

Sexual Harassment in the European Union: King Rex Meets Potiphar's Wife

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Sexual Harassment in the European Union: King Rex Meets Potiphar's Wife

Tanya Martinez Shively*

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To me belongeth vengeance, and recompence; their foot shall slide in due time: for the day of their calamity is at hand, and the things that shall come upon them shall make haste.¹

That which cometh out of the man, that defileth the man. For from within, out of the heart of men, proceed evil thoughts, adulteries, fornications, murders, thefts, covetousness, wickedness, deceit, lasciviousness, an evil eye, blasphemy, pride, foolishness: all these things come from within, and defile the man.²

[A] law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions or act according to them.³

I. INTRODUCTION.

Sexual harassment is a term that emerged in the United States in the last two decades to describe an intractable problem which has existed for centuries. Consider, for example, the case of Joseph and Potiphar's wife in the Old Testament of the Bible. Joseph, the grandson of Isaac, and the great-grandson of Abraham, was the most favoured son of Jacob.⁴ When Joseph's brothers saw

1. *Deuteronomy* 32:35 (King James).

2. *Mark* 7:20-23 (King James).

3. Vaughan, C.J., in *Thomas v. Sorrell* (1677), reprinted in George C. Christie & Patrick H. Martin, *Jurisprudence: Text and Readings on the Philosophy of Law* 216 (2d ed. 1995).

4. See *Genesis* 37:3 (King James). By this time, God had changed Jacob's name to "Israel," from whom "a nation and a company of nations" and kings would arise. See *Genesis* 35:11 (King James).

that their father loved Joseph more than they, they hated and envied Joseph.⁵ Joseph's brothers conspired against Joseph, planning to kill him and to cast him into a pit. Nevertheless, Joseph's brother Reuben, hoping that he might later save Joseph, persuaded Joseph's brothers merely to cast Joseph into a pit.⁶

Joseph's brothers sold him to a company of Ishmeelites for twenty pieces of silver, and the Ishmeelites brought Joseph into Egypt.⁷ In Egypt, Potiphar, an officer of Pharaoh and captain of the guard, bought Joseph from the Ishmeelites.⁸ "And the LORD was with Joseph,"⁹ and Potiphar made Joseph overseer over Potiphar's entire house.¹⁰

Unfortunately, however, Joseph became one of the first recorded victims of sexual harassment at the workplace:

And it came to pass after these things, that his master's wife cast her eyes upon Joseph; and she said, Lie with me. But he refused, and said unto his master's wife, Behold, my master wotteth not what is with me in the house, and he hath committed all that he hath into my hand; There is none greater in this house than I; neither hath he kept back anything from me but thee, because thou art his wife: how then can I do this great wickedness, and sin against God? And it came to pass, as she spake to Joseph day by day, that he hearkened not unto her, to lie by her, or to be with her. And it came to pass about this time, that Joseph went into the house to do his business; and there was none of the men of the house there within. And she caught him by his garment, saying Lie with me: and he left his garment in her hand, and fled, and got him out. And it came to pass, when she saw that he had left his garment in her hand, and was fled forth, [t]hat she called unto the men of her house, and spake unto them, saying, See, he hath brought in an Hebrew unto us to mock us: he came in unto lie with me, and I cried with a loud voice; and it came to pass, when he heard that I lifted up my voice and cried, that he left his garment with me, and fled, and got him out. And she laid up his garment by her, until his lord came home. . . . And it came to pass, when his master heard the words of his wife . . . that his wrath was kindled. And Joseph's master took him, and put him into the prison, a place where the king's prisoners were bound: and he was there in the prison.¹¹

5. See *Genesis* 37:4, 11 (King James).

6. See *Genesis* 37:22-24 (King James).

7. See *Genesis* 37:18-28 (King James).

8. See *Genesis* 39:1 (King James).

9. *Genesis* 39:2 (King James).

10. See *Genesis* 39:6 (King James).

11. *Genesis* 39:7-20 (King James). Fortunately, "the LORD was with Joseph, and shewed him mercy, and gave him favour in the sight of the keeper of the prison," *Genesis* 39:21 (King James), and Joseph eventually was freed by Pharaoh, who made Joseph "ruler over all the land of Egypt." *Genesis* 42:43 (King James). Compare Joseph's experience with the comment of one author who has

Joseph's experience aptly illustrates that both men and women in the workplace have suffered unwanted sexual attention and offensive behaviour based on their gender. Often victims either are prevented from raising the issue or are reluctant to raise the issue because of embarrassment, fear of ridicule, or fear of losing their jobs. Victims also suffer stress and anxiety that adversely affect their physical, emotional, and spiritual health. In addition, employers without a specific policy and procedures for combatting and preventing sexual harassment eventually will be confronted with problems of absenteeism, poor work performance, and the loss of valuable employees, in addition to the cost of litigation and compensation awards to employees who have been subjected to sexual harassment.

In the European Economic Community ("EEC"),¹² known as the European Union ("EU")¹³ since the 1991-1993 Maastricht Treaty, sexual harassment in the workplace is a serious and prevalent problem that adversely affects both

criticized the "unwelcome" requirement in American law on sexual harassment because the justifications offered for this requirement "demonstrate a reliance on outdated stereotypes. . . . The concern that women will abuse the legal system to punish others is a familiar concept in legal history. Such an unjustifiable belief should not be allowed to skew discrimination law towards defendants." Ann C. Juliano, Note, *Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 Cornell L. Rev. 1558, 1575 (1992).

12. The European Economic Community commenced with the signing of the Treaty of Rome in 1957 ("EEC Treaty") by the six original Member States, namely France, Germany, Italy, Belgium, the Netherlands, and Luxembourg. The EEC Treaty is a framework treaty offering as broad general principles the general goals to be achieved, and delegating to its institutions, both the Commission and the Council, often with the Parliament, the responsibility to fill gaps with secondary legislation. The general goals of the Treaty are set forth in Article 2, which provides:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

The EEC Treaty symbolized the movement toward international cooperation that had developed throughout the twentieth century, the catalyst of which was the devastation inflicted on Europe after the Second World War. With the Treaty of Accession in 1973, the United Kingdom, Denmark, and the Republic of Ireland joined the EEC, and in 1979, Greece, and in 1986, Spain and Portugal signed acts of accession to join the Community, raising the total membership to twelve countries. Currently, with the recent additions of Finland, Sweden, and Austria, the total membership of the EU is fifteen countries. The original EEC Treaty was primarily an economic treaty, the purpose of which was to create a single European market in Europe. However, the EEC Treaty was much broader in scope than the traditional free-trading agreements found in the original General Agreement on Tariffs and Trade ("GATT"), the European Free Trade Association, and the North American Free Trade Agreement ("NAFTA") and covered a wide range of matters that were not exclusively economic and expressly included a number of purely social goals. The Single European Act further broadened the scope of Community competence into new areas and set forth a formal framework for political cooperation by Member States that was not found in the original EEC Treaty, leading at Maastricht to a further and significant extension of Community goals. Josephine Steiner, *Textbook on EEC Law* 3-7 (3d ed. 1992).

13. This article refers both to the EEC and to the EU interchangeably.

victims and employers. Since 1976, the EU has exhibited increasing awareness that sexual harassment in the EU must be prevented and remedied if sex equality legislation in the EU is to have meaning and content. These responses to the problem of sexual harassment reflect a belief that remedies should be available to the victim after the harm has been done and that preventative measures at the industry level are necessary to reduce the prevalence of sexual harassment.¹⁴

The increased attention given by the EU to the problem of sexual harassment at work raises the issue of whether the expansion of legal liability for sexual harassment and the attendant increased public exposure to the issue of sexual harassment has significantly contribute to its elimination. In response thereto, this Article provides a general overview of the definition of sexual harassment, the prevalence of sexual harassment at the workplace, and EU law¹⁵ on sex discrimination and sexual harassment. The Article then examines in detail how the EU has addressed the problem of sexual harassment at the workplace.¹⁶ The Article concludes that despite its inherent problems with regard to Lon Fuller's concept of "procedural morality," the current EU Recommendation¹⁷ on sexual harassment is the most appropriate vehicle for confronting this complex issue and rejects the prevalent belief that a Regulation,¹⁸ a Direc-

14. For information on the status of the individual in EU law, see Steiner, *supra* note 12, at 279-84. In connection therewith, Steiner discusses the three different kinds of provisions in the EU Treaties; the two main objectives of individuals seeking legal redress in the EU; fundamental human rights as reflected in the general principles of law and the common constitutional traditions of the Member States; and the European Convention on Human Rights, which is a binding instrument on EU Member States and which, as an international treaty, is supreme over the acts of the institutions of the Member States.

15. Where appropriate, this Article also refers to industrialized countries that are not in the EU. Because this Article is based upon an earlier paper written for Professor Alain A. Levasseur's Spring 1994 European Economic Community Seminar, the research conducted for this Article is current through April 1994. In addition, because the focus of this Article is on EU law on sexual harassment, the Article only briefly references American law on this subject.

16. For the sake of brevity, the paper does not discuss the actions to combat sexual harassment taken by the United Nations ("UN") and the International Labour Organization ("ILO") "to advance the cause of social justice and, by so doing, to contribute to ensuring universal and lasting peace." See 132 Int'l Lab. Rev. Cover (1993). For information on actions taken by the UN, see 11 ILO, Conditions of Work Digest 1, at 41-43 (1992).

17. EU recommendations and opinions are not binding upon Member States and are not "enforceable Community rights" within the meaning of Section 2(1) of the European Communities Act of 1972; therefore, it would seem that they cannot be invoked by individuals, directly or indirectly, before national courts. Nevertheless, the European Court of Justice has held that Member States must take Community recommendations into consideration when deciding disputes, especially where they clarify the interpretation of national provisions adopted in order to implement them or where they are designed to supplement binding EU measures. This view is debatable since Recommendations, as non-binding measures, can be taken into account only in order to resolve ambiguities in domestic law. Steiner, *supra* note 12, at 39.

18. An EU Regulation is described in Article 189 of the EEC Treaty as being of "general application . . . binding in its entirety and directly applicable in all member States." Therefore, a Regulation takes immediate effect without the need for further implementation. Steiner, *supra* note 12, at 28. As to the "vertical" and "horizontal" direct effect of Regulations, see *id.* at 27-28.

tive,¹⁹ or a provision in a European Civil Code should supplant the Recommendation.

II. THE PROBLEM OF SEXUAL HARASSMENT AT THE WORKPLACE: A GENERAL OVERVIEW

A. *The Definition of Sexual Harassment*

The definition of "sexual harassment" is important because it determines both the number of people who believe that they have experienced sexual harassment and the kinds of behaviour that fall within the scope of the definition.²⁰ Although most people have a reasonably good idea of what the term "sexual harassment" means, it appears few people understand that "[s]exual harassment is one of the most offensive and demeaning experiences an employee can suffer."²¹ Some people, therefore, have commented that they wish they would be harassed by a particular person, without understanding the unwanted nature of the harassment and the consequent feelings of revulsion and violation. Author Michael Rubenstein has stated:²²

It is a common reaction of [people], when first discussing the issue, to say words to the effect of "I wouldn't mind being sexually harassed by [him or] her." Such a response reveals a failure to understand the "unwanted" character of sexual harassment for [people] and the feelings of revulsion and violation it produces. Although the analogy is not

19. According to Article 189 of the EEC Treaty, a Directive is "binding, as to the result to be achieved, upon each member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Steiner, *supra* note 12, at 29. As to the vertical and horizontal effect of Directives, see *id.* at 29-33.

20. See 11 ILO, *supra* note 16, at 10. In this 309 page report, the ILO examines how sexual harassment is addressed in twenty-three industrialized countries, including the EU, the United States, Japan, Sweden, Czechoslovakia, New Zealand, and Australia. The report concludes that only seven nations have specific laws prohibiting sexual harassment and that only six of these laws are "advanced." See Christopher Reid, *Australia: Understanding Sexual Harassment*, *The Age* (Melbourne), Dec. 23, 1992. For a background on the report, see Anita Diamant, *Sexual Harassment on Job Widespread, 24 Nation Study Says*, *Boston Globe*, Dec. 1, 1992, at 1; *Most Nations Don't Recognize Sex Harassment*, *Chicago Trib.*, Dec. 1, 1992, at C17.

21. Michael Rubenstein, *The Dignity of Women at Work: A Report on the Problem of Sexual Harassment in the Member States of the European Communities* 19 (1988).

22. Mr. Rubenstein is editor of *Industrial Relations Law Reports* and co-editor of *Equal Opportunities Review*, both based in the United Kingdom. Mr. Rubenstein is also author of *The Dignity of Women at Work: A Report on the Problem of Sexual Harassment in the Member States of the European Communities* (1988); *Preventing and Remediating Sexual Harassment at Work: A Resource Manual* (1992); and co-author of *How to Combat Sexual Harassment at Work: A Guide to Implementing the European Commission Code of Practice* (1993). Mr. Rubenstein was a consultant to the European Commission on the Code of Practice on measures to combat sexual harassment. See discussion *infra* at text accompanying notes 138-252.

precise, [people] might benefit by considering the likely effect upon them were they to be "harassed," not by an attractive . . . colleague, but by a . . . superior in the work hierarchy. How would they feel if the [person] to whom they report and who controlled their terms and conditions and promotion prospects made appreciative comments about their physical attributes: if, when they entered his [or her] office, he [or she] undressed them with his [or her] eyes; if he [or she] frequently put a caressing arm around them; if he [or she] habitually brushed up against them; if he [or she] threatened that they would lose their job if they didn't have sex with him [or her]? It cannot be imagined that most [people] would regard this as acceptable behaviour at work or that they would consider there should be no legal recourse which would ensure that the behaviour would stop if it was persisted in after their objections. It is hardly surprising, therefore, that [people] who experience such conduct are harmed by it.²³

Although most people might not be able to articulate a legal definition of "sexual harassment," they usually have a reasonably accurate idea of what sexual harassment means. Some differences may exist, however, between how men and women interpret the term.²⁴ Accordingly, there remains confusion about what exactly constitutes sexual harassment. Most definitions focus on the idea of sexual behaviour that is either physical or verbal and that is unwelcome to its recipient. Clear cases of sexual harassment are forcible sexual aggression, showing pornographic pictures, and bottom-pinching, but more doubtful cases are cheek-kissing on parting or leering.²⁵

The concept of sexual harassment is broader than conduct that is "sexual" in nature. Sexual harassment is more of an exhibition of power than of sexual desire. Moreover, although "harassment" suggests the reoccurrence of offensive conduct, a single incident of prohibited conduct can constitute sexual harassment.²⁶ Broadly defined, sexual harassment is the unwanted imposition of sexual requirements in the context of a relationship of unequal power.²⁷ More generally, sexual harassment is conduct of a sexual nature or with a sexual dimension that is unwelcome to the recipient. The key element in sexual harassment is that it is unwanted and unreciprocated.²⁸

23. Rubenstein, *supra* note 21, at 19.

24. *Id.* at 12. See *infra* text accompanying notes 215-229.

25. Lucy Kellaway, *Getting Sex Out of the Office: Women at Work*, *Fin. Times*, Oct. 23, 1991, §1, at 13.

26. 11 ILO, *supra* note 16, at 10.

27. Catharine A. MacKinnon, *The Sexual Harassment of Working Women* 1 (1979).

28. Rubenstein, *supra* note 21, at 12.

Usually, sexual harassment falls into broad categories of verbal,²⁹ physical³⁰ or sex-based conduct.³¹ Additional forms of sexual harassment may be visual, including displays of pornographic pictures at the workplace, pin-ups, and other sexually suggestive or derogatory objects, pictures, or written materials.³²

Sexual harassment also may be classified into *quid pro quo* harassment, otherwise known as sexual blackmail,³³ and hostile environment harassment.³⁴ Sexual harassment such as sexual blackmail or physical molestation may be compared with rape and other violent sexual crimes in that, contrary to popular belief, it is not a person's physical attractiveness that determines whether he or she will be subjected to sexual harassment. Rather, it is vulnerable people who are most likely to be victims of sexual harassment because from the perpetrator's perspective, it generally is not whether the behaviour is likely to be welcomed

29. Verbal conduct of a sexual nature may include propositions and other requests or demands for sexual favors or pressure for sexual activity; offensive flirtation; suggestive remarks, innuendoes or lewd comments; derogatory or degrading abuse; offensive comments about appearance or dress; epithets or slurs; and ridicule, tricks or jokes of a sexual nature. This behaviour emphasizes a view of the recipient as being an object. *Id.* at 12-13.

30. Physical conduct of a sexual nature generally includes staring or leering; gestures; unnecessary touching, patting, pinching, or brushing against another employee's body; and more serious offences that would amount to a criminal offence if the conduct occurred between strangers. *Id.* at 13.

31. Sex-based conduct may include behaviour which "[d]enigrates or ridicules or is intimidatory or physically abusive of an employee because of his or her sex, such as derogatory or degrading abuse or insults which are gender-related and offensive comments about appearance or dress. Such conduct can create an offensive working environment for the recipient." Michael Rubenstein & Ineke M. De Vries, *How to Combat Sexual Harassment at Work: A Guide to Implementing the European Commission Code of Practice 22* (1993).

32. *Id.* The Northern Ireland Equal Opportunities Commission has adopted a definition of sexual harassment which includes visual harassment of this nature. *Id.*

33. *See, e.g.*, 29 C.F.R. § 1604.11(a) (1993). By definition, sexual blackmail involves an abuse of authority because only someone in the capacity of supervisor or manager has the authority to threaten or to make an employment decision affecting the victim of harassment. Rubenstein & De Vries, *supra* note 31, at 23. Generally, *quid pro quo* harassment involves a grant or denial of economic benefits following the employee's response to unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature. The complainant alleging *quid pro quo* sexual harassment generally must show that tangible job benefits, such as transfers, promotions, favourable evaluations, pay raises, and continued employment, are conditioned upon an employee's submission to conduct of a sexual nature and that adverse job consequences have resulted from the employee's refusal to submit to the conduct. *See, e.g.*, 29 C.F.R. § 1604.11(a) (1993). Thus, the key to proving sexual blackmail is a link between rejection of the sexual advance and the detrimental treatment of the victim. Rubenstein & De Vries, *supra* note 31, at 23.

