assembly of the United Nations on December 18, 1979 entered into force on Sept. 3, 1981).

224. Charlesworth et al., *supra* note 3, at 632-33.

225. *Id.* at 633.

226. *Id.* at 634.

227. *See* DIGEST, *supra* note 8, at 41 (excerpting from United Nations, The Nairobi Forward-Looking Strategies for the Advancement of Women and Concrete Measures to Overcome Obstacles to the Achievement of the Goals and Objectives of the United Nations Decade for Women for the period 1986 to the Year 2000, adopted by the World Conference to Review and Appraise the Achievement of the United Nations Decade for Women, Nairobi, Kenya (1985)).

228. *Id.*

229. *Id.* at 24.

230. *Id.* at 42 (reprinting excerpts from General Recommendation No 19: Violence Against Women, Committee on the Elimination of Discrimination Against Women, 11th Sess., U.N. Doc. CEDAW/1992/L.1/Add.15 (1992)).

For discussion of women's presence in other human rights fora see Alan Riding, *Women Seize Focus At Rights Forum*, N.Y. TIMES, June 16, 1993, at A3 (noting that Secretary of State Warren Christopher, at the World Conference on Human Rights, announced that President Clinton would seek ratification of the Convention on the Elimination of all Forms of Discrimination Against Women). The reporter noted that "[w]omen, . . . have emerged as easily the strongest and most effective lobby . . . ." *Id.*

matters of state, and a policy of ignoring private, domestic matters considered internal to the country.[231] According to Professor Hilary Charlesworth, "[i]f violence against women were considered by the international legal system to be as shocking as violence against people for their political ideas, women would have considerable support in their struggle."[232] This reluctance to interfere in a state's internal matters absent compelling justification, or solely for self defense, will never permit UN intercession on behalf of women.

B. European Community

The development of sexual harassment law in the European Community parallels developments within the United States. Just as in the United States, initially the EC did not recognize sexual harassment or "sexual blackmail."[233] Although equality was not originally mandated by the EC, the Treaty of Rome, which established the European Economic Community, included a mandate for equal pay for men and women known as Article 119.[234] Article 119 states "[e]ach Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."[235]

In 1976, the EC passed the Equal Treatment Directive.[236] This directive outlawed sex discrimination, and like all directives, called upon member states to implement appropriate state legislation to achieve the objectives of the Directive. The Directive states:

> 1. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as 'the principle of equal treatment.'

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231. Charlesworth et al., *supra* note 3, at 629.

232. *Id.*

233. For a description of the development of sexual harassment law in the EC see EVELYN ELLIS, EUROPEAN COMMUNITY SEX EQUALITY LAW 149 (1991) (discussing the evolution of the treatment of sexual harassment in the European Community). Various terms are used to describe sexual harassment around the world including "unwanted intimacy" in Netherlands, "sexual molestation" in Italy, and "sexual blackmail" in France. DIGEST, *supra* note 8, at 10.

234. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, art. 119 [EEC TREATY] (also referred to as Treaty of Rome). For a discussion of the application of art. 119 see ELLIS, *supra* note 233, at 38. The case *Defrenne v. Sabena*, 43/75 [1976] ECR 455, expands on how art. 119 should be interpreted within the "social objectives" of the community. *Id.* at 41.

235. *Id.* at 38 (quoting EEC TREATY art. 119).

236. Directive 76/207, 1976 OJ (L 39/40). For a discussion of the Equal Treatment Directive see ELLIS, *supra* note 233, at 134.

> 2. With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangement for its application.[237]

The Directive continues in Article 2: "For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."[238]

In 1984, the EC published a non-binding Council of Ministers recommendation, intended to eliminate existing inequalities affecting working women and to promote "positive action for women."[239] The Council's recommendation also called for positive action to "respect . . . the dignity of women at the workplace."[240] The recommendation encouraged industry to make suggestions to further achievement of these goals.[241] However, the recommendation did not explicitly recognize sexual harassment as either a separate wrong or as a form of discrimination.

The Council recommended to member states:

> 1. To adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment.
>
> . . . .
>
> 4. To take steps to ensure that positive action includes as far as possible actions having a bearing on . . . respect for the dignity of women at the workplace.[242]

In 1986, the European Parliament, then an entity without direct power, resolved that sexual harassment was a form of violence against women.[243] This occurred the same year as the United States Supreme Court decision in *Meritor Savings Bank v. Vinson*.[244] The Resolution referred to the United Nations Convention

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237. Directive 76/207, 1976 OJ (L 39/40), *reprinted in* ELLIS, *supra* note 233, at 135.

238. *Id.*

239. 1984 OJ (L 331) 34-35, *reprinted in* DIGEST, *supra* note 8, at 26.

240. *Id.*

241. *Id.*

242. *Id.*

243. Resolution on Violence Against Women, 1986 OJ (C 176) 73. The power of parliament was expanded beyond just a consultative body by the Single European Act in 1987, 25 I. L. M. 503 (1986). *See generally* RALPH H. FOLSOM, EUROPEAN COMMUNITY LAW 25-66 (1992) (discussing the allocation of power between the European Community Council of Ministers, Commission and Parliament); *see also* NICHOLAS COLCHESTER & DAVID BUCHAN, EUROPOWER 14 (1990); RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 70 (1993) (discussing the structure of the European Community).

244. 477 U.S. 57 (1986).

on the Elimination of All Forms of Discrimination against Women,[245] and noted a connection between eliminating inequality and eliminating violence against women.[246] The Resolution specifically addressed sexual harassment and called for study of the financial costs associated with it. The Resolution states:

> 38. Whereas sexual harassment can be seen as non-respect of the principle of equal treatment with regard to access to employment and promotion, and working conditions, calls on the Commission to examine national labour and anti-discrimination legislation with a view to determining its applicability to such cases and, in so far as existing legislation may be deemed inadequate, to propose a directive to complete existing legislation;
>
> 39. Calls on the Council of Ministers meeting on the subject of labour legislation to take all the necessary steps to harmonize laws on sexual blackmail at work in the different Member states of the Community and while awaiting this harmonization, calls on national authorities to strive to achieve a legal definition of sexual harassment so that victims of such attacks will have a clearly defined basis on which to lodge complaints; . . . .[247]

The Resolution called for education on the issue of sexual harassment and advocated drafting codes of practice to address sexual harassment.[248] Unions and professional organizations were encouraged to become involved.[249] The EC Parliament also called for a study on the impact of "sexual blackmail" and to "harmonize laws on sexual blackmail at work in the different Member States of the Community."[250] "Harmonization" was a precursor to the single market program calling for greater uniformity among the member states' laws.[251] However, the EC did not actually issue a sexual harassment directive or regulation despite a number of calls for such legislation by experts in the field.[252]

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245. U.N. G.A. Res. 280 (XXXIV 1979), 19 I.L.M. 33 (1980), *reprinted in* DOCUMENTS, *supra* note 219, at 399.

246. Resolution on Violence Against Women, 1986 OJ (C 176) 73-83, *reprinted in* DIGEST, *supra* note 8, at 26-28.

247. *Id.*

248. *Id.*

249. *Id.* at 27-28.

250. *Id.*

251. *Id.* For discussion of harmonization see COLCHESTER & BUCHAN, *supra*, note 243, at 82-84. For a discussion of the assessment of progress see *A Rude Awakening: A Survey of the European Community*, THE ECONOMIST, July 3, 1993, at 5.

252. *See* RUBENSTEIN, DIGNITY OF WOMEN AT WORK, *supra* note 208, at 9. Mr. Rubenstein, in his 1987 report, called for a sexual harassment directive, stating:

> The approach of this report throughout is to suggest a legal framework which will reduce the need for litigation by encouraging the prevention of sexual harassment rather than stimulating law suits by concentrating on sanctions after the damage has been inflicted. It must be emphasized, however, that such a preventative approach will not succeed

In May 1990, the EC Council of Ministers passed a resolution on "the protection of the dignity of women and men at work."[253] The resolution explicitly defined sexual harassment:

> 1. Affirms that conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, constitutes an intolerable violation of the dignity of workers or trainees and is unacceptable if:
> (a) such conduct is unwanted, unreasonable and offensive to the recipient;
> (b) a person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions;
> and/or
> (c) such conduct creates an intimidating, hostile or humiliating working environment for the recipient; . . . .[254]

This Resolution also called for development of a Code of Conduct by July 1991.[255] In November 1991, the EC enacted a nonbinding Code of Practice stating "[t]he action[s] of the Member States, in thus initiating and pursuing positive measures designed to create a climate at work in which women and men respect one another's human integrity, should serve as an example to the private sector."[256] The Code states in part:

> Sexual harassment means unwanted conduct of a sexual nature, or other conduct based upon sex affecting the dignity of men and women at work. This can include unwelcome physical, verbal or non-verbal conduct. Thus, a range of behaviour may be considered to constitute sexual harassment. It is unacceptable if such conduct is unwanted, unreasonable and offensive to the recipient; a person's rejection of or submission to such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training or to employment, continued employment, promotion, salary or any other employment decisions; and/or such conduct creates an intimidating, hostile or humiliating working environment for the recipient. The essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behavior is acceptable to them

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without legislation to stimulate change. An effective law will focus attention on the problem.

Id.

253. 1990 OJ (C 157) 3-4, *reprinted in* DIGEST, *supra* note 8, at 29-30.

254. *Id.*

255. *Id.*

256. 1992 OJ (L 49) 1-8, *reprinted in* DIGEST, *supra* note 8, at 31-39.

> and what they regard as offensive. Sexual attention becomes sexual harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive, although one incident of harassment may constitute harassment if sufficiently serious. It is the unwanted nature of the conduct which distinguishes sexual harassment from friendly behaviour, which is welcome and mutual.[257]

The aim of the Code is to "give practical guidance" to employers, trade unions and employees. It is applicable to both the public and private sectors.[258] It focuses on education and prevention of harassment rather than on compensating victims. The Code recommends developing policy statements, communicating the policy to workers, and training.[259] The Code also recommends a complaint investigation and disciplinary procedure.[260] In 1994, the Commission is scheduled to report on all measures enacted and taken by industry.[261] On December 19, 1991, the Council endorsed the Commission's Code of Practice without modifying the original Code.[262]

The problem with the Code's definition and explanation is that women have the burden of notifying their superiors and co-workers about inappropriate conduct. As with United States laws, "welcomeness" focuses on the conduct of a complainant. The Code's definition does not address the problem that sexual bantering and touching may in fact be welcomed by some women in the workplace. Despite the acquiescence of some, this sort of behavior may create a hostile environment for other workers. This test especially burdens individuals who not only must deal with hostile environments, but with the difficulty of succeeding in nontraditional occupations such as female firefighters or carpenters, or male nurses or secretaries.