34. *See, e.g.*, 29 C.F.R. § 1604.11(a) (1993). Even where sexual blackmail cannot be shown, sexual harassment can "poison" the work environment, which may be considered a condition of the worker's employment, by causing psychological, emotional, and physical harm to the victim. Generally, a hostile environment claim may arise where an employee must be subjected to verbal or physical abuse as a part of his or her employment, but does not suffer a tangible job detriment. *See also* 11 ILO, *supra* note 16, at 14; Juliano, *supra* note 11, at 1575.

that is determinative of whether he or she will harass another, but whether the perpetrator will suffer adverse consequences from his or her behaviour.³⁵

B. Research on Sexual Harassment in the EU

In *Reuters* it was observed, "[a]lthough Europeans titter about American puritanism and hypocrisy, . . . groups from Europe . . . admit that sexual harassment is a world-wide problem."³⁶ Generally, depending upon the country, between twenty and seventy percent of working women in Europe claim that they have suffered sexual harassment, but public awareness on the subject is lacking as some people view sexual attention as flattery and others are reluctant to file a complaint against those persons responsible for the harassment.³⁷ Therefore, "[t]he real question seems to be not whether sexual harassment is a problem but how much of a problem it is."³⁸

Many industrialized countries have researched the nature and extent of sexual harassment, and some comparative research at the national and international levels also has been conducted. Most of the research has focused upon surveys of the working population to ascertain the percentage of men and women affected by sexual harassment, which social and occupational categories of workers are more likely to be subject to sexual harassment, and the opinions of employers, managers, and workers as to how sexual harassment should be combatted in the workplace. The results of these surveys depend upon whether the definition of sexual harassment used was broad or narrow and the time span covered, as well as the size and characteristics of the sample population.³⁹

Generally, research demonstrates that sexual harassment is a real and serious problem for a significant number of working women in the EU. The research also indicates men have been sexually harassed, although less frequently than women.⁴⁰ Research also confirms the link between the risk of sexual harassment and the victim's perceived vulnerability and demonstrates that although any person may be subjected to sexual harassment, generally it is unmarried, divorced or separated women, young women, and women working in traditionally male jobs who are at increased risk.⁴¹ Additionally, people who are sexually harassed often lack interpersonal skills. Persons in these categories usually suffer from low self esteem, and sexual harassment may further inhibit their ability to develop self confidence.⁴²

35. 11 ILO, *supra* note 16, at 8.

36. *U.S. Puritanism, Hypocrisy Blamed for Thomas Affair*, *Reuters*, Oct. 16, 1991.

37. Alan Riding, *Harassment or Flirting? Europe Tries to Decide*, *N.Y. Times*, Nov. 3, 1992, at A8.

38. Peter Forster, *Sexual Harassment at Work*, 305 *British Medical Journal* 944 (1992).

39. 11 ILO, *supra* note 16, at 285.

40. *Id.*

41. Rubenstein, *supra* note 21, at 15.

42. Forster, *supra* note 38, at 945.

Regardless of its precise incidence, available data demonstrates that sexual harassment in the workplace in the EU is not an isolated phenomenon perpetrated by strange, socially-deviant people. Rather, millions of people in the EU must contend with sexual harassment as an unpleasant and unavoidable part of their working lives.⁴³ Thus, Mr. Rubenstein has concluded that "sexual harassment is a problem in virtually every organization and that a substantial proportion of work[ers] . . . are the recipients of unwanted sexual attention at work."⁴⁴

C. The Consequences of Sexual Harassment: Sexual Harassment as an Individual and a Management Issue

Mr. Rubenstein has argued that "[s]exual harassment pollutes the working environment and can have a devastating effect upon the health and safety of those affected by it."⁴⁵ That is, although sexual harassment may exist in both employment and non-employment relationships, it is more insidious in employment relationships because the victim's material survival often depends upon the authority and control of supervisors, managers, and co-workers.⁴⁶

43. Rubenstein, *supra* note 21, at 16.

44. Michael Rubenstein, *Devising a Sexual Harassment Policy*, Personnel Management, Feb. 1991, at 34. For research on the extent of sexual harassment in France, see 11 ILO, *supra* note 16, at 286; Rubenstein & de Vries, *supra* note 31, at 13. For Germany, see Rubenstein & de Vries, *supra* note 31, at 13, 15; *European Parliament Passes Sexual Harassment Guidelines*, The Week in Germany, Oct. 25, 1991; *U.S. Puritanism, Hypocrisy Blamed for Thomas Affair*, *supra* note 36; Riding, *supra* note 37. For Ireland, see Lorna Siggins, *Minister Reviews Harassment Law: Fear of the Consequences Stops Many People [from] Reporting Cases of Sexual Harassment*, Irish Times, Oct. 16, 1993, at 5. For The Netherlands, see 11 ILO, *supra* note 16, at 286. For Portugal, see Rubenstein & de Vries, *supra* note 31, at 13. For Sweden, see *U.S. Puritanism, Hypocrisy Blamed for Thomas Affair*, *supra* note 36. For Spain, see 11 ILO, *supra* note 16, at 287; Rubenstein & de Vries, *supra* note 31, at 15; Riding, *supra* note 37; Tim McGirk, *Tawdry Don Juan Still Stalks His Prey in the Cities of Spain*, The Independent, Feb. 20, 1990, at 12. For the United Kingdom, see Melissa Benn, *UK: Sexual Harassment—Taking Liberties*, The Guardian, Oct. 29, 1991; Rubenstein & de Vries, *supra* note 31, at 15-16; Virginia Matthews, *Media & Marketing*, Daily Telegraph, May 6, 1992, at 14; Richard Palmer & Caroline Lees, *Britain's Top Women Tell of Sexual Harassment*, Sunday Times, Oct. 20, 1991; Kellaway, *supra* note 25.

45. Rubenstein, *supra* note 21, at 19.

46. For specific enterprise-level measures to prevent sexual harassment at the workplace, namely with regard to unions, employers' organizations, action by governments, collective agreement provisions, and policy statements, directives or guidelines issued by employers, see 11 ILO, *supra* note 16, at 177-78, 229-32, 291-96; *UK: Special Report on Management and Training—Harassment at Work—A Management Issue*, Mortgage Fin. Gazette, Apr. 6, 1992, at 46. Interestingly, although international and national trade unions both believe that sexual harassment will be extinguished most effectively if there is joint employer and union action, Guy Horsmans, Professor of Law at the University of Louvain-La-Neuve in Belgium, has observed that most Member State trade unions believe that they are more influential and powerful if they are *outside*, rather than inside, the internal governing structure of a corporation. 11 ILO, *supra* note 16, at 230-31. In contrast, in Germany, trade unions in some corporations enjoy a limited number of votes with regard to internal measures governing corporate decisions. Professor Guy Horsmans, Lecture to European Economic Community Seminar (April 12, 1994).

Similarly, Catherine MacKinnon has observed that it is in the workplace that victims, "dependent on their income and lacking job alternatives, are particularly vulnerable to intimate violation in the form of sexual abuse at work."⁴⁷ Accordingly, Mr. Rubenstein argues that merely addressing sexual harassment as a social problem is not sufficient to combat the problem; rather, he asserts that sexual harassment must be addressed so as to form the basis for a legal prohibition.⁴⁸

The harm that victims of sexual harassment experience includes anxiety, tension, irritability, depression,⁴⁹ inability to concentrate, sleeplessness, fatigue, headaches and other manifestations of stress at work.⁵⁰ Other effects on the recipient are deterioration of personal relationships and hostility.⁵¹ People under stress, of course, are likely to work more erratically, make more mistakes, and have more accidents. Accordingly, Mr. Rubenstein argues that sexual harassment may be viewed as a health and safety issue.⁵²

These consequences directly impact the profitability of an enterprise because those workers who become ill take time off from work, thus reducing efficiency and imposing costs on the employer and/or the Member State through sick pay and medical insurance payments. Moreover, while they are at work, victims of sexual harassment are likely to be less productive and less motivated, thus affecting both the quantity and the quality of their work.⁵³ Reduced economic efficiency, of course, results in reduced profitability. In addition, where the victim of sexual harassment has no effective remedy to combat it, the victim usually finds another job, thus resulting in substantial costs to the employer in recruiting and training replacement employees.⁵⁴

47. MacKinnon, *supra* note 27, at 1.

48. Michael Rubenstein, *Preventing Sexual Harassment at Work*, 20 *Indus. Rel. J.* 226, 227 (1989). See *infra* Parts VII, VIII and IX for a discussion of whether a Regulation, Directive, Recommendation, or European Civil Code provision is the most appropriate EU vehicle to combat sexual harassment at work.

49. The United Kingdom Employment Appeal Tribunal noted in a sexual harassment case: "We are fully aware of the deep and lasting hurt which such behaviour can cause and also of the extreme reluctance of those, like Mrs. Hawkins, who are subject to it, to make complaint." *Hawkins v. Pierce and Another*, EAT/648/92 (Oct. 22, 1993).

50. Rubenstein, *supra* note 21, at 20.

51. Forster, *supra* note 38, at 945.

52. Rubenstein, *supra* note 21, at 20. Sexual harassment at work thus may be viewed as both a management and an individual issue, recognizing that a working environment encouraging harmonious, respectful, and dignified working relations benefits both employers and employees. See *UK: Special Report on Management and Training—Harassment at Work—A Management Issue*, *supra* note 46.

53. Rubenstein, *supra* note 21, at 20.

54. *Id.* at 20-21. This finding was confirmed by the first British management study on attitudes regarding the issue of sexual harassment. See Catherine Milton, *Sex Pests Suffer Mild Sanctions*, *Fin. Times*, Jan. 11, 1992, § 1, at 5. With regard to such attitudes, reporter Sue Kernaghan has commented:

Sex pests at work are facing changes in the law and in employers' attitudes. . . . Can a pat on the bottom really affect the bottom line? It can now. Changes in legislation and

The lack of complaints about sexual harassment does not necessarily mean that an enterprise is not affected by it; some employees may not complain because of embarrassment, fear of reprisals, or belief that no action will be taken to remedy the situation.⁵⁵ Additionally, the victim of sexual harassment may be reluctant to get his or her harasser into serious trouble and may not want either to leave his or her job or to take his or her complaint before an industrial tribunal.⁵⁶ Moreover, as has been observed by reviewer Tariq Mundiya, "[l]awyers, employers and policy makers should . . . be aware that while appropriate and measured legal sanctions to combat sexual harassment are vital, overexposure of the issue of sexual harassment and growing numbers of high profile cases may discourage women from reporting harassment and bringing claims."⁵⁷

employers' attitudes have put sexual harassment on the workplace agenda with such force⁰ and financial penalties that men are crying foul. . . .

A barrage of recent studies suggest there is an epidemic of sexual harassment at work. . . .

This has less to do with an upsurge of boorishness than a sea change in attitude. Now, women (and men) are more likely to recognize harassment when it happens and complain about it. More to the point, treatment that was once sniggered at is now being treated with unprecedented gravity by courts, employers, and unions.

Sue Kernaghan, *Men Who Flirt With Disaster*, *The Times* (London), Sept. 16, 1993, at 14.

55. Ms. Jo Gardiner, co-author of the British Industrial Society's report on sexual harassment, cautions employers not to be fooled into thinking that sexual harassment is not a problem in their organization simply because complaints have not been made. Complaints are the "tip of the iceberg," in that although forty-five percent of respondents to the Industrial Society's survey said that they had been sexually harassed, only five percent had used their organization's grievance procedures. This reluctance may be due to the fact that employees fear their complaints will not be taken seriously, that they do not know to whom they should complain, that they fear reprisals, that they believe that there is no point in complaining that no action will be taken, or that no procedure for complaining exists. Kernaghan, *supra* note 54. For example, British clearing bank ICI's policy fulfills many of the guidelines set forth in the Code of Practice, discussed *infra* at text accompanying notes 138-252, but as of 1991, ICI stated that it had not yet received a complaint, thus concluding that it did not have a problem with sexual harassment. This conclusion, however, may be difficult to defend, given that at the time, ICI employed over 130,000 people worldwide. Perhaps a more realistic conclusion is that as of that time, people remained afraid to speak out. Kellaway, *supra* note 25.

56. UK: *Special Report on Management and Training—Harassment at Work—A Management Issue*, *supra* note 46.

57. Tariq Mundiya, Book Review, 15 *Comp. Lab. L.* 119, 126 (Fall 1993). Understanding the reluctance to report harassment may be viewed as being a part of good personnel management. In the United Kingdom, for example, Barclays produces a leaflet on equal opportunities which specifies what the organization means both by sexual harassment and racial harassment. A spokeswoman for the bank comments that Barclays attempts to be flexible in dealing with sexual harassment and that "[t]he way we deal with harassment cases depends on individual circumstances and although our official figures are quite low—less than 10 cases a year—we are not complacent. We are aware that there may be a number of cases we do not hear of." See UK: *Special Report on Management and Training—Harassment at Work—A Management Issue*, *supra* note 46.

III. GENERAL OVERVIEW OF EU LAW ON SEX DISCRIMINATION AND SEXUAL HARASSMENT

EU law⁵⁸ progresses in an integrated system on two levels—on a Community level and on a national level. The speed and effectiveness of implementation of standards in this integrated system is furthered by a supranational machinery: the formulation of binding, self-executing norms combined with the control procedures of the Commission⁵⁹ and the European Court of Justice (“ECJ”).⁶⁰ These norms and procedures place continuous pressure on the

58. The EU Treaties are the *primary* sources of EU law, carrying the same weight as the role held by constitutions in the national legal orders. Thus, the legality of the Treaties cannot be challenged and they have priority over all other rules of EU law. The protocols annexed to the Treaties form an integral part of the Treaties and thus share an equal status with the Treaties. The general provisions of each Treaty, found in the first title of each and elaborated in other parts and titles, have an important role in the interpretation and application of other provisions by the ECJ. Of lesser importance than the Treaties are the *secondary* EU laws, consisting of the EU’s Regulations, Directives, and the decisions of the EU institutions, such as the ECJ. Secondary EU laws may not restrict the application of the provisions of the Treaties, but being derived from the Treaties, secondary EU laws form an inseparable part of the EU legal order. Thus, it is “impossible” to treat secondary EU law differently from the Treaties in the “hierarchical relationship between legal orders.” *Tertiary* EU law consists of those regulations, directives, and decisions which derive their legal force not directly from the Treaties but from the rules of secondary EU law. The only rules of tertiary EU law that can be relied upon are those rules whose legality flows directly from the rules of secondary EU law. The *final category* of rules which comprise EU law are rules of pseudo-legislation, applied by EU authorities, although such rules do not have any formal legislative force. Henry G. Schermers & Denis F. Waelbroeck, *Judicial Protection in the European Communities* 9-11 (5th ed. 1992). Generally, decisions of the European Court of Justice are binding in their entirety upon those to whom they are addressed and may be invoked only against the addressee of the decision, which may be Member States, singly or collectively, or individuals. Steiner, *supra* note 12, at 38.

59. Article 4 of the EEC Treaty creates four principal institutions: the Assembly, otherwise known as the Parliament, the Council, the Commission, and the Court of Justice. Steiner, *supra* note 12, at 10. The EU Commission is the “guardian of the Treaties,” presently consisting of seventeen members and chosen on the grounds of their general competence and independence. The Commission is led by a President appointed from among the Commissioners by common agreement of the Member States for a renewable term of two years and is divided into directorates-general, each of which is responsible for certain aspects of EU policy. Commissioners are given responsibility for specific directorates, which vary significantly in size and prestige. *Id.* at 16. The Commission has three basic functions. First, the Commission initiates all EU action and all significant decisions made by the Council must be made upon the basis of proposals from the Commission, subject to the Council’s power to request the Commission to undertake any studies desirable for the attainment of common objectives. Second, the Commission plays the role of the EU’s “watchdog,” seeking out and terminating any infringements of EU law by Member States, and before the ECJ if necessary. The Commission enjoys complete discretion in this matter and has extensive investigative powers. Finally, the Commission functions as the executive of the EU, implementing, often through further legislation, policy decisions taken by the Council. *Id.* at 16-17.

60. The EU’s “lack of maturity” results in its needing even greater recourse to general principles of law than is true for most national legal orders. Generally, there are three types of general principles in the EU: compelling legal principles, regulatory rules common to the laws of

Member States to comply with their commitments. Moreover, the uniform interpretation by the ECJ of EU rules through the procedure of community rulings creates a Community "common law." This regional experience may serve as a model to benefit the international community at large.⁶¹

The EU Council of Ministers ("Council"),⁶² Commission⁶³ and Parliament⁶⁴ have been very active in addressing the problem of sexual harassment

the Member States, and general rules native to the EU order. Generally, compelling legal principles take priority over other elements of EU law, except for the express provisions of the Treaties. Other rules of national laws or of EU laws are to be relied upon only when no other sources of EU law are available. Schermers & Waelbroeck, *supra* note 58, at 27-29. General principles of law constitute an unwritten source of law applied by the ECJ. Unlike the International Court of Justice, which pursuant to Article 38 of its Statute must apply the "general principles of law recognized by civilized nations," the ECJ is not under such formal confines. The ECJ thus looks to national laws and to the constitutions of the Member States to develop its decisions and does not appear to require completely identical formulations of the principle in question from all the Member States; rather, the ECJ regards individual national rules as a source of inspiration and a guide to the solution of specific problems. Evelyn Ellis, European Community Sex Equality Law 117 (1991). For a discussion of other sources of law upon which the ECJ relies, including the European Convention on Human Rights, the European Social Charter, the Joint Declaration by the European Parliament, the Council and the Commission of 5 April 1977, 1977 O.J. (C 103) 1, the Preamble to the Single European Act of 1986, and the Social Charter of December 1989, see Ellis, *supra* at 118-21. The European Convention on Human Rights and the European Social Charter are indirect sources of EU law, upon which the ECJ may rely in its own formulation of the general principles of EU law on which the EU itself is based. *Id.* at 120-21.

61. Eve C. Landau, *The Rights of Working Women in the European Community* 16 (1985).

62. The Council, which is a political body whose goal is to ensure the attainment of the objectives set forth in the EEC Treaty, is composed of representatives of the Member States, each of which delegates to the Council a member. The Council has the final power of decision on most secondary legislation and thus some control by the Member States is guaranteed. Nevertheless, the Council usually can act only on the basis of a proposal from the Commission, and increasingly must consult both the Parliament and the Economic and Social Committee. The Council must override the Parliament's opposition to a measure or amend the Commission's proposals by a unanimous vote. Steiner, *supra* note 12, at 14.

63. See *supra* note 59.

64. Upon its creation in 1957, the Assembly, now called the European Parliament under the Single European Act, was composed of representatives of Member States who were required to be members of a national parliament. Since 1979, when direct elections began, the Parliament has been more democratic although a uniform voting procedure has not been agreed upon. Member States now are responsible to their electorate and rarely are subject to the rigorous demands of the "dual mandate" at home and in Europe. Because the Parliament was not intended to be a legislative body, the original Parliament had few powers, and its functions were advisory and supervisory. Since direct elections, however, the Parliament has taken an increasingly important consultative role in the legislative process and has been given final authority over certain aspects of the budget. The Maastricht Treaty also substantially increased the Parliament's powers. In its supervisory role, the Parliament must vote the Commission into power and exercises direct political control over the Commission, and Commissioners must reply orally or in writing to the Parliament's inquiries. In contrast, the Council is not under the control of Parliament, but is subject to the extensive supervision of the Parliament. The Parliament reports on the Council's activities three times a year and the President of the Council must address the Parliament at the beginning of every year. Steiner, *supra* note 12, at 11, 13.

in the EU.⁶⁵ Although Mr. Rubenstein has stated that these European instruments go further than do the American EEOC Guidelines on Discrimination Because of Sex,⁶⁶ the American and European approaches to sexual harassment essentially are equivalent.