The Code is not binding, nor does it provide a legal basis to ensure financial recovery for victims. The focus is on prevention of sexual harassment. This may be in response to research suggesting that survivors of sexual harassment primarily seek to end the harassment.[263] Also, European countries are less litigious than the

257. *Id.* at 33.
258. *Id.* at 32.
259. *Id.*
260. *Id.*
261. *Id.* at 31.
262. 1992 OJ (C 27) 1, *reprinted in* DIGEST, *supra* note 8, at 40.
263. Ms. Jayne Monkhouse of the British Equal Opportunity Commission states, "Most women who have been subjected to sexual harassment just want it to stop — they don't want to get their pound of flesh at a tribunal." Lucy Kellaway, *Getting Sex Out of the Office*, THE FIN. TIMES (LONDON), Oct. 23, 1991, at 13, *available in* LEXIS, Nexis Library, FINTME File; *see also UK: Institute of Personnel Management Reports that Harassment Still Goes Largely Unpunished*, Reuter Textline, Oct. 8, 1992, *available in* LEXIS, WORLD Library, ALLNWS File (stating that people who are sexually harassed generally just want it to stop).

United States.[264] The notion that everyone should have his or her day in court is unfamiliar in Europe and, in some instances, is not allowed.[265]

The choice of a non-binding code to address sexual harassment, rather than a directive or regulation which would have been directly enforceable, is significant. The European Community has several options for legislation.[266] A directive requires each member state to adopt its own legislation to conform to the directive standards, whereas a regulation is directly applicable to all member states.[267] The European Community's difficulties with the Maastricht Treaty, which is centered on the single currency, central bank, and the principle of subsidiarity,[268] militated against taking a stronger position on sexual harassment which would tread on sensitive issues of national autonomy.[269]

European Community states have experimented with different approaches to addressing sexual harassment — from criminalizing conduct, to relying on laws prohibiting discrimination, to ignoring the problem.[270] There is no uniformity between member states. This article advocates an EC directive or regulation on sexual harassment so that all sexual harassment would be prohibited throughout the European Community. Such a directive would send a message to businesses and individuals that harassment is an important concern requiring a standardized approach.

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264. For a comparison of litigation in different countries see Christopher J. Whelan, *Labor Law and Comparative Law*, 63 TEX. L. REV. 1425 (1985); *see also* P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo American Comparisons* 1987 DUKE L.J. 1002 (1987).

265. *Id.*

266. *See* ELLIS, *supra* note 233, at 4.

267. *Id.* at 4-5.

268. Subsidiarity refers to the concept that decisions should be made at the lowest level and that the Community governance structure should not become involved in a member state's concerns. This is analogous to the federal/state tensions in the United States. *See* COLCHESTER & BUCHAN, *supra* note 243, at 42, 179, 188 & 236 (giving examples and asserting that language teaching need not be centralized). "If it can cross frontiers, draft a directive. If it can't, hands off." *Id.* at 236. However, that distinction does not answer the question of whether political philosophy about the role of central government determines whether an issue should be handled at the state or community level.

269. Treaty on European Union and Final Act, 31 I.L.M. 247 (1992) (completed at Maastricht, The Netherlands Feb. 7, 1992 and also referred to as the Maastricht Treaty). The Maastricht Treaty has not yet been implemented.

270. *See* discussion *infra* part IV.

IV. The Status of Sexual Harassment Laws in Various Countries

A. *France*

The media in the U.S. and abroad fuel the illusion that the view of sexual harassment in the United States is odd and an aberration.[271] During the Thomas-Hill hearings, French philosopher Elisabeth Badinter commented that Justice Thomas was vilified for having sexual desires and expressing them.[272] Ms. Badinter blamed a "pitiless feminist Inquisition."[273]

A recent French poll buttressed the international perception that the view of sexual harassment in the United States is puritanical.[274] According to the poll, 20% of French women would not consider it sexual harassment if they were asked to undress during a job interview.[275] Only 47% thought it would be sexual harassment if a boss asked them to spend the weekend with him to discuss a promotion.[276] Not all French women share this rather incredible tolerance for sexual banter or joking. As one French journalist stated, "[a]ll too many men think that they are being charming when they are being a pain."[277]

Despite its professed national ambivalence about sexual harassment, France enacted a new 1992 law making sexual harassment a criminal offense.[278] The legislation was touted as "the toughest of its kind in Europe."[279] The French Secretary of State for Women's Rights, Veronique Neiertz, cautioned that not every advance by an employer is necessarily a criminal offense.[280] Ms. Neiertz also stated, "We must be careful to condemn sexual harassment without at the same time condemning sex and seduction. If

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271. Eduordo Cue, UPI, Feb. 3, 1992, *available in* LEXIS, Nexis Library, UPI File (stating that despite the "encroaching influence of American values" there remain "significant cultural differences" relating to sexual harassment between France and the U.S.).

272. Catchpole, *supra* note 2. Ms. Badinter laments the "unbearable regression which can only engender more fear and loneliness" and which will not "enlarge feminine dignity." *Id.* However, French feminists respond to these comments by asserting that sexual intrigue or "galanterie" has been a real problem in France. *Id.* The French Association of Violence Against Women receives on average three calls a day from women seeking assistance. *Id.*

273. *Id.*

274. Alan Riding, *France Rethinks its Wink at Sex Harassment*, N.Y. TIMES, May 3, 1992, § 1, at 9.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. Riding, *supra* note 274.