A. Equal Opportunity Law, Labour Law, Tort Law, and Criminal Law

Equal opportunity law, labour law, tort law, and criminal law generally regulate sexual harassment in most common-law countries and in a few civil-law countries. Equal opportunity laws that prohibit sex discrimination in employment, and even explicitly mention sexual harassment in the text of the law, set forth the most substantive source of protection in Australia, Canada, Denmark, Ireland, New Zealand, Sweden, the United Kingdom, and the United States. Equal opportunity laws protect both men and women if courts construe the anti-discrimination law to cover sexual harassment.⁶⁷

In most civil-law countries and in a few common-law countries, labour law provides some protection against sexual harassment although chiefly such law is directed at cases involving *quid pro quo* harassment. In Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, New Zealand, Portugal, Spain, Sweden, Switzerland, and the United Kingdom, labour law has been, or potentially could be, used to protect against constructive or unfair dismissal based on objection to sexual harassment pursuant to unfair dismissal provisions in legislation dealing with contracts of employment. With regard to labour law, almost all statutes in the EU Member States are drafted with respect to the employer's responsibility to his or her employees, and the employer's responsibility upon his or her failure to comply with applicable labour law provisions.⁶⁸

Often these specific legal provisions governing contracts of employment are framed in terms of the duties and obligations that an employer owes a worker and the corresponding duties and obligations that a worker owes the employer. In Belgium, for example, employers are to show respect for "propriety and

65. See *infra* Parts IV, V, and VI.

66. See 11 ILO, *supra* note 16, at 12. See also 29 C.F.R. § 1604.11 (1993); EEOC Policy Guidance No. N-915-050, *Current Issues of Sexual Harassment*, March 19, 1990, available in LEXIS, Employ Library, EEOMAN file. The EEOC has issued a Notice of Proposed Rulemaking indicating a desire to consolidate the standards for determining whether conduct in the workplace constitutes illegal harassment under various antidiscrimination statutes. 58 Fed. Reg. 189 (1993). In March 1990, the United States EEOC issued a policy statement stating that sex-based harassment not involving sexual activity or language may lead to Title VII liability if it is "sufficiently patterned or pervasive" and is directed at employees because of their sex. In addition, courts in the United States have recognized that non-sexual conduct may constitute sexual harassment. Mundiya, *supra* note 57, at 120.

67. 11 ILO, *supra* note 16, at 55.

68. *Id.*

decency" during the employment relationship.⁶⁹ In Italy, employers are responsible for their employees' physical and moral integrity.⁷⁰ In Portugal, employers are required to ensure both physical and moral good working conditions.⁷¹ In Switzerland, employers are required to protect and respect the employee's person and individuality with respect to the worker's health and observance of morals.⁷²

Tort law is another classification pursuant to which victims of sexual harassment have found a measure of protection. A tort is a legal wrong, other than a breach of contract, for which a court may grant a remedy, usually in the form of damages. In most civilian jurisdictions, tort law is defined in a civil code as the general responsibility to exercise due care towards others and the obligation to pay for damages caused by injury that results from a failure to exercise due care.⁷³ Therefore, tort law includes both negligent acts resulting from carelessness and inattention and intentional acts that cause harm. By its nature, sexual harassment is an intentional act that qualifies as an intentional tort. Therefore, tort law has been used as a remedy for sexual harassment in Japan, Switzerland, the United Kingdom, and the United States.⁷⁴ Moreover, tort law potentially may be applicable in all countries except where a statutory scheme provides the exclusive remedy, such as in Canada.⁷⁵

Since all persons are individually responsible for their tortious actions, it is difficult to determine whether an employer may be held liable for his or her employee's conduct under a theory of vicarious liability for tortious acts committed by an employee. Usually, an employer is responsible for an employee's actions committed within the scope of the employee's employment, although exceptionally an employer may be held to be vicariously liable for acts outside the scope of employment when it is equitable to do so.⁷⁶ Nevertheless, because sexual harassment is an intentional tort and intentional torts usually are not found to be within the scope of the employer/employee relationship, it

69. *Id.* at 56, 79-81.

70. *Id.* at 56, 113-16.

71. *Id.* at 56, 139-42.

72. *Id.* at 56, 151-55.

73. For articles suggesting a duty to rescue in the context of American tort law, but not specifically with regard to sexual harassment at the workplace, see Thomas J. Galligan, *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. Mich. J.L. Ref. 439 (1994); Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 Duke L.J. 848 (1990). See also Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 Cornell L. Rev. 575 (1993); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Ed. 3 (1988).

74. 11 ILO, *supra* note 16, at 56. In the United States, the torts that are applicable to sexual harassment include intentional infliction of emotional distress, assault and battery, false imprisonment, invasion of privacy, defamation, and negligent retention or supervision. Some contractual tort claims may be applicable to sexual harassment, such as claims for wrongful discharge as a tortious breach of public policy and tortious interference with contracts. *Id.*

75. *Id.* at 56, 83-86.

76. *Id.* at 59.

sometimes is difficult to hold an employer vicariously liable for an employee's intentional sexual harassment of another employee.⁷⁷ Moreover, the nature of sexual harassment suggests that the harasser was acting for his or her own purposes, rather than in the interest of the employer.⁷⁸

Criminal law is another classification of law potentially applicable to sexual harassment in the workplace. Although France currently is the only EU Member State that has a specific penal law proscribing sexual harassment,⁷⁹ the criminal laws of other EU Member States potentially are applicable to sexual harassment. For example, the following laws may apply to sexual harassment in the workplace: laws that proscribe the taking advantage of someone in a position of economic dependence; sexual assault and battery statutes that include the situation of putting someone in fear of unwanted bodily contact and the actual touching of intimate body parts; and indecent assault, indecent behaviour, and immoral conduct laws. More general criminal laws involving general assault and battery also may be applicable where specific sexual aggression criminal laws do not exist.⁸⁰

77. *Id.*

78. *Id.*

79. *Id.* at 57. All residents and foreign non-residents in France are subject to the French Penal Code. *Id.* The text of Article 222-32-1 voted by the French National Assembly became effective when the new Penal Code was adopted in 1993. The new text is based upon the principle of prohibiting an abuse of authority to obtain sexual favors; therefore, the new text addresses harassment by supervisors only, rather than harassment by colleagues or non-employees. Abuse of authority to pressure a person for sexual favours may be applied in the employment context and in other situations where a person has authority. See 11 ILO, *supra* note 16, at 98; Journal Official, No. 107[1]AN(CR), 7017 (Dec. 3, 1991). Under this law, the "act, by anyone abusing authority that is conferred by his or her position to pressure [someone] with the intention of obtaining sexual favors, is punishable." Although "sexual harassment" is named in the title of the law, neither the words "sexual harassment" nor "sexual aggression" appear in the text itself. See 11 ILO, *supra* note 16, at 97. Although they do not explicitly mention the term, several other provisions of the French Penal Code may be used to address sexual harassment at work. Because all persons residing in France are subject to the French Penal Code, the employer, supervisors, colleagues, and non-employees, such as clients or customers, may be liable if they commit behaviour constituting sexual harassment that constitutes a criminal offence. The principle of vicarious liability, however, could not be applied to hold the employer liable for a supervisor's or a worker's criminal actions. See, e.g., Article 309 (penal provision prohibiting assault and battery); Article 186 (unjustified violence by a public official); Articles 283, 284 (indecent conduct by use of the press and related media); Article 330 (offence against public decency); Article 333 (indecent behaviour); and Articles 187-1, 187-2, 416, 116-1 (discrimination on the basis of sex may be applied to actions constituting sexual harassment). See also 11 ILO, *supra* note 16, at 98-99. For commentary on the recent French law, see Susan Bell, *Office Flirt Gets Slap on Wrist*, *The Times* (London), Sept. 2, 1991; Barry James, *A French Revolution: Judge Gives Suspended Jail Term to Male Boss for Sexual Harassment*, *Int'l Herald Trib.*, Jan. 18, 1992; Frances Kerry, *French Bottom-Pinchers Could Face Prison*, *Reuters*, April 29, 1992; William Langley, *No Flirting Please, We're French*, *Evening Standard*, Jan. 13, 1992, at 19; Alan Riding, *France Rethinks Its Wink at Sexual Harassment*, *N.Y. Times*, May 3, 1992, § 1, at 9.

80. 11 ILO, *supra* note 16, at 49, 53.

B. Sanctions and Remedies

Generally, there are two types of remedies and two types of sanctions available to victims of sexual harassment. The most common form of remedies in the EU for sexual harassment is damages which represent the actual and pecuniary harm the victim suffered, such as a loss in income resulting from being dismissed or the failure to get a promotion and nonpecuniary damages including moral damages or compensatory damages. These latter damages, which generally are more available in tort than in contract actions, attempt to compensate the victim financially for injury to feelings, mental anguish, and humiliation caused by sexual harassment and may be extremely important because otherwise a victim of hostile environment sexual harassment would not be entitled to monetary recovery as no tangible pecuniary job benefit was affected.⁸¹ Although victims of harassment in the UK are entitled to compensatory damages for lost earnings and physical and mental distress,⁸² the new French law prohibiting sexual harassment fines harassers but does not expressly allow the victim to recover compensatory damages.⁸³

The second type of remedy available to victims of sexual harassment is a court order requiring that an employer or harasser cease doing the prohibited activity. The court also could order the employer to do certain acts that would remedy the damage caused, such as reinstatement of the victim, transfer of the harasser, or the adoption of an affirmative policy against sexual harassment.⁸⁴

The most common form of sanctions is for the harasser to be disciplined by the employer through a reprimand, transfer, demotion, temporary suspension of service, or actual dismissal. This disciplinary authority is inherent in the power of the private employer and is found in the public service through the civil servants' regulations. However, this authority is tempered by the principle of the proportionality of the sanction to the seriousness of the offence committed. Criminal penalties also may apply to sexual harassment, such as fines or, less frequently, prison terms.⁸⁵

Mediation, which is not uncommon in civil-law countries such as France, is an interesting and potentially successful alternative to the adjudicatory construct

81. *Id.* at 60. One commentator has argued for substantial compensation for victims of sexual harassment both "because sexual harassment is a form of personal injury" and because substantial compensation may deter future harassment. In connection therewith, she argues that whereas compensatory damages are an incentive for employers to adopt company policies against sexual harassment and to encourage behavioural change in the workplace, individual fines usually transform sexual harassment into a question of the appropriateness of an individual's behaviour rather than focus on the perpetuation of a hostile environment or of social attitudes tolerating discrimination. See Victoria A. Carter, *Working on Dignity: EC Initiatives on Sexual Harassment in the Workplace*, 12 J. Intl. L. Bus. 431, 450 (1992).

82. See Carter, *supra* note 81, at 449.

83. *Id.* at 449-50.

84. *Id.* at 445-46.

85. *Id.* at 437.

relied upon by most sanctions. Unlike the adjudicatory construct, which emphasizes the adversarial roles of the parties and may result in the imposition of extreme sanctions instead of a workable compromise, mediation would attempt to reconcile the parties, if possible, and to resolve the underlying issues through a workable scheme that accommodates the interests of both the employer and the employees.

C. Procedures

Special procedures regarding sexual harassment usually are found in equal opportunity statutes, such as a special equal opportunity commission, human rights commission, board, ombudsman, or commissioner that has the authority to receive and investigate claims of sexual harassment. These procedures are found in the equal opportunity laws of Australia, Canada, Finland, the Netherlands, New Zealand, Norway, Sweden, and the United States.⁸⁶ With the exception of New Zealand, which has novel and elaborate procedures defined under its employment contract law for proceeding with sexual harassment claims as a personal grievance against an employer, the Member States of the EU do not have specific procedures to handle claims of sexual harassment under labour laws. This also is the case with torts, which are processed in ordinary courts as are other civil complaints. With respect to criminal cases, prosecutorial discretion controls whether a claim of sexual harassment is prosecuted, except in the United Kingdom where private criminal prosecutions are available.⁸⁷

D. Burden of Proof

One important issue regarding the remedies available to a litigant under the Equal Treatment Directive⁸⁸ is the burden of proof required before a remedy should be granted. Currently in the EU, the burden of proof in a sexual harassment complaint rests completely upon the complainant. Nevertheless, this allocation of the burden of proof has been challenged. On 4 October 1991, the European Commission consulted the Economic and Social Committee, under Article 198 of the EEC Treaty establishing the EU, on a draft of the Commission Recommendation on the protection of the dignity of women and men at work. On 30 October 1991, the Economic and Social Committee adopted an Opinion on this draft. Among other things, the Economic and Social Committee commented that:

86. 11 ILO, *supra* note 16, at 60, 67-72 (Australia), 82-86 (Canada), 94-96 (Finland), 125-30 (the Netherlands), 131-34 (New Zealand), 135-37 (Norway), 147-50 (Sweden), and 160-73 (United States).

87. *Id.* at 60-61.

88. *See infra* Part IV.

[it was] crucial to the whole exercise that a fair and even-handed approach be instituted when complaints procedures are opened, so that the onus of proof is not exclusively borne by either the complainant or the alleged harasser. This is why the Committee would once again urge the Council to consider approving the long-standing Commission proposal on modifying the burden of proof in sexual discrimination cases.⁸⁹

IV. THE EQUAL TREATMENT DIRECTIVE

A. General Background of the Equal Treatment Directive

EU law on sex discrimination begins with Article 119⁹⁰ of the EEC Treaty, which sets forth a general principle of equal pay for equal work for men and women:

Each 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.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

89. 1992 O.J. (C 14) 4, Article 1.6. Observe that the Commission has proposed an identical Directive on the reversal of the burden of proof in the area of equal treatment, but the Council has not yet adopted this proposal. See Proposal for a Council Directive on the Burden of Proof in the Area of Equal Pay and Equal Treatment for Women and Men, 1988 O.J. (C 176) 6. For a view on allocating the burden of proof in EU sexual harassment cases, see Carter, *supra* note 81, at 446-48. For views on allocating the burden of proof in American sexual harassment cases, see Juliano, *supra* note 11, at 1576; Jolynn Childers, Note, *Is there a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 Duke L. J. 854, 863 (1993).

90. Perhaps the most important general principle of law with respect to the issue of sexual harassment at work is the principle of non-discrimination. In EU law, the ECJ has given considerable attention to guaranteeing equality and to preventing discrimination. In fact, the ECJ has accepted the principle of equal treatment as a superior rule of law and has recognized the general principle of equality as one of the fundamental principles of EU law. The EEC Treaty itself prohibits discrimination, defined as unequal treatment in situations that are identical or comparable, in Article 119, which sets forth the principle of equal pay for equal work; in Article 7, which prohibits discrimination on grounds of nationality, as do many Regulations; and in Article 40(3), prohibiting discrimination in the agricultural sector. Discrimination also is prohibited in the rules on the free movement of goods, persons, services, and capital. Different treatment, however, does not constitute discrimination when it is objectively justified or, with respect to economic matters, is not arbitrary. Schermers & Waelbroeck, *supra* note 58, at 69-70; Steiner, *supra* note 12, at 27.

Nevertheless, the principle of equal pay for equal work could not be applied unless there existed equality in conditions of employment, which the Equal Treatment Directive sought to address. The Equal Treatment Directive, however, was not only a response to the limitations inherent in Article 119 of the EEC Treaty. The origin of the Equal Treatment Directive began with the more general developments within the EEC when the social aspects of the common market became a matter for serious consideration. The major catalyst for Community social policy development began with the summit meeting of October 1972, held in Paris. The Heads of State and Heads of Government emphasized that they gave as much importance to rigorous action in the social field as they did to the achievement of the Economic and Monetary Union and thought it was essential to ensure the increasing involvement of labour and management in the economic and social decisions of the Community. Accordingly, in 1973 the Commission drafted a proposal for a social programme and on 21 January 1974 the Council of Ministers passed a resolution initiating the Social Action Programme.⁹¹

The chief objectives of the Social Action Programme were: (1) full and better employment at community, national, and regional levels, which is an essential condition for an effective social policy; (2) improvement of living and working conditions so that they may be harmonious while improvement is being achieved; and (3) increased involvement of management and labour in the economic and social decisions of the Community and of workers. The Council called for measures to achieve equality between men and women with respect to access to employment, vocational training, advancement and working conditions, including pay; and to reconcile the family responsibilities of all people with their professional aspirations.⁹²

Accordingly, in 1975 the Commission drafted a Memorandum on the situation of working women in the Community and a draft Directive which was to meet the difficulties described in the Memorandum.⁹³ Although the Commission realized that problems of job segregation resulting from cultural, historical, and social barriers could not be met by legislative action alone, the Commission recognized that legislation was an appropriate means for reaching the goal of equal treatment. The Social Action Programme itself, however, could not serve as a juridical basis for a directive as Community directives must be issued in accordance with the provisions of the EEC Treaty.⁹⁴

91. Sacha Prechal & Noreen Burrows, *Gender Discrimination Law of the European Community* 104 (1990).

92. *Id.* at 105.

93. *Id.* See COM (75)36 final.

94. See Prechal & Burrows, *supra* note 91, at 43, 105. See also Article 189 of the EEC Treaty and Steiner, *supra* note 12, at 20.

While the Equal Pay Directive implemented Article 119 of the EEC Treaty, the Equal Treatment Directive, resulting from the Council's Resolution of 21 January 1974, is based upon Article 235 of the EEC Treaty. The Preamble of the Equal Treatment Directive sets forth its specific goals:

Whereas Community action to achieve the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion and in respect of other working conditions also appears to be necessary; whereas equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are "inter alia" to be furthered.

Given these broad objectives, the Equal Treatment Directive was based not upon Article 100 of the EEC Treaty (the "harmonization" Article), but upon Article 235, which provides:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

This general power has been used as a basis for legislation on matters concerning the equal treatment for men and women, which was within the broad goals of the Community as set forth in the preamble, but which was not specifically addressed in the EEC Treaty.

B. Substantive Rights Given by the Equal Treatment Directive

Article 1 of the Equal Treatment Directive sets forth its purpose:

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 This principle is hereinafter referred to as the "principle of equal treatment."⁹⁵

Article 2 of the Directive addresses sex discrimination on the grounds of marital or family status and thus is inapplicable to the issue of sexual harass-

95. Council Directive 76/207, art. 1, 1976 O.J. (L39) 40.

ment. Articles 3,⁹⁶ 4,⁹⁷ and 5⁹⁸ of the Directive, however, are crucial for

96. Article 3 of the Directive provides:

1. Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.
2. To this end, Member States shall take the measures necessary to ensure that:
 - (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;
 - (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;
 - (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour management shall be requested to undertake the desired revision.