280. *Id.*

we don't, watch out for moralism and the war of the sexes."[281] According to Ms. Neiertz, "a good slap in the face" may be the best course of action.[282] Ms. Neiertz deplores the excesses of American sexual correctness where even "the slightest wink can be misinterpreted."[283]

The French legislation consists of two parts: Penal Code sections and Labor Code sections.[284] The Penal Code states: "The action of harassing another by using orders or position by threats or duress to obtain sexual favors by a person who abuses the authority granted by his position may be punished by a year in prison and a 100,000 Franc fine."[285]

The power of this legal development is evidenced by an action brought by a labor union on behalf of a telephone operator who was fondled by her boss in which the offender received a suspended jail term.[286] Despite the contempt some French evince for Americans' view of sexual harassment, the Thomas controversy was educational and stimulated discussion as well as legal change. Ultimately, it fostered a new public understanding of sexual harassment as criminal behavior, as reflected in the imposition of a suspended jail sentence. The French law stands in marked contrast to U.S. law which makes no attempt to specifically criminalize sexual harassment.[287]

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281. Cue, *supra* note 271.

282. Riding, *supra* note 274.

283. *Id.*

284. *See* DIGEST, *supra* note 8, at 97-100.

285. CODE PENAL [C. PÉN.] art. 222-23 Titre II (Fr.), *available in* LEXIS, LOIREG Library, CODES File (translated by Beverley Earle). In French: "Le fait de harceler autrui en usant d'ordres, de menaces ou de contraintes, dans le obtenir des faveurs de nature sexuelle, par une personne abusant de l'autorite que lui conferent ses fonctions, est puni d'un an d'emprisonnement et de 100,000 F d'amende." *Id.*

286. Barry James, *A French Revolution; Judge Gives Suspended Jail Term to Male Boss for Sexual Harassment*, INT'L HERALD TRIB., Jan. 18, 1992, *available in* LEXIS, Nexis Library, IHT File.

287. *See* MACKINNON, *supra* note 19, at 161-64 (discussing the criminal nature of many acts of sexual harassment which should be prosecuted as assault). Professor Estrich compares U.S. rape laws to sexual harassment law and views both as embodying sexist attitudes about how women should act. Estrich, *Sex at Work*, *supra* note 21, at 814-15. Professor Estrich writes:

> [S]exism is entrenched in [the] law — one realm where traditional male prerogatives are most protected, male power most jealously preserved and female power most jealously limited — it is the area of sex itself .... In life, this male domain is protected by the wielding of real power — economic, physical, psychological, and emotional. In law, it is protected by doctrines of consent, corroboration, fresh complaint and provocation .... It is protected, in short, by the operation of sexism in law.

Id.

Other countries also use existing criminal laws to address sexual harassment. For example, in New Zealand criminal indecent assault charges were brought against the owner of a shop for harassing a foster child, cousin and employees. *R. v.*

As a result of changes enacted to the French Labor Code in 1992, workers fired for resisting sexual harassment may be reinstated.[288] The revised code prohibits employers from demoting or reducing the salaries of employees who resist sexual harassment.[289] The law states:

> Any wage earner should not be sanctioned or laid off for having to submit or refusing to submit to actions of sexual harassment by an employer or by his representative or by all persons who abuse the authority given to them by their position through giving orders or pressure uttering threats or imposing will or exercising pressure on the worker for the purpose of obtaining sexual favors or for the benefit of a third party. No worker shall lose salary or a job because of the previous actions.[290]

Dean, 3 N.Z.L.R. 444 (Wellington Ct. App. 1991). The defendant was a 38 year old married man with three children who was "highly regarded and respected in the small rural community . . . ." *Id.* at 447. The four employees, aged 15, 16 and 18, alleged that the defendant touched them on their breasts and buttocks when they were bending over or on ladders. *Id.* at 446. Initially the defendant stated he believed he had done nothing wrong, but later conceded he was wrong "particularly having regard to the age difference between him and the girls affected." *Id.* at 447. The court sentenced the defendant to 4 1/2 years in prison. *Id.* On appeal his sentence was reduced to 3 1/2 years. *Id.* at 445.

In an Australian case, a woman employee in a bake shop was sexually harassed by her supervisor. Aldridge v. Booth, 80 A.L.R. 1 (Fed. Ct. 1988). The court held that the supervisor was acting as an agent to three other respondents who did nothing to stop the harassment. *Id.* The court ordered the defendants to pay Ms. Aldridge $7,000. *Id.* at 2. Enforcing the ruling, the Federal Court discussed both Australian law and the International Convention on Elimination of all Forms of Discrimination Against Women:

> Section 28 of the [Sex Discrimination Act of 1984] is a valid exercise of the external affairs power . . . if it gives effect to an international convention which Australia has adopted, in this case, [the International] Convention on Elimination of All Forms of Discrimination Against Women . . . . It is sufficient to give effect to a convention if an Act gives effect to principles stated in the convention; it is not necessary that the legislation implement an obligation imposed on Australia by adoption of the convention. Section 28 . . . [gave] effect to the Convention . . . in the sense that it implemented an obligation imposed on Australia by Article 11.1 of the Convention to take 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.

Id. at 2. In initially construing Section 28 of the Sex Discrimination Act, the Federal Court of Australia took notice of overseas judicial opinion. "A finding that [the Sex Discrimination Act] does not include sexual harassment of the kind to which [Section] 28 is directed would appear contrary to the trend of judicial opinion in Australia and overseas." *Hall v. A & A Sheiban PTY Ltd.*, 85 A.L.R. 503, 504 (Fed. Ct. 1989).