Council Directive 76/207, art. 3, 1976 O.J. (L39) 40.

97. Article 4 of the Directive provides:

Application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States shall take all necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;
- (c) without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex.

Council Directive 76/207, art. 4, 1976 O.J. (L39) 40.

98. Article 5 of the Directive provides:

1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.
2. To this end, Member States shall take the measures necessary to ensure that:
 - (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;
 - (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;
 - (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour management shall be requested to undertake the desired revision.

addressing sexual harassment.⁹⁹

C. Direct Effect of Equal Treatment Directive

A major problem with the Equal Treatment Directive has been whether it is directly effective.¹⁰⁰ That is, while a claim for equal pay under Directive 75/117 might be brought under Article 119 of the EEC Treaty, a claim for equal treatment may not be brought under Article 235 of the EEC Treaty because this Article merely sets forth the general law-making powers of the EEC. Although it is established that a Directive may be vertically effective against the State, it is doubtful whether a Directive can be invoked against the State in its capacity as employer. Even more questionable is the issue of whether a Directive might be horizontally effective against a private person, such as a private employer.¹⁰¹

Although the Equal Treatment Directive does not specifically address sexual harassment, it is significant that the Directive prohibits *any* form of sex discrimination as regards access to employment, vocational training, promotion, and working conditions. Moreover, the Directive requires Member States to introduce measures to enable employees to deal with violations of the principle of equal treatment and to protect those employees who seek to enforce compliance.¹⁰²

The ECJ has regarded the principle of non-discrimination on the ground of sex as a positive and enforceable right and usually exercises its powers of judicial review on this matter. The Court's liberal interpretation of the Equal Treatment

Council Directive 76/207, art. 5, 1976 O.J. (L39) 40.

99. Article 6 of the Equal Treatment Directive requires Member States to introduce into their national legal systems such remedies as are necessary to enable all persons who consider themselves to have been wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4, and 5 to pursue their claims by judicial process after possible recourse to other competent authorities. Council Directive 76/207, art. 6, 1976 O.J. (L39) 40. This provision is unusual and is not found in most Directives.

100. The European Community Treaties that have been incorporated into the laws of Member States generally are directly applicable; that is, applicable as part of each Member States' internal legal system. Consequently, EU law may form the basis of rights and obligations enforceable by individuals before their national courts. Also termed "directly applicable" are provisions of international law which may be applied by national courts at the suit of individuals. The confusion in these terms has led European Union scholar Josephine Steiner to use the term "directly effective" or "capable of direct effects" to refer to those provisions of EU law which give rise to rights or obligations which individuals may enforce in their national courts. Steiner, *supra* note 12, at 24. A "vertical direct effect" reflects the relationship between individual and State, whereas a "horizontal direct effect" reflects the relationship between individual and individual. *Id.* at 27. Section 2(1) of the European Communities Act provides for the direct application of Community law but does not offer any guidance as to which provisions of EEC law are to be directly effective. Article 189 of the EEC Treaty provides that Regulations are "directly applicable," but the ECJ, principally pursuant to its jurisdiction under Article 177, has extended the principle of direct effects to Treaty articles, Directives, Decisions, and to provisions of international agreements to which the EEC is a party. *Id.* at 25.

101. Steiner, *supra* note 12, at 267.

102. Ellis, *supra* note 60, at 134-54.

Directive is attributable in part to its wish to further the general principle of equality of the sexes.¹⁰³ In fact, the ECJ has held that Article 3 of the Equal Treatment Directive has direct effect, thus allowing a EU citizen to enforce the Equal Treatment Directive directly against an organ of the State, but not against a private body.¹⁰⁴ Similarly, the ECJ has held that Article 4 of the Equal Treatment Directive is directly effective.¹⁰⁵ Article 5 of the Equal Treatment Directive also is directly effective.¹⁰⁶

Whether Article 5 of the Equal Treatment Directive is applicable to cases involving sexual harassment alleged against an organ of the State is an unresolved question. However,

[t]here seems little doubt that most forms of sexual harassment in the work-place are forbidden by Article 5 of the Equal Treatment Directive: to subject a woman employee to sexual harassment is *not* to grant her equal working conditions to those enjoyed by her male colleagues, without discrimination on grounds of sex.¹⁰⁷

Nevertheless, the principle that sexual harassment, without more, constitutes unlawful discrimination is rare. It is only in the UK and Ireland that there is relatively unequivocal acceptance that sexual harassment itself constitutes sex discrimination.¹⁰⁸

D. Remedies Available for Breach of the Equal Treatment Directive

Article 7 of the Directive is notably broad in its inclusion of those who have merely made a complaint rather than only those who have actually begun legal

103. *Id.* at 131.

104. *Id.* at 137-39. See Case 222/84, *Johnston v. Chief Constable of the RUC*, 1986 E.C.R. 1651 (Article 4 of the Equal Treatment Directive confers an enforceable right on a policewoman to the same type of firearms training as was provided to her male colleagues); Case 177/88, *Dekker v. Stichting Vormingscentrum Voor Jonge Volwassen Plus*, 1991 I.R.L.R. 27 (Article 3 of the Equal Treatment Directive forbade an employer from refusing to employ a pregnant woman, who otherwise was suitable for the job); Case 179/88, *Handels-OG Kontorfunktionaerernes Forbund I Danmark v. Dansk Arbejdsgiverforening (acting for Aldi Marked K/S)*, 1991 I.R.L.R. 31 (this principle holds good throughout the relevant period of maternity leave); Case 165/82, *Commission v. UK*, 1983 E.C.R. 3431 (Commission alleged that as of 1982 no legislative instrument in force in the UK provided that discriminatory provisions contained in all collective agreements, rules of undertakings, or rules governing independent occupations were, or could be declared to be void; Court held that the Directive covers all collective agreements without distinction as to the nature of the legal effects which they do or do not produce; UK responded by enacting section 6 of the Sex Discrimination Act of 1986, which provides for the automatic invalidity of discriminatory provisions contained in collective agreements, employers' rules and the rules of trade unions, employers' associations, professional organizations, and qualifying bodies).

105. *Ellis*, *supra* note 60, at 141. See Case 222/84, *Johnston*, 1986 E.C.R. 1651.

106. *Ellis*, *supra* note 60, at 141-48.

107. *Id.* at 149.

108. *Id.* See also *Rubenstein*, *supra* note 21, at 15.

proceedings and narrow in its protection only against dismissal and not against other forms of detrimental treatment by the employer. Nevertheless, the wording of Article 7 implies that there must be effective protection against dismissal provided in national law.¹⁰⁹

Nevertheless, the remedies available for the breach of the Equal Treatment Directive are not specific and thus do not guarantee an appropriate remedy in matters involving sexual harassment.¹¹⁰ That is, although Article 189 of the Treaty of Rome delegates to Member States the freedom to choose the manner of ensuring that a Directive is implemented, they nevertheless are obligated to ensure that they comply with the substance of the Directive. Because the Equal Treatment Directive is not a criminal statute, it does not prescribe any specific remedies for sex discrimination and leaves the crafting of such remedies to the courts. Pursuant to Article 6, however, there must be proper judicial remedies that are sufficient to fulfill the objectives of the legislation. Therefore, although Article 6 is not specific enough to require the existence of a specific remedy, such as an injunction, it potentially may be used by litigants in national courts to challenge unduly burdensome restrictions placed on those remedies which are available. The Equal Treatment Directive, however, can only be enforced against organs of the State.¹¹¹

To combat the reality that a Directive cannot of itself impose obligations on private parties, and rather than focusing upon whether Article 6 of the Equal Treatment Directive confers vertical or horizontal effects, one may look to Article 5 of the EEC Treaty, which requires States to "take all appropriate measures" to ensure the fulfillment of their Community obligations. The ECJ has held that this Article applies to all the authorities of a Member State, including the courts, and the courts of Member States must interpret national law in such a way as to ensure that the objectives of the Directive are achieved.¹¹² Therefore, although Community law is not applied directly and, thus, is not directly effective, it nevertheless may be applied indirectly as domestic law by means of its interpretation.¹¹³ The success of this principle of indirect effects, however, depends upon the extent to which national courts believe themselves to have discretion, under their own constitutional rules, to interpret domestic law to comply with Community law. Nevertheless, this view establishes that national courts must as much as possible interpret national law with regard to the wording and purpose of the Directive so that they might achieve the result purposed by

109. *Id.* at 161.

110. *Id.* at 149.

111. *Id.* at 152-53. See Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891.

112. See *Von Colson v. Land Nordrhein-Westfalen* (case 14/83) and *Harz v. Deutsche Tradex GmbH* (case 79/93). See also Steiner, *supra* note 12, at 34.

113. Steiner, *supra* note 12, at 34.

the Directive. This obligation is applicable whether the national provisions in question were adopted before or after the Directive.¹¹⁴

V. RESOLUTION ON THE PROTECTION OF THE DIGNITY OF WOMEN AND MEN AT WORK¹¹⁵

In May 1990, the Council of the European Communities adopted a resolution on the protection of the dignity of women and men at work.¹¹⁶ The Council noted that unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work, including the conduct of superiors and colleagues, is unacceptable and "may, in certain circumstances, be contrary to the principle of equal treatment within the meaning of Articles 3, 4, and 5 of Council Directive 76/207/EEC of 9 February 1976."¹¹⁷

The Council also noted that in accordance with its recommendation of 13 December 1984 on the promotion of positive action for women, many Member States had carried out a variety of positive action measures and actions having a bearing on respect for the dignity of women at the workplace; that the European Parliament in its resolution of 11 June 1986 on violence against women¹¹⁸ had called on national authorities to achieve a legal definition of

114. *Id.* at 35-37.

115. See also *Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women*, 1984 O.J. (L 331) 34-35, in which the Council recommended to the Member States that they "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" and "take steps to ensure that positive action includes as far as possible actions having a bearing on the . . . respect for the dignity of women at the workplace." See also *Resolution on Violence Against Women*, 1986 O.J. (C 176) 73-83, adopted by the European Parliament in June 1986, stating their "regard to the United Nations Convention on the elimination of all forms of discrimination against women" and "taking the view that the quest for a policy to combat violence against women and girls is part of an emancipation policy aimed at eliminating inequality and achieving equality between the sexes."

116. 1990 O.J. (C 157) 3-4. In its Resolution, the Council adopted language similar to that used in the United States' Equal Employment Opportunity Guidelines. See generally Nicolle R. Lipper, Comment, *Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States*, 13 Comp. Lab. L. 293, 295 (1992).

117. 1990 O.J. (C 157) 3-4.

118. On December 25, 1993, the European Parliament also approved a Commission proposal on a medium-term programme (1994-1999) for the war against social exclusion and to promote solidarity and suggested measures aimed specifically at women, such as a Directive on sexual harassment at work. *EU: Parliament Wants Poverty Programme Strengthened and Specific Measures for Women*, Agence Europe, Feb. 26, 1994. In February, 1994, the European Parliament adopted a resolution stating that Member States should adopt legislation requiring companies to appoint an in-house counsellor to address cases of sexual harassment. The non-binding resolution also stated that employers should incorporate measures and penalties to prevent sexual harassment in the internal rules of the company. Social Affairs Commissioner Padraig Flynn told the Parliament that "[t]he Commission is in fact trying to highlight, through the (publication of a) guide on sexual harassment, the desirability, indeed the necessity, of taking such measures." See *Sexual Harassment Counsellor*

sexual harassment; that the Council was anxious to take account of a study finding that sexual harassment is a serious problem for many working women in the labour market; and that the Advisory Committee on Equal Opportunities between Women and Men, in its opinion of 20 June 1988, had unanimously recommended that there be a recommendation and code of conduct on sexual harassment in the workplace covering harassment of both sexes.¹¹⁹

The Council also:

1. Affirm[ed] 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.¹²⁰

The Council also called on Member States to develop campaigns of information and awareness for employers and workers to counter sexual harassment; to promote awareness that sexual harassment may be contrary to the principle of equal treatment; to remind employers that they have a responsibility to ensure that the work environment is free from sexual harassment and retaliation against a person complaining of sexual harassment or against a person wishing to give, or giving, evidence in the event of a complaint; to develop appropriate measures in accordance with national legislation in the public sector, which may serve as an example in the private sector; and to consider that both sides of the industry could examine in the collective bargaining process the question of including appropriate clauses in agreements, aimed at achieving a work environment free of sexual harassment and free of retaliation against its victims.¹²¹

The Council requested the Commission to draw up by 1 July 1991 a "code of conduct on the protection of the dignity of women and men at work which will provide guidance on initiating and pursuing positive measures designed to

Needed in Companies, Says EP, Reuter European Community Rep., Feb. 11, 1994.

119. 1990 O.J. (C 157) 3-4.

120. *Id.*

121. *Id.*

create a climate at work in which women and men respect one another's human integrity."¹²²

Finally, the Council requested that the institutions and organs of the European Communities respect the concept that sexual harassment constitutes an intolerable and unacceptable violation of the dignity of workers or trainees and develop positive action measures aimed at achieving a work environment free of sexual harassment and free of retaliation against its victims.¹²³

VI. COMMISSION RECOMMENDATION ON THE PROTECTION OF THE DIGNITY OF WOMEN AND MEN AT WORK.¹²⁴

Pursuant to the Council's 27 June 1990 Resolution on the protection of the dignity of women and men at work,¹²⁵ in November 1991, the Commission adopted a Recommendation on the Protection of the Dignity of Women and Men at Work (the "Recommendation"),¹²⁶ to which was annexed a Code of Practice (the "Code")¹²⁷ on measures to combat sexual harassment.

The Commission adopted the Recommendation and the Code on an initiative by Mrs. Vasso Papandreou, EC Commissioner for Social Affairs. The purpose of the Code is to give practical guidance to employers, trade unions, and

122. *Id.*

123. *Id.*

124. In 1993, the Commission also published the booklet *How to Combat Sexual Harassment at Work*, which is the latest initiative from the Commission on addressing the issue of sexual harassment in the workplace. Based on the Commission's Code of Practice, which was published in 1991, the booklet consists of a two-pronged approach: to prevent harassment from occurring and to establish measures of addressing it once it has occurred. The Booklet urges companies to issue a statement specifically describing what constitutes harassment, making it absolutely clear that such behaviour is unacceptable and describing a procedure through which employees may complain. The Booklet also suggests that employees be informed about the policy, that responsibility should be placed on managers to ensure that harassment does not occur in their areas, that employers provide training for managers and for staff processing sexual harassment complaints, that they designate someone to give advice and assistance, that they ensure that cases are investigated quickly and by a committee set up for the purpose, and that employers give suitable disciplinary measures to guilty parties. See Lucy Kellaway, *Curbing the Office Pest*, *Fin. Times*, Sept. 17, 1993, at 12.

125. See also Council Declaration of 19 December 1991, 1992 O.J. (C 27) 1, on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the Code of Practice to combat sexual harassment, in which the Council also endorsed the general objective of the November 1991 Commission recommendation, which invited the Member States to develop and implement coherent, integrated policies to prevent and combat sexual harassment at work, taking account of the Commission Recommendation.

126. 1992 O.J. (L 49) 1-2.

127. 1992 O.J. (L 49) 3-8. Despite its title, the Code of Practice does not appear to be a true civilian code. See generally Alain A. Levasseur, *On the Structure of a Civil Code*, 44 *Tul. L. Rev.* 693 (1970); Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 *La. L. Rev.* 1073 (1988).

employees on the protection of the dignity of women and men at work, which guidance is urged to be implemented in the public and the private sectors.¹²⁸

The expert report done on behalf of the Commission found that sexual harassment is a serious problem for many working women and for some men in the EU and that research in Member States had proven that sexual harassment at work was not an isolated phenomenon. The report found that sexual harassment pollutes the working environment, can have a devastating effect upon the health, confidence, morale, and performance of those affected by it, requires costs to the employers and has a direct impact on the profitability of an enterprise.¹²⁹ In the report, the EU viewed sexual harassment as an obstacle to the proper integration of women into the labour market, and the Commission committed, in its Third Action Programme on Equal Opportunities for Women and Men (1991-1995), to encourage the development of comprehensive measures to improve such integration.¹³⁰ The Code and the Recommendation represent the first concrete initiatives within the framework of the EU's new five-year action programme on equal opportunities (1991-1995).¹³¹

A. *The Recommendation*

The Commission, as the guardian of the EC Treaty,¹³² has the duty to ensure that equality between men and women "figures prominently in the new EEC Treaty."¹³³ Notably and wisely, the Commission was careful not to draft a detailed list of what could be considered sexual harassment in the workplace, but instead delegated to the Member States the decisions on what actually constitutes sexual harassment. Nevertheless, the Recommendation states that behaviour resulting in harmful consequences to the professional life of the victim, such as being passed over for promotion or losing his or her job because

128. See *Protection of the Dignity of Women and Men at Work: The Commission Adopts a Recommendation and Proposes a Code of Practice*, RAPID Info. Memo, July 3, 1992, at 43, available in LEXIS, World Library, Allwld File.

129. *Id.*

130. *Id.*

131. *Id.*

132. With regard to the Commission's role as a guardian of the EEC Treaty, Section 4.5 of the Social Affairs Title of EC Commentaries states:

The Commission, as a guardian of the EEC Treaty, has a duty to ensure that equality between men and women figures prominently in the new Treaty on European Union. . . . In the [27 November 1991] Recommendation, the Commission asks Member States to accelerate awareness of sexual harassment, which is contrary to the rights of men and women. The Member States should set a good example by first combating the problem of sexual harassment in their own government and civil services. They should also encourage companies and trade unions to comply with a code of good practice.

Social Affairs Title of EC Commentaries § 4.5 (Coopers & Lybrand 1993).

133. See *Social Affairs: Commission Calls for Code of Conduct on Sexual Harassment*, European Rep., July 6, 1991, § IV, at 4.

he or she rejected sexual advances, would constitute sexual harassment.¹³⁴ The Commission expects Member States to set an example for the private sector by dealing effectively with sexual harassment in the civil service and to encourage employers and trade unions to comply with the Code.¹³⁵

Although the Commission Recommendation and the Code are not legally binding, the ECJ has held that National Courts are bound to consider Commission Recommendations when deciding disputes, particularly where the Recommendations clarify the interpretation of national decisions adopted to implement the Recommendations or where they are designed to supplement binding Community actions.¹³⁶ Generally, the Commission's Recommendation makes the following recommendations to the Member States: that they take action to promote awareness that conduct of a sexual nature or other conduct affecting the dignity of women and men at work is unacceptable and may, in certain circumstances, be contrary to the principle of Equal Treatment for Men and Women within the meaning of the Equal Treatment Directive; that Member States implement the recommendations contained in the Commission's Code; and that Member States encourage employers and employee representatives, including trade unions, to implement the recommendations contained in the Code.¹³⁷

B. *The Code*

1. *In General*

The Commission formally introduced the Code during a meeting in November, 1991 in the Hague, the Netherlands. Representatives of women's groups, trade unions, employers and governments attended the meeting.¹³⁸ The stated purpose of the Code is "to give practical guidance to employers, trade unions, and employees on the protection of the dignity of women and men at work" and is "intended to be applicable in both the public and the private sector and employers are encouraged to follow the recommendations contained in the code in a way that is appropriate to the size and structure of their organization."¹³⁹ Thus, the Code acknowledges that smaller organizations may need to

134. See *Sexual Harassment: EC Recommendation on Sexual Harassment*, 3 *Europe* 2000—Human Resources, No. 5, Aug. 1991.

135. See *EC: Code of Conduct on Sexual Harassment*, Accountancy, Sept. 4, 1991.

136. See Rubenstein & De Vries, *supra* note 31, at 9. Additionally, the United Kingdom's Employment Appeal Tribunal recently held that industrial tribunals may obtain guidance on sexual harassment from Recommendations adopted by the European Commission on November 27, 1991. See *Wadman v. Carpenter Farrer Partnership*, 1993 I.R.L.R. 374; see also *UK: Sexual Harassment—EC Guidance*, Accountancy, July 1, 1993.

137. See *Protection of the Dignity of Women and Men at Work: The Commission Adopts a Recommendation and Proposes a Code of Practice*, *supra* note 128.

138. See Abbie Jones, *Priority code: Europeans Seek Unity Against Harassment*, *Chicago Trib.*, Dec. 1, 1991, at 1.

139. See Articles 1.1 and 1.2 of the Code.

adapt the Code to what is practicable, given their limited resources. In connection therewith, the Code seeks to provide practical guidance to employers, trade unions, and employees on the means of ensuring that sexual harassment does not occur in the workplace, and if it does occur, that adequate procedures are available to deal with the problem and to prevent its reoccurrence.

The Code also basically sets forth the legal position and the Council's belief that, in certain circumstances, sexual harassment may be contrary to the principle of equal treatment contained in the Equal Treatment Directive,¹⁴⁰ and makes a series of recommendations to employers, trade unions, and employees on practical steps, both preventative and procedural, that may be taken. These recommendations are based on examples of current appropriate practices in the Member States and on a draft of the Code that had been the subject of consultation with the Member States, the social partners, and the national equality agencies.

Wisely, the wording of the Code is deliberately general, rejecting an early attempt to divide offensive behaviour into four rigorous categories (physical conduct of a sexual nature, verbal conduct of a sexual nature, non-verbal conduct of a sexual nature, and "sex-based" conduct affecting the dignity of women and men).¹⁴¹ Instead, the wording adopted an approach similar to the EEOC's 1981 Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11.¹⁴² The EEOC defined this harassment as consisting of "unwelcome" sexual advances, requests for sexual favours, and other verbal or physical sexual conduct where the response is used as the basis for an employment decision or where such conduct creates an intimidating, hostile, or offensive environment.¹⁴³ The Code defines sexual harassment as involving "unwanted" conduct of a sexual nature or other conduct affecting the dignity of women and men at work, including "unwelcome" physical, verbal, or non-verbal conduct. Such conduct is unacceptable if: (1) it is unwanted to the recipient; (2) a person's rejection of, or submission to, such conduct by employers or workers, including superiors or colleagues, is used explicitly or implicitly as a basis for a decision

140. Although the Code, the Council Resolution, and the Recommendation state that sexual harassment "may in certain circumstances" be contrary to the Equal Treatment Directive, such language is not intended by the Code to detract from the generality of that principle. Rather, such words merely recognize that certain factual situations may exist that fall outside of the scope of the prohibition on unequal treatment of men and women, such as where the employer neither knew nor could have known of the harassment. Rubenstein & De Vries, *supra* note 31, at 27.

141. See Matthew D'Ancona, *Europe Backs Code to Stop Sexual Harassment at Work*, The Times (London), Oct. 23, 1991. See also *Euro-MPS Call for Code of Conduct on Sexual Harassment*, The Reuter Library Report, Oct. 22, 1991. Nevertheless, according to the UK's Equal Opportunities Commission, the Code prohibits such "sex-based" conduct as wolf calls and pin-ups, which give women the message that they should not be in the work environment. See Diane Summers, *Minister Finds that Sex and Politics Don't Mix*, Fin. Times, March 6, 1992, at 20.

142. See Mundiya, *supra* note 57, at 122.

143. See David Pannick, *The Euro Guide on Sexual Harassment*, The Times (London), Oct. 29, 1991.

which affects that person's access to vocational training, employment, continued employment, promotion, salary, or any other employment decisions; and/or (3) such conduct creates an intimidating, hostile, or humiliating working environment for the victim.¹⁴⁴

2. *Informal Responses in the EU*

The introduction of the Code was widely welcomed in the EU, demonstrating that EU Member States recognize that they should consider the Code's recommendations when disputes are settled and that the Code's recommendations will be relevant as to whether an employer took reasonable steps to prevent employees from engaging in behaviour that amounts to sexual harassment or discrimination.¹⁴⁵ As observed by the Information Memo:

Sexual harassment at work could be a thing of the past after a Euro-vote to ban it [in 1991]. . . . The European Parliament backed new guidelines to torpedo [unwanted] . . . advances. . . . These regulations will try to curb both the wandering hand brigade as well as those who think that their suggestive comments make them God's gift to the opposite sex.¹⁴⁶

Comments received on the draft by the Member States, the social partners, and the national equity agencies were mostly favourable and helpful.¹⁴⁷ Joanna

144. See *Protection of the Dignity of Women and Men at Work: The Commission Adopts a Recommendation and Proposes a Code of Practice*, *supra* note 128.

145. See *Code Reinforced*, *The Times* (London), Sept. 24, 1991. In connection therewith, some have argued that an employer's adoption of measures consistent with the Code of Practice should be made directly relevant to the issue of its liability in any legal proceeding, as is the case with American courts, which have shown considerable deference to the EEOC Guidelines in determining employer liability. Moreover, the EEOC Guidelines have been the catalyst for the creation of many sexual harassment policies currently in force in the United States, suggesting that the Code of Practice, which specifically sets forth the standard of care with which employers must comply to avoid liability, will cause enterprises in the EU to implement these measures. See also Lipper, *supra* note 116, at 341.

146. See Benn, *supra* note 44.

147. See *Protection of the Dignity of Women and Men at Work: The Commission Adopts a Recommendation and Proposes a Code of Practice*, *supra* note 128. Notably, four British models who posed topless for a London tabloid newspaper opposed the Commission's Recommendation and Code of Practice, claiming that the Commission's proposal would ban the posting of nude pinups at the workplace. Nevertheless, an EU Commission spokesman commented, without providing specific reasons, that the tabloid's "Page 3 girls" would not be outlawed by the measure, so they "should have read first and demonstrated later." See Charles Goldsmith, *EC Code Proposed to Prevent Sexual Harassment*, *Int'l Herald Trib.*, July 4, 1991. In summarizing the Recommendation and the Code, the spokesman emphasized that sexual harassment "must have a direct impact on the working career of the concerned employee" and that the Recommendation "result[s] from close consultation" with Member States, trade unions, and national equality agencies. See *EC Commission Issues Draft Recommendations on Child Care, Sexual Harassment in Workplace*, *BNA Int'l Bus. Daily*, July 5,

Foster, chair of the Equal Opportunities Commission in the United Kingdom, and herself a victim of sexual harassment, commented that the Code would assist thousands of people whose careers had been damaged by harassment: "This is a very widespread problem and the more we can discuss this issue the easier it will be to change people's attitudes."¹⁴⁸

The Code also was endorsed by British groups campaigning for a legal definition of sexual harassment and was welcomed by Britain's Women Against Sexual Harassment ("WASH"), a lobby group that in 1991 expected to deal with more than 5,500 complaints of sexual harassment. Louise Noakes, co-ordinator of WASH, commented: "The EC has recognized sexual harassment as one of the most important forms of discrimination in the work place and has given us a definition which gets rid of the grey area of when behaviour becomes sexual intimidation."¹⁴⁹ Mr. Rubenstein, a consultant to the EC on the Code, said the issue was not what constituted sexual harassment as much as how to give victims the confidence to come forward with their complaints, noting "[t]here are a lot of [people] putting up with sexual harassment at work because they are not sufficiently confident they will be listened to if they stand up to it."¹⁵⁰

In Ireland, the Code was widely welcomed. In 1993, the Employment Equality Agency ("EEA") and the Council for the Status of Women ("CSW") called for the implementation in Irish law of the Code although this measure has not yet been adopted.¹⁵¹ Carmel Foley, who in 1993 was chief executive of the CSW and now is chief executive of the EEA, also requested that the Recommendation become legally binding. Ms. Foley noted that although the Irish Business and Employers' Confederation and the Irish Congress of Trade Unions have accepted the EU Guidelines, "it was time that they became firmly included in legislation."¹⁵²

VII. REGULATION, DIRECTIVE, RECOMMENDATION, OR EUROPEAN CIVIL CODE?

Article 118A of the Single European Act of 1987, which grants the Council the authority to adopt by a qualified majority directives to improve the working environment, particularly with regard to worker health and safety, may provide the EU with the authority to adopt binding legislation on sexual harassment in employment. Pursuant to this authority, the EU could adopt an amendment to the Equal Treatment Directive, thereby widening its scope to include sexual harassment

1991. The spokesman also commented that the proposal was part of a five-year equal opportunities program designed to bring more women into the Community's labor market. See *Models Protest at EC Code Against Sexual Harassment*, Reuters, July 3, 1991.

148. See Palmer & Lees, *supra* note 44.

149. See Louise Hildago, *EC Code to Call for Stronger Laws on Sexual Harassment*, The Times (London), Oct. 21, 1991.

150. See *id.*

151. See *EC News in the European Press on Friday, March 19, 1993*, Reuter European Community Rep., March 19, 1993.

152. Mary Cummins, *Sex Harassment Law Urged*, Irish Times, March 19, 1993, at 4.

as a form of sex discrimination. The EU could also adopt a new directive on sexual harassment or retain its current Recommendation. The scholars, practitioners, and citizens discussed below have vehemently disagreed on which alternative the EU should adopt.

A. Regulation

Elisabeth Zoller, Professor of Law at the University of Strasbourg and the Institute of Political Science, has suggested that perhaps a "purer" approach to combatting sexual harassment would be a Commission Regulation rather than merely a Recommendation. Zoller supports her suggestion with the principle of integration,¹⁵³ which was central to the creation of the EU and which by necessity takes away from Member States at least some of their sovereignty. That is, by entering into the EU, the Member States sought integration, rather than merely co-existence or cooperation, and thereby renounced at least some of their sovereignty on social issues such as sexual harassment. Accordingly, she argues that a Regulation prohibiting sexual harassment would be consistent with the principle of integration. Moreover, the fact that the Member States would thereby lose their sovereign right to draft their own laws on the matter would be immaterial because they, in fact, lack this sovereignty as a natural result of being members of the EU.¹⁵⁴

Perhaps, Professor Zoller is correct in her argument that a Regulation prohibiting sexual harassment accords with the integrated nature of the EU. Nevertheless, as a practical matter, it would be extremely difficult, if not impossible, to give integrated content to a Regulation prohibiting sexual harassment in the workplace, given the hesitation the Member States have exhibited in relinquishing their sovereignty over social matters¹⁵⁵ and the deep differences in culture among the Member States. Moreover, a Regulation would grievously

153. In principle, integration under the EEC Treaty is comprehensive and does not apply to separate economic sectors, such as coal and steel or nuclear energy, as do the ECSC Treaty and the Euratom Treaty, respectively. The establishment of the Common Market under the EEC Treaty, therefore, refers to the entire sphere of economic activities in the Community. See 1 A.G. Toth, *Legal Protection of Individuals in the European Communities* 102 (1978). Accordingly, in areas within Community jurisdiction the individual becomes, through the process of integration, "increasingly detached from the legal (legislative) authority of the Member States and subjected to that of the Communities to the extent to which such authority is being transferred to the latter." *Id.* at 104.

154. Professor Elisabeth Zoller, *Lecture to European Economic Community Seminar* (March 1, 1994).

155. For example, Britain has rejected the European Social Charter, which became available for signature in October 1961 and concerns economic and social rights, requiring constructive action, rather than a mere understanding by Member States not to interfere with such rights. Of the Member States, only Belgium, Luxembourg, and Portugal have not ratified the Charter. Because the Charter gives ratifying Member States the option to enter reservations in relation to specific Articles, there is a substantial lack of evenness in the amount of legal commitment to this instrument. See Ellis, *supra* note 60, at 118.

exacerbate the problems inherent in the Code, particularly with regard to its lack of "procedural morality."¹⁵⁶

B. Directive

With regard to amending the Equal Treatment Directive to include sexual harassment, not all Member States regard sexual harassment as sex discrimination, and these political considerations might discourage the Commission from proposing amendments to the Equal Treatment Directive that would include sexual harassment within its scope. However, with regard to a Directive specifically covering sexual harassment, most EU institutions and experts in the subject of sexual harassment support binding legislation in the form of a Directive, rather than a Regulation, to prohibit sexual harassment. In fact, the EU Parliament has requested a Council directive to make binding the action program under which the Commission proposed its recommendation on sexual harassment.¹⁵⁷ Moreover, a July 1991 resolution states that the Parliament "deplores" the Commission action program because it lacks "a binding procedure for its implementation by either the Community institutions or the Member States."¹⁵⁸ This Parliament resolution responds to several requests to the Council by the Parliament's Committee on Women's Rights, suggesting that the Council adopt a Directive on sexual harassment.¹⁵⁹

In addition, on 30 October 1991, the Economic and Social Committee of the EU adopted an Opinion on the Commission's Recommendation on sexual harassment in which the Committee characterized the Recommendation as a "first step in promoting awareness, and in turn prevention of the problem." Nevertheless, the Committee noted:

This in turn is why the Committee is disappointed that the "code of practice" proposed is only limited to a Commission Recommendation. Given the seriousness and widespread occurrence of sexual harassment or of unwanted behaviour demeaning the dignity of women and men at work, and considering that Ministers have already pronounced themselves on this problem, the Committee considers that at least a Council Recommendation is required, possibly leading at a future stage, after EC-wide

156. See *infra* Parts VIII and IX.

157. See European Parliament Resolution on the Third Medium-Term Community Action Programme on Equal Opportunities for Women and Men, Minutes of Proceedings of the Sitting of the Parliament, July 12, 1991. See also Carter, *supra* note 81, at 452.

158. See European Parliament Resolution on the Third Medium-Term Community Action Programme on Equal Opportunities for Women and Men, Minutes of Proceedings of the Sitting of the Parliament, July 12, 1991, at 5. See also Carter, *supra* note 81, at 452.

159. See Parl. Eur. Doc. (SEC 0167) 10 (7 June 1991) (stating that the Commission action program simply is a declaration of intentions, describing future actions to be taken by the Commission without making binding commitments). See also Eur. Parl. Doc. (COM 0358) 8 (6 Dec. 1990); Carter, *supra* note 81, at 452.

monitoring, to a more binding EC instrument registering an appropriate degree of political commitment and scrutiny.¹⁶⁰

Other commentators have agreed with the Parliament and the Economic and Social Committee. Pointing to the Parliament's Resolution of 20 May 1986 in which the Parliament stated that sexual harassment was a violation of the principle of equal treatment for men and women and invited the Commission to examine labour law and non-discrimination law to determine their applicability to the issue and to issue a Directive supplementing existing legislation if it was inadequate, and to the Council Resolution of 13 December 1984, in which the Council asked the Member States to take measures to ensure respect for the dignity of women at the workplace, Mr. Rubenstein, the consultant to the Commission who assisted in drafting the Code, has commented that he prefers formal legislation to address sexual harassment in the workplace but that the Code is a reasonable first step.¹⁶¹ Arguing that the Code will not be entirely effective unless all employers adopt it, Mr. Rubenstein stated: "A great many will ignore it for sure. That obviously is inevitable."¹⁶²

Moreover, in his 1988 Report on the Dignity of Women at Work, written at the Commission's request, Mr. Rubenstein argues that there is a need for a separate Community Directive on sexual harassment at work¹⁶³ and suggests that although there would be advantages in clearly establishing that sexual harassment is unlawful sex discrimination contrary to the Equal Treatment Directive, this would not likely provide an effective solution to the problem of sexual harassment. Rather, Mr. Rubenstein contends what is needed is "specific legislation to confer upon employees a right to a working environment free of harassment and to encourage employers to take appropriate steps to establish and maintain such a working environment."¹⁶⁴ Mr. Rubenstein also observes that equal treatment legislation currently in force in the Member States is directed towards providing a remedy to those people who are subjected to sex discrimination, rather than focussing on preventing sexual harassment from occurring or reoccurring—goals which would be furthered by specific legislation.¹⁶⁵

Mr. Rubenstein further argues that a Directive is justified because he believes that it would greatly facilitate the Member States' obligation to take steps directed at protecting employees against the risk of sexual harassment, given that Member States normally would not expect employees to work with hazardous substances or

160. See *Opinion on the Draft Commission Recommendation on the Protection of the Dignity of Women and Men at Work*, 1992 O.J. (C 14) 4-5. See also *Dignity of Women and Men at Work: Council Recommendation Required Pending More Binding Legal Instrument*, European Rep., Nov. 23, 1991, at 3.

161. Rubenstein, *supra* note 21, at 37-39.

162. See Jones, *supra* note 138, at 1.

163. Rubenstein, *supra* note 21, at 36.

164. *Id.*

165. *Id.*

dangerous machinery with no recourse until they have contracted a disease or suffered an injury. In connection therewith, Mr. Rubenstein notes that because sexual harassment damages the working environment and constitutes a risk to health and safety, a Directive on preventing sexual harassment would support a declared priority of the EU, as set forth in Article 118A of the Single European Act, that Member States shall encourage improvements, especially in the working environment, with respect to the health and safety of workers and shall have as their objective the harmonization of conditions in this area, while maintaining the improvements made.¹⁶⁶ Similarly, Mr. Rubenstein argues for a Directive because sexual harassment interferes with productivity, undermines employee morale, disrupts effective working relationships, and results in absence from work and higher turnover. Moreover, a Directive would result in greater efficiency, competitiveness, and profitability.¹⁶⁷

Finally, Mr. Rubenstein suggests that a Directive would "complement existing legislation on the realization of equal treatment for men and women" by giving employees and prospective employees an equal opportunity to show their talents and would widen the employer's base for recruitment and promotion.¹⁶⁸ He concludes his argument as follows:

The author strongly believes that such objectives [to prevent and remedy sexual harassment] can only be achieved if the Community initiative is in the form of a Directive. The inadequacies of existing legal remedies are so patent, the discrepancies between the provisions in Member States so vast, that only a legal instrument with binding force will provide the necessary impetus for voluntary action to be taken. There is no reason to believe that moral suasion, in the form of a Recommendation or a Code of Practice, in itself will have the impact necessary to rectify the injustices currently suffered.