288. CODE DU TRAVAIL [C. TRAV.] art. L. 122-46.

289. *Id.*

290. C. TRAV. art. L. 122-46. Translated by Beverley Earle, In French,

> Aucun salarié ne peut être sanctionne ni licencié pour avoir subi ou refuse de subir les agissements de harcèlement d'un employer, de son représentant ou de toute personne qui abusant de l'autorité qui lui confèrent ses fonctions a donne des ordres, profère des menaces, impose des contraintes ou exerce des pressions de toute nature sur ce salarié

Though this law reflects substantial progress, it is limited in that it focuses on blackmail-type actions rather than the creation of a hostile environment.[291] Some French citizens, concerned that France would wholeheartedly adopt an American view, greeted this limited definition of harassment with relief.[292] A columnist in *L'Express* expressed sympathy for quid pro quo claims but lamented a world where a man becomes fearful of complimenting a woman and so refrains.[293] While mere "compliments" do not rise to the level of compensable harm under either French or U.S. law, comments containing graphic bodily detail might constitute actionable sexual harassment in the United States but not in France.[294]

Currently, a paucity of cases interpret France's new laws so their legal ramifications may not be clear for some time. The French approach of criminalizing harassment would not be effective in the United States. Although a judgment might force employers and individuals to take sexual harassment seriously, such an approach would not achieve the objective of compensating the victim. Furthermore, the higher burden of proof in criminal cases might dissuade victims from pressing a complaint, particularly where ambiguity exists or where there were no verifiable threats. The issue of when behavior crosses the boundary from acceptable banter to actionable sexual harassment has yet to be clarified in either the U.S. or France.

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dans le but d'obtenir des faveurs de nature sexuelle à son profit ou au profit d'un tiers. Aucun salarie ne peut être sanctionne ni licencié pour avoir témoigne des agissements définis a l'alinéa précédent ou pour les avoir relates.

291. *See generally* Philip Jacobson, *France Prepares to Outlaw the Unwanted Office Flirt*, THE TIMES (LONDON), Jan. 8, 1992, *available in* LEXIS, Nexis Library, TTIMES File (discussing feminist criticism of limited application of the penal code); *France Has New Law Banning Sexual Harassment*, Agence France Presse, Oct. 19, 1992, *available in* LEXIS, Nexis Library, AFP File (asserting that the Communists abstained from voting on the labor code because it was a "watered down version").

292. *See supra* notes 271-283 and accompanying text.

293. Andre Pautard, *Harceler disent-elles*, L'EXPRESS, Nov. 22, 1991, at 5 (describing differences between America and France). "[L]a courtoisie galante née de l'admiration irrépressible de tout mâle pour les représentantes du sexe oppose qui méritent un hommage . . . ." *Id.*

294. *See generally* Riding, *supra* note 1 (contrasting the French legal approach which criminalizes coercive demands for sexual favors while avoiding legislation that would impair flirting behavior or compliments, with the U.S. law which many Europeans view as outlawing harmless flattery); Policy Guidance, *supra* note 78, at 6691-92 (discussing the U.S. Equal Employment Opportunity Commission's position that verbal conduct may constitute sexual harassment).

B. *United Kingdom*

There is no specific mention of sexual harassment in the law of the United Kingdom.[295] However, in 1986, the court in *Porcelli v. Strathclyde Regional Council* interpreted the 1975 Sex Discrimination Act[296] to include sexual harassment as a form of sex discrimination.[297] This decision was contemporaneous with *Vinson*, where the U.S. Supreme Court recognized sexual harassment as a form of discrimination.[298]

Ms. Porcelli was hired as a laboratory technician.[299] The court concluded that Porcelli was sexually harassed by two other male laboratory technicians, based on a finding that she suffered unfavorable treatment at her job because she was a woman.[300] The defendants did not challenge the court's conclusion of harassment, but instead argued that they treated Porcelli no less favorably than a man.[301] They argued that they would have harassed a male technician as well had they disliked him, but using different words and actions.[302] In rejecting the defendants' argument, the court described harassment as a "sexual sword" that was "unsheathed" and used because Porcelli was a woman.[303] According to the court, if that sword inflicts more than a scratch, then it was "unsheathed because the victim was a woman," and therefore violates the Sex Discrimination Act.[304] The Court stated:

> In my opinion these offensive remarks were examples of the use by Messrs. Coles and Reid of a 'sexual sword', and were of a sufficiently material nature to be to the applicant's detriment .... [W]hile the treatment accorded to the woman may be less cruel than that accorded to the man, [a hypothetical man] it may still have been meted out to her on the ground of her sex, and therefore be 'less favorable' in terms of section 1(1)(a) [of the Sex Discrimination Act of 1975].[305]

Criticizing both the lower court and the Employment Appeals Tribunal which ruled against Porcelli, Lord Brand succinctly stated: "they should have asked (1) was there sexual harassment and (2) if

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295. DIGEST, *supra note* 8, at 156.

296. Sex Discrimination Act, 1975, ch. 65, 2 PUB. GEN. ACTS AND MEASURES, 1975, *amended by* ch. 59, 1986, 3 PUB. GEN. ACTS AND MEASURES.

297. Porcelli v. Strathclyde Regional Council, 1986 I.C.R. 564 (Scot. Sess.).

298. Meritor Savings Bank v. Vinson, 477 U.S. 57, 62 (1986).

299. *Porcelli*, 1986 I.C.R. at 565.

300. *Id.* at 568.

301. *Id.* at 569.

302. *Id.* at 569-70.

303. *Id.* at 573.

304. *Porcelli*, 1986 I.C.R. at 573.

305. *Id.* at 574. For additional discussion see Nicole R. Lipper, Comment, *Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States*, 13 COMP. LAB. L.J. 293, 317 (1992).

so was it to the detriment of the applicant . . . . It follows that if a form of unfavourable treatment is meted out to a woman to which a man would not be vulnerable, she has been discriminated against within the meaning of section 1(1)(a)."[306] *Porcelli* was significant because the court acknowledged sexual harassment as an actionable claim. Moreover, the court neither considered the issue of "welcomeness" nor scrutinized Ms. Porcelli's behavior.

The explosion of sexual harassment claims is not unique to the United States. The Equal Opportunities Commission (EOC) in Britain released a report finding that harassment complaints increased 50%, employment complaints increased 40%, and pay inquiries increased 20% in 1991.[307] Despite these increases, a London School of Economics and Political Science study reported that a large percentage of harassment incidents went unreported in Britain.[308] The reported reasons, not surprisingly, were concerns that the incidents would not be taken seriously, and because of the seniority of the harassers.[309] Other victims might not complain because very few complainants achieve compensation of any kind due to difficulties in proving their cases and in financing legal costs.[310] EOC chair, Ms. Joanna Foster commented:

> [W]hile expectations of fair treatment are higher than ever before redress is more difficult to obtain because of the complexity and the cost of taking legal action. If the Government is serious about its Citizens' Charter giving individuals greater understanding of their rights and access to the means of redress, then it will now need to give serious consideration to the amendments we have put forward to simplify and strengthen the equality laws. A simple start could be made by revising and simplifying Tribunal and Court procedures to remove barriers causing delays (the average length of time taken for a case to reach employment appeals tribunals is two years in England and Wales); recruiting more women members to the Industrial Tribunals and the EAT; and establishing a substantial basic

306. *Porcelli*, 1986 I.C.R. at 576.

307. Allan Jones, *Campaign to Fight Sexual Harassment*, Press Assoc. Newsfile, Mar. 5, 1992 *available in* LEXIS, Nexis Library, PANEWS File; *Britain Issues Harassment Code*, WALL ST. J., Mar. 6, 1992, at A6 (noting that the Government received 427 sexual harassment complaints in 1991, "up 50% from 1990"); *UK Institute of Personnel Management Reports that Harassment Still Goes Largely Unpunished*, *supra* note 263.

308. *See* Thompson, *supra* note 207, at 13.

309. *Id.*

310. Michael Smith, *Woman Wins 6,000 Pounds (sterling) Harassment Award*, FIN. TIMES (LONDON), Apr. 3, 1989, at 10. (discussing a case where a baker resigned after three months of fending off supervisor's kisses).

> minimum award for successful discrimination cases with compensatory awards extra.[311]

In 1991, more than 90% of British companies had no policy on sexual harassment.[312]

Despite this dismal picture, numerous recent cases report modest victories for complainants. For example, an industrial tribunal awarded a woman who was called a "tart" and a "slapper" one thousand pounds sterling.[313] The court rejected the defense that both men and women were verbally abused in the office.[314] With respect to the abusive comments, the chairman of the tribunal stated, "[t]hey were unpleasant, they caused hurt and distress and undermined confidence. They were not in any way trivial . . . . We make the wider point that no one should have to put up with such treatment at her workplace — or anywhere else."[315]

The United Kingdom opted for a voluntary approach encouraging companies to enact policies on sexual harassment.[316] This decision was inspired partially by the EC Code of Practice encouraging member states' action.[317] The decision is also consistent with the United Kingdom's aversion to social legislation proposed by the EC.[318] The United Kingdom strongly prefers industrial flexibility and is reluctant to model itself after France or Germany, especially with regard to worker's rights and participation in management.[319] The United Kingdom offers no promising model for addressing sexual harassment in a more effective way.

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311. *UK: EOC - 40% Increase in Workplace Discrimination Complaints Exerts Pressure for Law Reform*, Reuters Textline, June 24, 1992, *available in* LEXIS, World Library, ALLNWS File.

312. *Facts on File*, WORLD NEWS DIGEST, Jan. 30, 1992, at 61 (basing this finding on a Manchester Institute of Technology survey). The survey also reported that "the most common outcome of sexual harassment complaints in Britain was an official or unofficial warning to the alleged harasser. The second most common outcome was no action." *Id.*

313. *£1,000 Award to Woman Over 'Tart' Taunts*, Press Assoc. Newsfile, Sept. 10, 1992 *available in* LEXIS, Nexis Library, PANEWS File.

314. *Id.*

315. *Id.*

316. *See* Alison Roberts & Richard Ford, *Tough line urged on office sex pests*, THE TIMES (LONDON), Mar. 6, 1992, *available in* LEXIS, Nexis Library, TTIMES File. The British Government issued a pamphlet consistent with the European Code of Practice and mailed it to 100,000 companies. *Id. See also* Jones, *supra* note 307 (discussing mailing the pamphlet).

317. *See supra* notes 256-262 and accompanying text.

318. *See* COLCHESTER & BUCHAN, *supra* note 243, at 184-86 (discussing social policy and disagreement among the member states); *A Rude Awakening*, *supra* note 251 at 8 (discussing the role of the UK in the EC).

319. *See* COLCHESTER & BUCHAN, *supra* note 243, at 188 (discussing co-determination in Germany and mentioning the British system).