A Directive on preventing sexual harassment at work will not cost money. Preventing sexual harassment will save more money than the cost of permitting sexual harassment to continue. A Directive would not represent an unnecessary burden upon employers. Sensible employers already recognize that it is not good management to permit a working environment which allows sexual harassment. A Directive would not represent an intrusion of the law into the private behaviour of employees. The distinction between relationships mutually entered into and the imposition of unwelcome and offensive conduct, once understood, is easily recognized. A Directive on sexual harassment would not conflict with equal treatment legislation. Sexual harassment at work is an obstacle which must be removed if the aspiration of equal treatment for men and women is to be realized.

166. *Id.* at 37-38.

167. *Id.* at 38.

168. *Id.* at 38.

... This generation of women has a right to expect that the laws of Member States will protect them against the risk of sexual harassment and allow them to pursue their working lives with dignity.¹⁶⁹

Perhaps, Mr. Rubenstein is correct in arguing that a Directive prohibiting sexual harassment in the workplace would solve the non-binding nature of the Commission's Recommendation on sexual harassment. Moreover, a Directive might accord with the integrated nature of the EU, albeit to a lesser extent than would a Regulation. Nevertheless, a Directive prohibiting sexual harassment presents problems which a Recommendation evades. For example, a Directive would require the Member States to relinquish sovereignty which they have hesitated to abandon.¹⁷⁰ Moreover, although a Directive ultimately would be implemented by each Member State in its own manner, the actual content of a Directive would be difficult, if not impossible, to fashion because of the vast cultural differences between the Member States. Finally, a Directive, like a Regulation and the current Recommendation, would encounter problems with regard to "procedural morality."¹⁷¹ These concerns belie Mr. Rubenstein's belief that the Code will not be entirely effective unless all employers adopt it, for such problems will remain even if all employers do adopt the Code.

C. Recommendation

Relatively few EU commentators supported the Commission's choice to adopt a Recommendation,¹⁷² rather than a Regulation or a Directive, to combat

169. *Id.* at 101-02. Like Mr. Rubenstein, Victoria A. Carter has argued that binding Community legislation in the form of a Directive, rather than merely a Recommendation, is necessary to eradicate sexual harassment from the lives of EU workers. Carter admits, however, that offensive and harmful behaviour of a sexual nature will not disappear from the EU merely because the EU adopts legislation prohibiting it. See Carter, *supra* note 81, at 450-51. Women's organizations in the EU, such as the European Association Against Violence Towards Women at Work and the UK Women Against Sexual Harassment, both of which work with labour unions to raise awareness of the problems caused by sexual harassment in the workplace, also support binding legislation to prevent sexual harassment. They support their argument by observing that the Equal Pay Directive resulted in all Member States adopting sufficient legal standards to achieve necessary social change. *Id.* at 452-53.

170. See *supra* note 155. Interestingly, Mrs. Nel Van Dijk, speaking for the Green Party, has argued for a Directive to combat sexual harassment at the workplace based upon the European Social Charter's mission of ensuring a Euro-wide social policy. See *Social Charter: European Parliament Committee Unveils Counter Proposals*, European Rep., July 4, 1990, at 13. Similarly, Ms. Christine Crawley, Chairman of the public forum sponsored by the European Union on Women's Rights, has requested implementation of the European Social Charter through a Directive issued on sexual harassment. See *EC: Forum on Equal Pay Legislation in the Member States*, Agence Europe, March 26, 1993.

171. See *infra* Parts VIII and IX.

172. See *infra* Part IX for this Article's defense of the Commission's choice of an EU Recommendation to combat sexual harassment.

sexual harassment at the workplace. As has been mentioned,¹⁷³ the European Parliament would have preferred a Directive on the subject of sexual harassment, but nevertheless, supported the Commission's Recommendation. A Directive, of course, would have had "more teeth with which to fight harassment,"¹⁷⁴ but Ms. Christine Crawley, Labour MEP and author of a Parliament report on the Commission's Recommendation on sexual harassment, which was adopted by the Parliament at its October 24 1991 session in Strasbourg, expressed support of the Commission's Recommendation to promote dialogue in companies and to introduce procedures to settle disputes involving sexual harassment.¹⁷⁵

Similarly, in London the Employment Department said that the voluntary approach to combating sexual harassment—in the form of a Recommendation and a Code, rather than a Directive—"is the answer."¹⁷⁶ In response thereto, Ms. Crawley commented that the Recommendation offered "unambiguous guidelines" on what kinds of behaviour were acceptable and that sexual harassment was a complex issue.¹⁷⁷ Moreover, Sir Leon Brittan, who was present at the Parliament's plenary session, expressed his approval of the Parliament's support but did not believe that a Directive should be issued on the subject, noting that Articles 3, 4, and 5 of the Equal Treatment Directive provide a legal response to most cases of sexual harassment. He also noted that the Commission's Recommendation is designed chiefly to change people's attitudes, which purpose was reflected in the Commission's Recommendation and its Code of Conduct.¹⁷⁸

D. *European Civil Code*

Professor Guy Horsmans¹⁷⁹ has argued that a European Civil Code, based on the European Social Charter, rather than mere Regulations, would be an appropriate means of regulating social conduct in the European Union. Professor Horsmans develops his argument by noting that although the Treaty of Rome began with purely economic purposes, today the purposes of the Treaty include a social agenda, such as health and education. Therefore, Professor Horsmans argues, the European Union is not so much a common market or even a community as it is an integrated system combining economic purposes with social welfare.¹⁸⁰

173. See *supra* text accompanying notes 157-159.

174. See *Sexual Harassment; European Parliament Backs Commission*, European Rep., Oct. 26, 1991, at 18.

175. *Id.*

176. See D'Ancona, *supra* note 141.

177. *Id.*

178. *Id.*

179. See *supra* note 46.

180. Professor Guy Horsmans, Lecture to European Economic Community Seminar (March 24, 1994).

Professor Horsmans notes that a current problem with European integration is that goals that seem common in the Treaty may differ in their implementation from one state to another and that most Member States focus only on themselves to solve their problems. That is, the economic difficulties facing the Member States today make it difficult to obtain good regulations, and some regulations cannot be understood unless one understands the national problems being addressed. Professor Horsmans, therefore, urges each Member State to take into account the national interest of the European Union rather than merely their respective interests, as was done with the Treaty of Maastricht. By doing so, the Member States would make the EU more democratic and would build Europe by the will of the people rather than their governments. Nevertheless, Professor Horsmans laments that it is extremely difficult for Member States to relinquish their sovereignty. Perhaps, in ten years, he hopes, the Member States will disappear and will be replaced with an integrated European Union.¹⁸¹

In support of the European Civil Code, Professor Horsmans notes that the "free market" of the European Union has not been sufficient to sustain gains in social welfare in education, health, and housing. He observes that the "welfare state" used to be the answer to ensuring goals of social equality. However, now that the Member States have little money and are burdened with high unemployment, they have failed to follow through on this social agenda. Although Professor Horsmans admits that the content of a European Civil Code regulating social matters would be difficult to develop, much less to implement, he notes that the European Social Charter might provide some principles for guidance. In such a Civil Code, Professor Horsmans believes that it is not sufficient merely to state that the State will help the poor; rather, the Code should be more specific, such as championing equality between men and women. Rather than being "technicians," Professor Horsmans believes we should focus on the fact that a code is a view of normal situations for normal people in certain countries. That is, the morality in a code should prevail over concerns about practicality. After all, Professor Horsmans declares: "Why do you make money if you don't take care of social rights?"¹⁸²

Professor Horsmans' suggestion that a European Civil Code regulate social matters, and in particular the problem of sexual harassment, may be appealing to those who support a Regulation or a Directive, not only because such a Civil Code would be in accordance with the integrated nature of the EU, but also because it would create binding legislation on the Member States. Nevertheless, as would be the case with a Regulation or Directive prohibiting sexual harassment in the workplace, it would be extremely difficult, if not impossible, to give content to a European Civil Code article prohibiting sexual harassment, given the hesitation the Member States have exhibited in relinquishing some of their sovereignty over social matters and the deep differences in culture among

181. *Id.*

182. *Id.*

the Member States. In addition, a Civil Code provision would encounter problems with procedural morality.¹⁸³

VIII. THE DILEMMA OF KING REX

A. *Introducing: King Rex!*

In *The Morality of Law*,¹⁸⁴ Lon Fuller sets forth his theory of "procedural morality" by discussing "eight ways to fail to make law." Fuller begins with an allegory concerning the "unhappy reign of a monarch who bore the convenient, but not very imaginative and not even very regal sounding name of Rex."¹⁸⁵ Like those people in the EU who have attempted to eliminate sexual harassment in the workplace, King Rex "came to the throne filled with the zeal of a reformer. He considered that the greatest failure of his predecessors had been in the field of law. For generations the legal system had known nothing like a basic reform."¹⁸⁶ Unfortunately, although King Rex was resolved to remedy this problem and to "make his name in history as a great lawgiver,"¹⁸⁷ he "failed spectacularly, since not only did he not succeed in introducing the needed reforms, but he never even succeeded in creating any law at all, good or bad."¹⁸⁸

Because he believed that he needed a clean slate on which to write, King Rex's first official act was to announce to his subjects the immediate repeal of all existing law. He then drafted a new code but found himself to be incapable of making even the simplest generalizations because, though not lacking in confidence with regard to deciding specific controversies, the effort to give articulate reasons for any particular conclusion "strained his capacities to the breaking point."¹⁸⁹

Aware of his limitations, King Rex relinquished the idea of a code and announced to his subjects that henceforth he would act as a judge in any disputes that might arise among them. The King, thus, hoped that by judging a variety of cases, his latent powers of generalization might develop and, proceeding case by case, he gradually would develop a system of rules that could be incorporated into a code. Unfortunately, King Rex's venture failed completely in that after he had handled literally hundreds of decisions, neither he nor his subjects could detect in those decisions any pattern whatsoever. Moreover, their confusion was

183. See *infra* Parts VIII and IX.

184. Lon L. Fuller, *The Morality of Law* 33-41 (1964), reprinted in Christie & Martin, *supra* note 3, at 216. For commentary on Fuller's legal theory, see Robert S. Summers, Lon L. Fuller et al., *Lon Fuller and Substantive Natural Law*, 26 *Am. J. Juris.* 202 (1981).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

compounded by any tentatives toward generalization in the King's opinions because these generalizations gave false leads to his subjects and threw his own meager powers of judgment off balance in his decision of later cases.¹⁹⁰

After this fiasco, King Rex decided to make a fresh start, and his first move was to subscribe to a course of lessons in generalization. Accordingly, he resumed the project of a code and, after many hours of solitary labour, prepared a fairly lengthy document. Not being confident, however, that he had fully overcome his previous defects, the King announced to his subjects that he had written a code and henceforth he would be governed by it in deciding cases but for an indefinite future the contents of the code would remain an official state secret, known only to him and to his scrivener. To the King's surprise, his subjects deeply resented this sensible plan and declared that it was "very unpleasant to have one's case decided by rules when there was no way of knowing what those rules were."¹⁹¹

Stunned by this rejection, King Rex decided that life had taught him one clear lesson, namely, that it is easier to decide things with the aid of hindsight than it is to attempt to foresee and to control the future. The King reasoned that hindsight not only made it easier to decide cases, but it also made it easier to give reasons. Accordingly, the King decided that at the beginning of each calendar year he would decide all the controversies that had arisen among his subjects during the previous year and he would accompany his decisions with a full statement of reasons. These reasons, naturally, would be understood as not controlling decisions in future years, for that would defeat the whole purpose of the new arrangement, which was to gain the advantages of hindsight. The King confidently announced his new plan to his subjects. His subjects quietly explained that when they said that they needed to know the rules, they meant that they needed to know them *in advance* so that they could act on them. The King muttered that they might have made that point a little clearer but said that he would see what could be done.¹⁹²

King Rex now realized that he could not escape from a published code declaring the rules to be applied in future disputes. The King accordingly worked on a revised code, which unfortunately his subjects received with dismay because it was a "masterpiece of obscurity."¹⁹³ Indeed, the legal experts who studied it declared that there was not a single sentence in it that could be understood either by an ordinary citizen or by a trained lawyer. Soon, a picket sign appeared before the royal palace declaring, "How can anybody follow a rule than nobody can understand?"¹⁹⁴

King Rex quickly withdrew the code and recognizing for the first time that he needed assistance, employed a staff of experts to work on a revision. The

190. *Id.* at 216-17.

191. *Id.* at 217.

192. *Id.*

193. *Id.*

194. *Id.* at 217-18.

resulting code was a model of clarity. After it had been studied, it became apparent that its new clarity merely brought light on its many contradictions. A picket again appeared before the royal residence, declaring "“This time the king made himself clear—in both directions.””¹⁹⁵

King Rex once again withdrew his revision, but having lost his patience with his subjects, he instructed his experts to purge the code of contradictions and at the same time drastically to stiffen every requirement contained in it and to add a long list of new crimes. A revolution almost resulted when the new code was published. Leading citizens declared their intention to flout its provisions, and someone quoted the following passage: "“To command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear, and chaos.””¹⁹⁶

Again, King Rex withdrew the new code and instructed his staff of experts that whenever they encountered a rule requiring an impossibility, it should be revised to make compliance possible. To accomplish this result, every provision in the code had to be substantially rewritten. The final result, however, was clear, consistent with itself, and demanded nothing of the subject that did not lie easily within his powers. Nevertheless, before the effective date for the new code had arrived, it was discovered that so much time had been spent in successive revisions of the King's original draft that the substance of the code had been overtaken by events. Accordingly, as soon as the new code became legally effective, it was subjected to a daily stream of amendments. Again, popular discontent mounted, and an anonymous pamphlet appeared on the streets, carrying scurrilous cartoons of the king and a leading article with the title: "“A law that changes every day is worse than no law at all.””¹⁹⁷

Although this source of discontent began to cure itself as the pace of amendment gradually slackened, King Rex announced that because much of his trouble lay in the bad advice he had received from experts, he was reassuming the judicial power in his own person. In this way he could directly control the application of the new code and insure his country against another crisis. Accordingly, the King began to spend almost all of his time hearing and deciding cases arising under the new code. For his subjects, "“a new day seemed to dawn when they could finally conform their conduct to a coherent body of rules.””¹⁹⁸ This hope, however, was soon shattered as the King's subjects discovered that there existed no discernible relation between those judgments and the code they purported to apply. Insofar as it was expressed in the actual disposition of controversies, the new code may not have existed at all, yet in almost all of his decisions, the King declared and redeclared the code to be the basic law of his kingdom. While leading citizens began to hold private meetings to discuss what

195. *Id.* at 218.

196. *Id.*

197. *Id.* at 218-19.

198. *Id.* at 219.

measures, other than open revolt, could be taken to get the king away from the bench and back on the throne, King Rex suddenly died, "old before his time and deeply disillusioned with his subjects."¹⁹⁹

The first act of King Rex's successor, Rex II, was to announce that he was taking the powers of government away from the lawyers and placing them in the hands of psychiatrists and experts in public relations. This way, he explained, "people could be made happy without rules."²⁰⁰

B. Fuller's Concept of "Procedural Morality"

Fuller uses King Rex's bungling career as a legislator and a judge to illustrate that the attempt to create and to maintain a system of legal rules may miscarry in at least eight ways, which he describes as follows:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules; or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration. A total failure in *any one* of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract. Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be counted. . . . [T]here is a kind of reciprocity between government and the citizen with respect to the observance of rules. Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that

199. *Id.*

200. *Id.*

will be applied to your conduct." When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.²⁰¹

Fuller notes that increasingly the principal object of government seems to be not that of giving the citizen rules by which to shape his or her conduct, but to frighten the citizen into impotence. In such a situation, the problem the citizen faces is not as simple as that of a voter who knows with certainty that his or her ballot will not be counted. Rather, Fuller argues, it is more like that of the voter who knows that the odds are against his or her ballot being counted at all and that, if it is counted, there is a good chance that the ballot will be counted for the side against which the citizen actually voted. Fuller concludes with the following:

A citizen in this predicament has to decide for himself whether to stay with the system and cast his ballot as a kind of symbolic act expressing the hope of a better day. . . .

In situations like these there can be no simple principle by which to test the citizen's obligation of fidelity to law, any more than there can be such a principle for testing his right to engage in a general revolution. One thing is, however, clear. A mere respect for constituted authority must not be confused with fidelity to law. Rex's subjects, for example, remained faithful to him as king throughout his long and inept reign. They were not faithful to his law, for he never made any.²⁰²

201. *Id.* at 219-20 (emphasis supplied). Martin P. Golding has criticized Fuller's procedural morality as follows:

What entitles Fuller to regard the eight conditions of success in the enterprise of subjecting human conduct to the governance of rules as a morality? As conditions for the successful performance of an activity (here law making), they seem to be no more a morality than a batter's keeping his eyes on the ball is part of a morality of baseball.

Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. Legal Educ. 441, 478 (1986). See also Christie & Martin, *supra* note 3, at 222 n.2.

202. Christie & Martin, *supra* note 3, at 220. Fuller's concept of the reciprocity between government and citizen as an aspect of procedural morality also is reflected in John Finnis' *Natural Law and Natural Rights*. In his discussion of punishment, Finnis observes the importance of promulgation as follows:

The legal sanction, then, is to be a human response to human needs, not modelled on a campaign of "social defence" against a plague of locusts, or sparrows. *There is the need of almost every member of society to be taught what the requirements of the law—the common path for pursuing the common good—actually are; and taught not by sermons, or pages of fine print, but by the public and (relatively!) vivid drama of the apprehension, trial, and punishment of those who depart from that stipulated common way. . . .*

. . . . The punitive sanction ought therefore to be adapted so that, within the framework of its two sets of defining purposes already indicated, it may work to restore reasonable

IX. KING REX AS REFLECTED IN THE CODE

As has been observed by *The London Times* reporters Jaime Dettmer and Susan Ellicott, "[w]hat is clear through the minefield of definitions and arguments over legal remedies is that sexual harassment at work is on the increase in American and in European countries."²⁰³ Therefore, I believe that it may fairly be said that a lasting solution to the problem of sexual harassment will not quickly arise, despite the EU's considerable attention to the matter. The Code's mission of quenching sexual harassment in the EU workplace is laudable, and the EU must be commended in its efforts. Nevertheless, I believe that the Code unwittingly travels on some of Fuller's eight distinct routes to disaster. In particular, the Code fails to: (1) make available to the affected party the rules he or she is to observe; (2) make rules understandable; (3) set forth rules that do not require conduct beyond the powers of the affected party because the rules themselves are difficult to understand; and (4) establish a congruence between the rules as announced and their actual administration. I believe that this failure results not only in a bad system of law; it results, as Fuller notes, in a system that cannot properly be called a legal system at all.²⁰⁴

Specifically, I believe that the Code fails to achieve a legal system for three, perhaps, insurmountable reasons: (1) it requires an overwhelmingly active and perhaps unachievable role for employers;²⁰⁵ (2) it utilizes a purely subjective definition of sexual harassment;²⁰⁶ and (3) it does not account for the inherent cultural differences between the Member States themselves and between the Member States and the United States.²⁰⁷ These three failings of the Code have set its course on Fuller's "routes to disaster" in the following ways: (1) the affected parties (employers and potential harassers) do not have available to themselves the rules they are expected to observe; (2) the rules are difficult to understand and lack specific and meaningful content; (3) because the rules are difficult to understand in specific situations, they require conduct beyond the powers of the affected parties; and (4) the resulting confusion most likely will result in a failure of congruence between the rules as announced and their actual administration.

personality in the offender, reforming him for the sake not only of others but of himself:
"to lead a good and useful life."

John M. Finnis, *Natural Law and Natural Rights* (1980), reprinted in Christie & Martin, *supra* note 3, at 211-13 (emphasis supplied).

203. Jamie Dettmer & Susan Ellicott, *Hearings Spark Debate on Meaning of Harassment*, *The Times* (London), Oct. 15, 1991.

204. See *supra* text accompanying note 201.

205. See *infra* text accompanying notes 210-220.

206. See *infra* text accompanying notes 221-234.

207. See *infra* text accompanying notes 235-258.

I believe that these substantial obstacles strongly militate against the issuance of a Regulation, a Directive, or a European Civil Code provision prohibiting sexual harassment in the workplace in the EU and instead support the Commission's choice of a Recommendation thereon, despite the Code's inherent problems. Moreover, I believe that these obstacles support the adoption of a Recommendation because its non-binding nature characterizes it not as a "rule," standing on its own and possessing great force, but rather as a "norm," representing general policies having little force of their own and gathering content and force only by virtue of their relationship to the specific rules that constitute EU law on sex discrimination and sexual harassment.²⁰⁸ The Recommendation's characterization as a norm in turn protects it from Fuller's "procedural morality" concerns.²⁰⁹

A. *An Active Role for Employers*

One notable but very troubling characteristic of the Code is that in order to achieve its chief goal of improving corporate practice with regard to preventing sexual harassment and sexual harassment claims, it envisions a very active and, perhaps, inherently unachievable role for employers in preventing and remedying sexual harassment in the workplace.²¹⁰ In response thereto, EU companies slowly are beginning to realize that sexual harassment at the workplace somehow

208. For the jurisprudential distinction between a "rule" and a "norm," see Roscoe Pound, *Outlines of Lectures on Jurisprudence* 73-80 (5th ed. 1943).

209. The Code's lack of "procedural morality" is reminiscent of the uncertainty created by the jurisprudence of anti-formalist reform, which was a reaction to the views that all law can be found in statute and doctrine and that the judicial function is to apply this law as found (the "formalist approach"), and also was a challenge to use the social sciences or the reality of social life to guide judicial decision where the formalist approach was inadequate to serve society. See Christie & Martin, *supra* note 3, at 725, for an excellent discussion of reform jurisprudence.

210. In commenting upon this role and stressing that any action taken in the public sector will serve as an example to the private sector, Ita Mangan, a barrister with the Commission, recommended that employees emphasize to employers the loss in revenue to the employer caused by sexual harassment, as people will work in a far less productive fashion when under psychological or physical threat. Ms. Mangan further stated that implementing the EU Code would give practical advice to employers, trade unions, and workers on the protection of the dignity of women and men at work and that should sexual harassment occur, adequate procedures would be readily available to confront the problem. See Audrey Magee, *Harassment at Work Dominate Women's Seminar*, Irish Times, March 22, 1993, at 4.

Notably, Article 7 of the Code sets forth correlative employee responsibilities, providing that employees themselves have a "clear role to play in helping to create a climate at work in which sexual harassment is unacceptable . . . through an awareness and sensitivity towards the issue and by ensuring that standards of conduct for themselves and for colleagues do not cause offence." Article 7 also emphasizes that sexual harassment is not merely a "management problem" or a "women's problem" but that all employees have rights and obligations with respect to the working environment and thereby suggests that the victim exhibit through words or actions what they find to be objectionable behaviour.

must be addressed.²¹¹ Nevertheless, because almost all private companies (approximately eighty percent in Britain as of 1991)²¹² have no policy whatsoever to address sexual harassment, meaningful guidance clearly has been needed.

Specifically, with regard to the role of the EU employer in preventing and remedying sexual harassment, the Code states that the aim of the Code is:

to ensure that sexual harassment does not occur, and, if it does occur, to ensure that adequate procedures are readily available to deal with the problem and prevent its recurrence. The Code thus seeks to encourage the development and implementation of policies and practices which establish working environments free of sexual harassment and in which women and men respect one another's human integrity.²¹³

The Code thus adopts a "twin-track" strategy, pursuant to which action is necessary to protect employees against sexual harassment at work and to provide measures to address the problem when it arises. Training and communication strategies are required to minimize the risk of sexual harassment, whereas

211. Consider the following comments by *Financial Times* reporter Lucy Kellaway: "European companies *can no longer ignore* the problem of sexual harassment. Governments, trade unions, employers' bodies, industrial tribunals, the press, equal opportunities groups and countless victims have made sure of that." Kellaway, *supra* note 124. "Everybody agrees that the taboo surrounding sexual harassment *must* be broken and that *it is up to companies to act.*" Kellaway, *supra* note 25. Exemplifying the gradual "awakening" of companies to their new obligations, Britain increasingly has been busy running a service advising employers on how to combat sexual harassment. In 1990, an average of one employer per week used the service, whereas by 1992, the EOC had received about two inquiries per day and the figures are increasing. See Kellaway, *supra* note 124. Similarly, legal complaints and inquiries to Northern Ireland's EOC rose by more than one-quarter in 1992, with complaints regarding sexual harassment showing a substantial increase. See Gerry Moriarty, *Complaints on NI Equality Up*, *Irish Times*, Dec. 7, 1992, at 7.

212. Recent research by Britain's Industrial Relations Services, the pay and conditions research group in the UK, found that although one-third of British employers had a policy to deal with sexual harassment and a further third were considering introducing one, many British companies had policies which do not satisfy the EU's guidelines, and more than one-fifth of UK employees did not know if their organization had a sexual harassment policy. See Kellaway, *supra* note 124. Similarly, a study by the Manchester, England, School of Management found that of 110 top British companies, sixty-three percent did not have any specified procedures to deal with complaints about sexual harassment. See Kernaghan, *supra* note 54. Moreover, in 1991 in Ireland, Ms. Rosaleen Glacken, assistant general secretary of the Civil and Public Services Union, lamented that at the moment the majority of those in management "do not have the competence to deal with complaints of sexual harassment." See Magee, *supra* note 210. Nevertheless, according to a survey of 132 employers conducted by Britain's Industrial Relations Service, there is a growing trend to introduce policies to deal with sexual harassment, and more policies are being adopted by employers. See Ian Hunter, *Hope for the Sexually Harassed*, *The Independent*, Nov. 28, 1993, at 18. Moreover, as of 1991, ICI and the big clearing banks in the UK had been in the forefront among private sector employers, but it is not clear whether their policies are having an effect. The public sector in the UK has taken a stronger stand against sexual harassment, and its policies have tended to be broader than those in the private sector. See Kellaway, *supra* note 25.

213. See Article 1.3 of the Code.

effective complaints and counselling procedures are required to address an incident of sexual harassment once it has occurred.

Moreover, Article 3.5 of the Code provides that employers have a responsibility to seek to ensure that the work environment is "free" from sexual harassment: "The prime objective should be to change behaviour and attitudes, to seek to ensure the prevention of sexual harassment," through policies linked to a broader policy to promote equal opportunities and to improve the position of women and through procedures to deal with complaints. Thus, Article 3.5 emphasizes the need for a procedure to deal with complaints of sexual harassment, but notes that a procedure is only one component of a larger strategy to address the problem. In connection therewith, the Code suggests that training and communication strategies are necessary to help men and women become aware of the issue of sexual harassment and of the organization's policy to address it. Article 5.A. of the Code of Practice therefore sets forth four elements of a prevention strategy: policy statements, communicating the policy, responsibility, and training. The Code also emphasizes that employees and union representatives should be consulted in the development of policies and procedures.

The Code's insistence upon an active role for the employer in combating sexual harassment at the workplace is reminiscent of the American case *Ellison v. Brady*,²¹⁴ in which the court declared that "[e]mployers should impose sufficient penalties to assure a workplace free from sexual harassment" and made several references to the "discipline" of employees by employers.²¹⁵ This active role is also similar to *Ellison's* predecessor, *Meritor Savings Bank, FSB v. Vinson*.²¹⁶

Professors Christie and Martin have raised the following insightful and deeply troubling questions with regard to these cases:

Do *Ellison* and *Meritor* stand for the proposition that Congress has given employers a police power and duty, together with quasi-judicial authority, to regulate the conduct of employees? Are employers in effect required to establish codes of sexual conduct and enforce them with civil penalties? Could an employer dock a harassing employee's pay or require the harassing party to pay a sum of money to the victim? If the sexual harassment by one employee against another takes place entirely off the employer's premises, is the employer nevertheless required to take action after complaint? What investigative powers should an employer have with respect to an employee's off-hours conduct? On-site conduct? What due process rights (hearing, cross-examination) does an employer have who is alleged to have harassed another employee? Observe that the defendant in *Ellison v. Brady* is an

214. 924 F.2d 872 (9th Cir. 1991).

215. *Id.* at 882.

216. 477 U.S. 57, 106 S. Ct. 2399 (1986).

agency of the government, and administrative law already has spelled out due process rights of agency employees; however, such standards have heretofore been inapplicable to private employers. Have private employers become in effect an arm of the state in promulgating and enforcing codes of sexual conduct? One may note that the Federal government has recently proposed guidelines that would extend an employer's responsibility to preventing harassment of an employee by a non-employee; it also has proposed guidelines that would require policing of harassment not only on race and gender but also on religion, national origin, age, or disability. See 58 FR 51266 (1993).²¹⁷

Professors Christie's and Martin's incisive questions suggest other troubling issues that the Code has not, and perhaps cannot, meaningfully answer, such as whether serious criminal offences such as rape and indecent assault should be covered by a policy prohibiting sexual harassment. Britain's Equal Opportunities Commission ("EOC") believes that although there is not a definition in British law of sexual harassment, this term includes rape. Accordingly, if rape is the "ultimate sexual harassment" for which employers are obliged to introduce procedures to protect employees, employers necessarily will encounter complex issues regarding the manner in which they handle their internal proceedings. For example, should the employer's disciplinary procedure be stayed until the conclusion of criminal proceedings? What standards of proof and rules of evidence should employers adopt if the police decide not to proceed? Does the employer have the jurisdiction to deal with rape at all?²¹⁸

Britain's EOC supports the view that it would be fair to put into an EU employer's internal procedure that if there are criminal charges pending, the employer will await the outcome of those charges before proceeding internally. Nevertheless, whether or not a criminal investigation proceeds, an EU employer may encounter a legal duty of fairness in public law in its proceedings, meaning that the internal hearing may have to adhere to a higher standard of proof than the civil standard of a "balance of probabilities."²¹⁹ That is, the legal duty of

217. Christie & Martin, *supra* note 3, at 1126 n.3.

218. See Deborah Wolfson, *Sexual Harassment: A Field Day for the Lawyers*, *The Guardian*, Nov. 22, 1993, at E6. Perhaps, the questions raised by Professors Christie and Martin and by this Article reflect a typically common-law perspective on social issues. That is, a typically civilian perspective on social issues, as exemplified in the European Social Charter, for example, might be that the state "delegates," as it were, to private employers, for example, the state's supervisory powers, including some of the state's duties, legal process, guarantees, protections, etc. In contrast, despite *Ellison* and *Meritor*, a typically common-law perspective might emphasize the private employer's lack of a duty to enforce the law or to take an active role in positive social change.

219. See Wolfson, *supra* note 218. See also *Klass v. Germany*, 18 EHRR 305 (European Court of Human Rights, 22 Sept. 1993); *Schuler-Zgraggen v. Switzerland*, 16 EHRR 405 (European Court of Human Rights, 24 June 1993); *Kenneth James Best v. The Wellcome Found. Ltd.*, [1993] EEC 342 (Irish Supreme Court, 3 June 1993); *The Observer and the Guardian v. United Kingdom*, 14 EHRR 153 (European Court of Human Rights, 26 Nov. 1991); *John Kyle v. P & J Stormonth*

fairness in public law is such that most employers are not equipped to guarantee a fair procedure. If an employer faces judicial review of its internal procedures, one of the issues raised will be that the standards of fairness taken as public authority must be of the strictest standards. Therefore, this necessarily involves adhering to a standard of proof that is close to the criminal burden of "beyond a reasonable doubt" and adopting an internal procedure that is like the criminal court and has the same evidentiary and procedural safeguards. The employer also may need to adopt the principles that are developed in criminal courts for sexual offences that govern, for example, the extent to which the prosecution can ask about someone's sexual history.²²⁰

B. The Code's Subjective Definition of Sexual Harassment

Article 2.1 of the Code defines sexual harassment as "unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include *unwelcome* physical or non-verbal conduct."²²¹ Rather than confining itself to listing specific actions which constitute sexual harassment, Article 2.2 of the Code states that a "range of behaviour" may constitute sexual harassment. The test for determining whether an action constitutes sexual harassment and, therefore, is unacceptable is if such conduct is:

1. unwanted, unreasonable and offensive *to the recipient*;²²²
2. 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

Darling, WS, [1992] EEC 368 (Outer House of the Court of Session, Scotland, 10 July 1991).

220. See Wolfson, *supra* note 218. Compare Fed. R. Evid. 412, which prohibits the admission into evidence of a rape victim's past sexual conduct but does not prohibit the admission into evidence of a victim's speech and dress, with New Zealand's approach to combating sexual harassment through the medium of employment contract law, which approach prohibits the sexual experience or reputation of a sexual harassment complainant from being admitted into evidence. See 11 ILO, *supra* note 16, at 61. For an article on the revision of the labour court system as it took place in New Zealand, see Martin Vranken, *Specialisation and Labour Courts: A Comparative Analysis*, 9 Comp. Lab. L. 497 (1988).

221. (Emphasis supplied). Although the Code's use of the term "harassment" suggests the need for repeated incidents, the Code prohibits any act of harassment, even if it is done only once. For example, physical violence or non-consensual touching of the victim's intimate body parts would constitute sexual harassment the first time they occur. 11 ILO, *supra* note 16, at 24-25.

222. (Emphasis supplied). This subjective standard is reminiscent of the subjective *in concreto* "reasonable man" standard utilized in the defense of duress in La. Civ. Code art. 1959 and Article 1112 of the French Civil Code, rather than the objective *in abstracto* "reasonable man" standard.

3. such conduct creates an intimidating, hostile or humiliating working environment for the recipient.

Article 2.3 of the Code thus sets forth a subjective definition of sexual harassment in that "[t]he essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive." Article 2.3 concludes that "[s]exual 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 sexual harassment if sufficiently serious. It is the unwanted nature of the conduct which distinguishes sexual harassment from friendly behaviour, which is welcome and mutual."

The Code's definition of sexual harassment is noteworthy in that it incorporates two ideas. First, the definition focusses on how the recipient of the behaviour regarded the behaviour rather than upon the motive or intent of the harasser. Therefore, the Code establishes that such behaviour cannot be justified by the fact that the harasser was joking or merely being friendly. Second, the definition recognizes that sexual harassment includes but is not limited to sexual conduct. The Code, therefore, establishes that sexual harassment may have nothing to do with an attempt to initiate sexual relations but instead may be an exhibition of power or even hostility.²²³

By focussing on the principle that the individual person himself or herself may determine what is offensive and what is welcome or acceptable, the Code suggests that the right to be treated with dignity is an individual right that is not dependent upon the culture of the workplace and is not subject to the majority view of colleagues. Therefore, according to the Code, as is the case with one's life outside of work, one has the right to differentiate between the treatment one will accept from one person and that which one will accept from another. Pursuant to the Code, it is conceivable that one may accept one person's sexual remarks, but not similar remarks by another person. That is, "[b]y welcoming certain behaviour from one work colleague, a [person] does not confer a licence upon all other colleagues to treat [him or] her in the same way."²²⁴

In its meeting of 30 October 1991, the Economic and Social Committee of the EU adopted an Opinion²²⁵ on the Commission's Recommendation on the

223. Rubenstein & De Vries, *supra* note 31, at 21. The Code's definition also distinguishes between sexual blackmail or quid pro quo harassment, pursuant to which sexual harassment is used as the basis for employment decisions affecting the victim, and hostile environment sexual harassment, pursuant to which the sexual harassment damages the employee's working environment. Thus, the Code suggests that even where no tangible employment benefits are lost, women who work in a sexually offensive working environment enjoy less favourable working conditions than their male colleagues. *Id.* at 23. The Code's definition also emphasizes that sexual harassment is neither "romantic nor sexy," although romantic relationships, which are consensual, often are formed in the workplace. *Id.*

224. *Id.* at 24-25.

225. 1992 O.J. (C 14) 4-5.

issue of sexual harassment, in which the Committee "wholeheartedly endorsed" the Recommendation's emphasis on the "unwanted nature of the conduct," in contrast to "friendly behaviour which is welcome and mutual." The Committee requested, however, that along with this definition the Commission should append practical examples of behaviour which the Commission considers to be covered by the definition. The Committee argued that this appendix would help Member States interpret the Code of Practice, would make management and workers more aware of what actually constitutes offensive conduct or sexual harassment at the workplace, and would be helpful to the prevention of sexual harassment and the implementation of a basic training policy in this area and for drafting appropriate clauses in collective bargaining agreements.