C. Other Countries

Other countries address sexual harassment through a number of approaches with varying degrees of success. These approaches include anti-discrimination laws, labor laws, tort law and criminal laws.[320] Before examining these in more detail, the European context with regard to workers should be examined. European workers are afforded significant workplace protections. These protections include maternity leave, severance pay, dismissals requiring just cause, more vacation and worker representation on boards.[321] These protections are in marked contrast to the employment at will status of most workers in the United States.[322] Thus, there may be less "urgency" for increased worker protection in Europe than in the U.S.

European countries, and countries around the world have recently implemented or revised sexual harassment legislation. A survey of other countries shows whether the country has specific sexual harassment legislation.

320. *See* DIGEST, *supra* note 8, at 67-173.

321. *See* Schaffer et al., *supra* note 243, at 448-49 (discussing impediments to dismissal); *see generally* FOLSOM, *supra* note 243, at 185 (discussing social policy in the European Community including a discussion of Spain); *see* Alan Riding, *Women to the Fore! (What would Franco Say?)* N.Y. TIMES, May 30, 1989, at A4 (noting that Spain provides paid *paternity* leave four weeks and paid maternity leave 16 weeks as well as the right for *either* parent to take an unpaid year off to care for the baby).

322. For discussion of the employment at will doctrine see Aleta Sangrey Callahan, *Employment at Will: The Relationship between Societal Expectations and the Law*, 28 A.B.L.J. 455 (1990)

Country	Special Legislation
Australia	Yes (1984)
Austria	No
Belgium	Yes (recently reported to have changed)[323]
Canada	Yes
Denmark	No (but case law holding that harassment is discrimination)
Finland	No
France	Yes
Germany	No (but case law holding that harassment is discrimination)
Greece	No
Ireland	Yes (1985)
Italy	No
Japan	No
Luxembourg	No (1 court case)
Netherlands	Yes (1992)
New Zealand	Yes
Norway	No (but case law)
Portugal	No
Spain	Yes (1989)
Sweden	Yes (1991)
Switzerland	No (but case law)
UK	No (but case law)
US	Yes (and case law)[324]

Even countries that do not have specific statutes pertaining to sexual harassment may use discrimination laws as a basis for sexual harassment claims. The EC Code of Practice explicitly recognizes this avenue of redress.[325]

In Japan "seku hara," or sexual harassment, is actionable under § 709 of the Japanese Civil Code which states "a person who intentionally or negligently violates the right of another is bound to make compensation for damages arising therefrom."[326] In one Jap-

323. *See Sex Harassment at Work Grows as Global Concern, supra* note 211, at A5 (noting that Belgium reportedly enacted specific sexual harassment legislation).

324. DIGEST, *supra* note 8, at 67-173.

325. 1992 OJ (L 49) 3, *reprinted in* DIGEST, *supra* note 8, at 33. The Code of Practice states:

> *The Law and Employers' Responsibilities*. Conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work may be contrary to the principle of equal treatment within the meaning of Article 3, 4 and 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women . . . .

Id.

326. DIGEST, *supra* note 8, at 118 (quoting Civil Code, Law No. 89 of 1896 (Kampoo, 1986), as amended up to Act No. 68 of 1979 (Kampoo, 1979)).

anese case, an unmarried woman brought an action against her supervisor who suggested she was promiscuous.[327] Initially, the claimant took her case to arbitrators who advised her to be "flattered" by the attention.[328] Ultimately, the court ordered the defendant to pay her the equivalent of $12,500 U.S. dollars, though this was less than the claimant originally sought.[329]

For many countries sexual harassment in the workplace has yet to be addressed — perhaps because concerns for basic survival are paramount. In Poland, for example, classified ads commonly list good looks as a necessary job requirement.[330] In a 1990 survey, the Warsaw Voice reported that "Polish women do not debate the phenomenon described as sexual harassment in the West. Do they view it as a problem? Even if they do, it is certainly not a major problem in their minds."[331]

Other cities and countries are moving ahead to combat sexual harassment. In Germany, Stuttgart mayor Manfred Rommel, son of Field Marshal Erwin Rommel, is reportedly leading efforts to eliminate sexual harassment in his country.[332] He seeks to ban pinups in offices, flirting, 'fondling' and 'lascivious glances' in German offices.[333] Many countries are moving towards either explicit recognition of sexual harassment or classifying harassment as a form of discrimination.[334] However, in many places the concept of sexual harassment is disregarded or mocked[335] despite survey data documenting its pervasiveness.[336] Clearly, no country has found a way to entirely eliminate sexual harassment despite both legal changes and education.

Conclusion

The development of sexual harassment law in the United States clearly exerts an important influence upon the world in the

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327. Weisman, *supra* note 215.

328. *Id.*

329. *Id.*

330. Dorota J. Bartyzel, *Women's Rights: Gals, Ladies and Feminists*, WARSAW VOICE, Mar. 8, 1992, at 12.

331. *Id.*

332. Joseph Fleming, *Rommel's Son Campaigns Against German Sexism*, WASH. TIMES, Dec. 6, 1990, at A7 (also noting that a backlash against the feminist cause includes the publication of a handbook for "the new German male chauvinist").

333. *Id.*

334. *See supra* text accompanying note 324.

335. *See, e.g.*, Fleming, *supra* note 333 (discussing an anti-feminist backlash in Germany); Zingg, *supra* note 11 (quoting a Japanese lawyer as stating, "[M]ost Japanese do not think sexual harassment violates human rights . . . . They think it's a trivial thing.").