The Economic and Social Committee's Opinion²²⁶ is indicative of the fact that the Code's subjective definition of sexual harassment is inherently problematic in that it focusses solely on the victim's perspective and thus removes *any impact whatsoever* of societal views or cultural views about what may or may not constitute offensive behaviour.²²⁷ The definition thus is neither "real" nor "conventional" in the jurisprudential sense²²⁸ in that it neither communicates to others conventionally understood meanings nor states real or essential attributes of what constitutes sexual harassment, particularly in the "grey areas,"²²⁹ other than the fact that the offensive behaviour is "unwanted" or "unwelcome." This lack of content makes it exceptionally difficult for a potential harasser to know whether or not his or her behaviour, particularly in the "grey areas," constitutes sexual harassment. As has been observed by *The Daily Telegraph* reporter Lesley Garner:

Does simply making blue jokes or raising the subject of sex with . . . colleagues qualify as sexual harassment? . . . [T]here are no clear answers to any of these questions. There is the infinite range of normal human behaviour which between men and women involves the many subtleties of sexual interest and pursuit. And there is the law. With the rise of sexual harassment as a prosecutable offence, the two have become entangled. . . . There is widespread misunderstanding of the differences between pleasantries, flirting, even open sexual advances, and this new offence called sexual harassment. . . . There is a lot of room here for interpretation. You might find it offensive and threatening to be groped, flashed at or shown dirty pictures. I might be the

226. See *supra* note 225.

227. One question that arises is whether under the Code an employee must prove that he or she suffered severe psychological injury, merely than being offended, to win a sexual harassment suit. See *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), in which the United States Supreme Court ruled that severe psychological injury neither should be required as proof of unreasonable interference with an individual's work performance nor should it be required to establish an intimidating, hostile, or offensive working environment.

228. Edwin W. Patterson, *Jurisprudence—Men and Ideas of the Law* § 2.00 (1953).

229. See *infra* text accompanying notes 232-234.

object of exactly the same behaviour but enjoy it. If I do, it no longer constitutes sexual harassment. I can see how this would baffle [people].²³⁰

This comment well illustrates that one major problem with the "unwanted" or "unwelcome" requirement in the Code's definition of sexual harassment is the practical difficulty of determining whether the conduct, indeed, was wanted or unwanted or welcome or unwelcome. For example, a victim might silently accept harassment because she fears retaliation, yet under the Code, such conduct would not appear to be unwelcome. Conversely, a victim might appear to find the harassment to be unwelcome, yet, in fact, find it to be welcome.²³¹

The Code's subjective definition of sexual harassment also raises the complex issue of whether the Code espouses a "reasonable person" or a "reasonable woman" standard of "unwelcomeness," or whether the subjective definition of sexual harassment might characterize some behaviour as being sexual harassment that for another victim might not constitute sexual harassment.²³² Similarly, the Code's subjective definition of sexual harassment is that it does not answer the questions of exactly what types of behaviour are offensive? What types of offensive behaviour cause harm? Should people be required to tolerate a minimum level of offensive sexual conduct within the working environment? There is less agreement among men and women regarding milder examples of sexual harassment than regarding the more extreme examples, and thus confusion as to what exactly constitutes sexual harassment

230. See Lesley Garner, *Where Do We Draw the Line? Sexual Harassment*, Daily Telegraph, Oct. 16, 1991, at 19.

231. One author has argued that with regard to American law on sexual harassment, *statutory definitions* of "welcomeness" should determine whether there has been true consent or mere acquiescence. See Juliano, *supra* note 11, at 1575. But given the inherent differences between people's subjective feelings of something being "unwelcome," an attempt to codify a meaningful definition appears to be unrealistic. Moreover, were a victim of sexual harassment to choose to express his or her "unwelcome" response to the harassment in a manner not explicit, then such a person might be deemed to have welcomed the offensive behaviour. The Code's subjective definition of sexual harassment raises other evidentiary problems in that in deciding if conduct is unwelcome, courts and juries are shouldered with the difficult burden of determining whether the victim "asked for it." In connection therewith, the investigation may yield evidence that under United States law would be excluded in federal cases. See *supra* text accompanying notes 214-220.

232. One American commentator has argued that to avoid the problems posed by both the reasonable person and the reasonable woman standards, courts should adopt a "reasonable victim standard with an explicit gender analysis as a relevant and necessary element of the case evaluation," thus focussing on the "power differential implicit in the relationship of the parties involved." See Childers, *supra* note 89, at 902. See also *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (court's reliance on the "reasonable woman" standard with regard to sexual harassment, and acknowledgment that this standard will change over time, suggests that the court adopted women's "positive morality"); see *Christie & Martin*, *supra* note 3, at 1125 n.1; *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993) (court declined to use the language of a "reasonable woman" standard); *Commonwealth v. Dillon*, 598 A.2d 963 (Pa. 1991) (relying upon the "battered-woman syndrome"); *Bender*, *supra* note 73.

may permeate the workplace. For example, most men and women would agree that a supervisor requiring an employee to perform sexual favours for the supervisor if the employee wants to keep his or her job constitutes sexual harassment; however, not all men and women would agree that unsolicited comments and requests for dates constitute sexual harassment. As has been observed by author Jolynn Childers:

Compliments, sexual innuendoes, sexual jokes, sexual references scattered throughout conversations, and subtle pressure to comply with implied sexual demands are all in the "gray" area for many people. In contrast, pornography, extremely vulgar language, sexual touching and battery, including rape, and other forms of sexual violence seem to be more universally agreed-upon forms of harassment.²³³

The "grey" area, however, may yield grievous, and potentially disastrous, misunderstandings between men and women. In connection therewith, Ms. Childers has commented as follows:

Because of the very different implications an uninvited sexual encounter might have for a woman than for a man in th[e] larger societal context, it is understandable that a woman and a man would perceive such incidents differently. A woman who is trying to establish herself in male-dominated or nontraditional career may not regard a seemingly innocuous comment as a joke, because the content of the comment undermines the professional image she is trying to project and maintain, i.e., as an equal and a colleague in the working environment.²³⁴

C. *Cultural Differences Within the Community*

A final and, perhaps, insurmountable obstacle not addressed by the Code is both the extremely diverse cultures between the Member States themselves and the significant differences in the cultures of the EU and the United States. Cultural differences between Member States in the EU are important because these differences strongly militate against the adoption of an integrated statutory prohibition on sexual harassment at the workplace.²³⁵ Moreover, cultural differences between the United States and Europe may be a major impediment to adopting a Regulation, Directive, or European Civil Code provision even though the EU has adopted much of its sexual harassment guidelines from the United States because unlike the EU, the United States as a federation is more amenable to comprehensive federal sexual harassment law.

233. See Childers, *supra* note 89, at 866.

234. *Id.* at 869.

235. The cultural differences between the Member States suggest that many Member States will choose whether and how to implement the Code in vastly different ways, thereby generating complex conflict of laws problems.

The significant differences between America and the EU with regard to business ethics have prompted David Vogel, a professor at the Haas School of Business, University of California at Berkeley, to observe:

The "ethics gap" between the United States and the rest of the developed world remains substantial. By any available measure, the level of public, business, and academic interest in issues of business ethics in the United States far exceeds that in any other capitalist country. Nor does this gap show any signs of diminishing; while interest in the subject in Europe has increased in recent years, its visibility in America has increased even more.²³⁶

Vogel views "America's Protestant heritage" as a key element in the great interest of Americans in business ethics:

By arguing that one can and should do "God's work" by creating wealth, Protestantism raised the public's expectations of moral behavior of business managers. . . . Compared to the citizens of other capitalist nations, Americans are more likely to believe that business and morality are, and should be, related to each other, that good ethics is good business, and that business activity both can and should be consistent with high personal moral values.²³⁷

Noting that in Europe, in contrast, the moral status of capitalism traditionally has been more questionable, Vogel comments that

[t]here appears to be much more cynicism about the ethics of business in Europe and Japan. Europeans, in part due to the legacy of aristocratic and pre-capitalist values, have always tended to view the pursuit of profit and wealth as somewhat morally dubious, making them less likely to be surprised—let alone enraged—when companies and managers are discovered to have been "greedy."²³⁸

236. See David R. Francis, *US Interest in Ethics Greater than Rivals*, *Christian Science Monitor*, Jan. 15 1993, at 7. Notably, Professor Guy Horsmans disagrees with the analysis which Vogel espouses, arguing instead that although Europeans and Americans both wish to make money, Europeans are much less likely than are Americans to admit this goal. He observes, however, that notwithstanding their profit motives, Europeans appear to be more concerned with social matters than are Americans and that Europeans question the value of making money without simultaneously addressing social problems. Professor Guy Horsmans, Lecture to European Economic Community Seminar (March 24, 1994).

237. See Francis, *supra* note 236.

238. *Id.* Observe, however, that some civilians informally might disagree with Vogel's statement because of the rather common civilian belief that Europeans, and perhaps the French in particular, tend to be egalitarian when considering others, but personally will try to "beat the system." See *infra* note 240 with regard to the "follies of socialism in western Europe."

Noting also that Europeans often regard the American interest in business ethics as somewhat excessive, Vogel, nevertheless, has observed a substantial increase in business ethics in a number of European countries, such as the enactment in several European countries of laws prohibiting sexual harassment. He concludes, however, that fundamental national differences leave a gap "in the ways in which business ethics is defined, debated, and judged."²³⁹

Europeans may well be concerned at the unbridled litigation in the United States and wonder if increased protection for victims of sexual harassment in the European Union will foment more litigation. As has been observed by reporter Ambrose Evans-Pritchard in the *Sunday Telegraph*:

Unbridled litigation is eating away at the foundation of the United States. Unless it is brought under control by legal reform, it will suck the life out of the free-market system, subvert moral order, and poison all the transactions of daily life. . . . The [United States] employer . . . is potentially liable for permitting sexual harassment if one of his fork-lift drivers, say, puts up a poster of a topless woman in the locker room, or if a customer ogles one of his saleswomen. Regulations and litigiousness are a deadly cocktail for the economy. The impediments to enterprise in the United States have reached a point where they match, and possibly exceed, the follies of socialism in western Europe. In effect, America has adopted the rigidities of the EEC labour markets—job tenure, high severance pay, etc—through the backdoor of civil rights litigation.²⁴⁰

With regard to cultural norms, rather than business ethics, some have claimed that the "European norm" is that "even grandmothers commonly go topless at beaches (though not on city streets),"²⁴¹ thus, it is not surprising that the cultural gap between the United States and the EU continues to exist, at least with regard to sexual harassment. For example, although twenty years ago concerns about sexual equality in the EU were imported from America and Europe's new debate about sexual harassment also had its origin in the United States, many European men continue to think that America's concern with sexual harassment in the workplace is "oddly American."²⁴² Indeed, Coro Mira, the woman in charge of women's affairs in Spain's largest labour group, has stated that "[c]ompliments about the way a woman looks are not generally considered bad taste here. If a woman were offended by compliments, she'd have a hard time claiming harassment."²⁴³ Not surprisingly, it is in southern Europe that

239. *Id.*

240. Ambrose Evans-Pritchard, *Sunday Comment: Chipping Away the USA*, *Sunday Telegraph*, June 20, 1993, at 32.

241. See *The Last Thing Women Need*, *The Gazette* (Montreal), July 22, 1992, at B2.

242. See Riding, *supra* note 37.

243. *Id.*

the "peccadillos of politicians" are not matters of state and rarely are subjects of gossip and that sex scandals involving public figures in America result in amusement and puzzlement among EU men and women.²⁴⁴

These cultural differences have prompted legislators in some Member States to be reluctant to adopt what they view as being "the desexualization of the United States."²⁴⁵ For example, Veronique Neiertz, the French Secretary of State for Women's Rights, has commented that France's new law prohibiting sexual harassment carefully avoided "American excesses," such as casting all sexual advances into potential criminal offences.²⁴⁶ In connection therewith, *New York Times* reporter Alan Riding has observed:

Certainly in Mediterranean countries, where ordinary socializing involves far more physical contact than in the United States and northern Europe, there is a feeling that flirtation and sensuality are part of the spice of life and should not be renounced.²⁴⁷

Research also reveals the significant cultural differences between the United States and the EU with regard to sexual harassment. A recent joint study conducted by the University of St. Thomas in Minneapolis/St. Paul and the Industrial Society in London concludes that British women are more likely than are American women to complain about sexual harassment. Nevertheless, sexual harassment has received more attention in the United States than in Britain, and many more sexual harassment cases are commenced in America than in the United Kingdom.²⁴⁸ Similarly, a poll in the French magazine *Le Point* suggests that French women are less sensitive than are American women to some forms of sexual harassment. For example, in responding to questions regarding hypotheticals, twenty percent of the women surveyed said that they would not consider themselves to have been sexually harassed if they were asked to undress during a job interview. Moreover, forty-five percent of the women surveyed thought that it would not be harassment for a male manager to suggest that a female employee spend a weekend with him to discuss her request for a promotion. Forty-seven percent of the women, however, considered this hypothetical to constitute sexual harassment, while the balance of the women did not respond. Forty-five percent of the men surveyed thought this conduct would constitute sexual harassment, while fifty-one percent did not.²⁴⁹

Despite the apparent resilience of EU workers to conduct that Americans might consider to be sexual harassment, letters to the editor of the *International*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. See Mundiya, *supra* note 57, at 125.

249. See Riding, *supra* note 79.

Herald Tribune suggest that Europeans actually "lag behind" Americans with respect sexual harassment:

In the United States, sexual harassment is unacceptable. Europe lags decades behind. In fact, sexual harassment is viewed as normal; most women would rather suffer than speak out, for fear that they will not be taken seriously or will lose their jobs. The question is not what men think while they are sitting at their desks. The question is how they interact with female colleagues. If problems do occur, all women, whether executives or factory workers, need a legal, corporate, and societal framework that takes their concerns seriously.²⁵⁰

Similarly, another commentator has speculated that "[t]he argument that European women for years have been liberated without undue harassment does not stand up. No American adults are very repressed by comparison to European social views."²⁵¹

Working women in the EU, however, seem to be losing their resilience to what Americans might consider to be sexual harassment. In fact, the issue of sexual harassment in the EU has become so popular that viewers' of Channel 4's soap opera *Brookside* in England witnessed in the fall of 1993 a steady escalation in one male character's subtle and then not-so-subtle sexual harassment.²⁵² As has been observed in *The Economist*:

Sexual flirtation is second nature to the French, or so they like to believe . . . [unlike] . . . in other countries such as America, Britain and Germany. . . . But French men can be too keen on sex. Sexual harassment of women workers by their bosses is believed to be widespread. It has now been outlawed.²⁵³

Similarly, *New York Times* reporter Alan Riding has commented:

For decades, the gap between French and American cultures could be measured through sex—the French made saucy movies, kissed in public and boasted of extramarital affairs, while Americans treated sex as something between a secret ritual and an embarrassing necessity. That, at least, was how many of the French saw things. . . .

Now, however, it seems that not all is well behind France's facade of sexual freedom. Some French men may think they are the natural heirs to "le droit de cuissage"—the squire's right to spend the wedding night with the new brides of his estate—but more and more women think otherwise.²⁵⁴

250. See *Letters to the Editor*, Int'l Herald Trib., June 10, 1993.

251. See *Brought to Bare*, Vancouver Sun, July 27, 1992, at A11.

252. See Hunter, *supra* note 212.

253. See *Frenchmen, Beware*, the Economist, July 6, 1991.

254. Riding, *supra* note 79.

Likewise, Ms. Purificacion Gutierrez Lopez, the head of the Women's Institute in Spain, has commented that the problem of sexual harassment has always existed, "[b]ut the fact that it is now recognized and talked about means we have started dealing with it. So far, though, Spanish women are only just beginning to understand that sexual harassment is an offense."²⁵⁵ Similarly, it appears that women in Italy are tired of "gratuitous" sexual comments. For example, Ms. Francesca Tronco, an English teacher in Rome, has commented that "[i]n this country, it's normal for men to say things to you, but that doesn't justify it. It doesn't happen in other countries. Why should it happen here?"²⁵⁶ Not surprisingly, Italy's social attitudes toward sexual harassment in the workplace have lagged "far behind" its good, but poorly enforced, laws.²⁵⁷

Differences in culture thus are apparent in how Americans and Europeans view sexual harassment, although *New York Times* reporter Alan Riding has observed that the cultural gap may be lessening:

For all their sniggering at American hang-ups over sex, Europeans are following the United States' example of clamping down on sexual harassment in the workplace, drawing a line for the first time between old-fashioned flirting and outright abuse.²⁵⁸

The increasing awareness of sexual harassment in the EU may lead toward a cultural shift that acknowledges the serious nature of harassment, but men and women in the EU are only now learning about sexual harassment and thus some progress must be made before a meaningful and workable consensus is reached on the subject.

X. CONCLUSION

Sexual harassment at the workplace in the EU is a pervasive and serious problem adversely affecting men, women, and employers. In reaction thereto, the EU has exhibited commendable courage in attempting to confront sexual harassment through the November 1991 Recommendation on sexual harassment and through the Code of Practice. Nevertheless, the EU's actions are problematic in that they lack a "procedural morality" that would make them meaningful and workable to men, women, and employers. Accordingly, although the Recommendation is not binding upon the Member States and exhibits difficulties with regard to procedural morality and cultural differences, as a practical matter the Recommendation, rather than a Regulation, a Directive, or a European Civil Code provision, is the best solution to a problem that currently, and indeed

255. Riding, *supra* note 37.

256. *Id.*

257. See Doris Anderson, *Former "Land of Mother" Surprisingly Shows Europe's Lowest Birthrate*, *The Gazette* (Montreal), Dec. 29, 1991, at D5.

258. See Riding, *supra* note 37.

inherently, is not susceptible to uniform and integrated solutions.²⁵⁹ In summarizing the contending views on whether law originates in folkways or whether it shapes society, Lon Fuller discussed a process that aptly describes this difficulty:

We may picture Law and Society as the two blades of a pair of scissors. If we watch only one blade we may conclude it does all the cutting. Savigny kept his eye on the Society blade and came virtually to deny the existence of the Law blade. With him even the most technical lawyer's law was a kind of glorified folk-way. Austin kept his eye on the Law blade and found little occasion in a book of over a thousand pages to discuss the mere "positive morality" which social norms represent. Blackstone shifted his eye from one blade to the other and gave us the confused account in which, on the one hand, he bases the common law on custom, and, on the other, informs us that the authoritative statement of this custom is to be found only in court decisions. As to add to the confusion, he then lays down rules for determining when a Custom should be recognized by the law. We avoid all these difficulties by the simple expedient of recognizing that both blades cut, and that neither can cut without the other.²⁶⁰

259. Indeed, one wonders whether law is even capable of ultimately overcoming the "original sin" of rebellion against God and yielding to temptation, as exhibited in the Garden of Eden in which Adam and Eve rebelled against God's only rule, namely, "Of every tree of the garden thou mayest freely eat: But of the tree of the knowledge of good and evil, thou shall not eat of it: for in the day that thou eatest thereof thou shalt surely die." See *Genesis* 2:16-17 (King James). See also *Romans* 5:12-21 (King James).

260. Lon Fuller, *American Legal Realism*, 82 U. Pa. L. Rev. 429, 452 (1934). See also Christie & Martin, *supra* note 3, at 215 n.87.