336. See *supra* notes 8-16 and accompanying text.

effort to remedy sex discrimination. Title VII of the Civil Rights Act of 1964 laid the groundwork for legislation of similar types around the world.[337] Sexual harassment laws are converging at an international level, though convergence does not mean the approaches of various countries are identical.

Unfortunately, despite the recent *Harris* decision, the United States has abdicated its role as leader in this area of equal treatment and providing remedies for sexual harassment. To reassert leadership in this area, three legislative changes are necessary. First, the legislature should repeal the section of the Civil Rights Act of 1991 that imposed caps on recovery for victims of sexual harassment.[338] The recent imposition of caps on recovery under the Civil Rights Act of 1991 sends a clear message that this type of discrimination should be treated less seriously than racial discrimination. Placing limitations on monetary recovery for only certain types of actions appears to be a legislative bone thrown to appease corporate defendants who are often the "deep pockets" in sexual harassment actions.[339]

Second, America's definition of sexual harassment should be statutorily amended to delete the "welcomeness" test. This amendment would end debate over whether to apply a reasonable woman or a reasonable person standard and would shift the inquiry away from a plaintiff's conduct and demeanor. Employers would have an obligation to maintain a workplace free of sexual harassment. This does not mean that employers should become "speech police" or watchdogs of sexual correctness, instead, employers should make an effort to educate their employees about harassment. For example, the U.S. Navy recently published a short, but detailed, code on sexual harassment in the wake of the "Tailhook" incident.[340] It listed behaviors under the headings of "green light," "yellow light" and "red light" to help differentiate acceptable and unacceptable behaviors.[341]

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337. *See supra* notes 30-31 and accompanying text.

338. *See supra* notes 196-202 and accompanying text discussing the imposition of caps on recovery under Title VII.

339. The list of corporate defendants who have been sued for sexual harassment in the federal courts includes many major U.S. companies. *See, e.g.*, Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986); Spencer v. General Electric Co., 894 F.2d 651 (4th Cir. 1990); Hew-Len v. F.W. Woolworth Co., 737 F. Supp. 1104 (D. Haw. 1990).

340. *See* Maureen Dowd, *Navy Defines Sexual Harassment with Colors of Traffic Lights*, N.Y. TIMES, June 19, 1993, § 1, at 1 (describing the code created by the Navy in response to the Tailhook incident).

341. *Id.* (noting that "green zone" includes saying "hello", yellow zone includes questions about personal life and "unwanted poems," and red zone includes rape).

Essentially, a harassment-free workplace is analogous to clean air and a safe environment — employees need them in order to work efficiently. A Massachusetts law provides an example of a move towards establishing a right to a harassment free environment.[342] The law states: " A person shall have the right to be free from sexual harassment . . . . The superior court shall have the jurisdiction in equity to enforce this right and to award damages."[343]

Courts should also consider the different perceptions of men and women toward harassment which are documented in many studies.[344] Thus, courts should apply the reasonably prudent woman standard to analyze when actions or words cross the line from isolated acts of sexism to violations Title VII. A "harassment free workplace" standard would simplify an inquiry. The analysis would focus on whether offensive words or conduct occurred.[345] If so, then damages would be assessed based on the severity of the harasser's conduct. The *Harris* decision, rejecting the requirement of psychological harm to establish a claim under Title VII, is a step in the right direction.[346]

Significant leadership from the United States on the issue sexual harassment would be enormously helpful at the international level. United States ratification of the UN Convention on the Elimination of All Forms of Discrimination Against Women would be an important symbolic step.[347] Some countries maintain that enforcement of women's rights in accord with the Convention would interfere with states autonomy and sovereignty as well as religious freedom.[348] Consequently, intolerable and universally condemned practices against any racial minority, are tolerated and excused when practiced against women.[349]

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342. MASS. GEN. L. ch. 214, § 1C (1986).

343. *Id.*

344. For a review of numerous studies collected by country, see DIGEST, *supra* note 8, at 67-173.

345. Professor Estrich advocates a standard requiring harassment free workplaces:

> if an objective standard is to be applied at all, then it should be defined by reference to a normative standard of a nonhostile workplace, not to a standard of what powerless and economically dependent women are willing to tolerate. Credibility rules should be reformulated to eliminate the double standard and sharply limit, if not entirely eliminate, the persuasive value of the absence of corroboration or a fresh complaint.

Estrich, *Sex at Work*, supra note 21, at 858.

346. *See supra* notes 132-187 and accompanying text discussing proof of psychological harm in U.S. sexual harassment cases.

347. *See supra* text accompanying note 223.

348. *See supra* notes 223-232 and accompanying text.

349. *See supra* text accompanying notes 225-226.

Legal developments in the United States regarding sexual harassment are a catalyst for change around the globe. The United States, through Congress and the courts, must alter its interpretation of Title VII to focus on the actions of harassers and to better protect victims of sexual harassment. In the words of one court:

> We realize that it is unrealistic to hold an employer accountable for every isolated incident of sexism, however, we do not consider it an unfair burden of an employer of both genders to take measures to prevent an atmosphere of sexism to pervade the workplace.[350]

Only this approach will secure a harassment-free environment for all employees. If the pattern of looking toward the United States for leadership in the area of sexual harassment continues, it will only be a short time before a new, less ambivalent definition will be exported around the world.

350. Andrews v. City of Philadelphia, 895 F.2d. 1469, 1486 (3rd Cir. 1990) (discussing the problem of sexual harassment in a police station).