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Law, Culture, and Harassment

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INTRODUCTION

The phrase sexual harassment was made in America, by women.¹ It appeared simultaneously in theoretical writing and the popular media. Before the phrase emerged, *Redbook* magazine published a questionnaire asking women about sexual intimidation at work; nine thousand women responded, beginning a nationwide discussion that continues to deepen and spread.² Soon Catharine MacKinnon, in her pathbreaking book, connected sexual harassment with sex discrimination law.³ This change in consciousness was rapid. Within a few years, a phrase emerged to describe that which once "did not socially 'exist,' had no shape, no cognitive coherence."⁴

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¹ Early instances of the term sexual harassment appear in the writings of the Working Women United Institute, the Alliance Against Sexual Coercion, and CARROLL BRODSKY, *THE HARASSED WORKER* (1976). See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 27-28 & n.13 (1979).

² The questionnaire was published in the January 1976 issue of *Redbook*. See Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 42 (1990) (citations omitted); see also Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment: Some See It . . . Some Won't*, HARV. BUS. REV., Mar.-Apr. 1981, at 76 (joint survey by *Harvard Business Review* and *Redbook*).

³ See MACKINNON, *supra* note 1.

⁴ CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 106 (1987).

Slowly this American idea crossed the Atlantic. Arriving in Europe, it found expatriate companionship in the law books. From the place where political questions usually become legal ones,⁵ European nations and the European Community⁶ have over the decades acquired an array of legal change: labor statutes only lightly rewritten,⁷ bankruptcy law,⁸ the principle that race and sex discrimination ought to be actionable,⁹ the concept of products liability,¹⁰ franchising law,¹¹ and other innovations.¹² The journey of law from west to east is a famous one. Equally familiar is the debate within comparative law of how borrowing takes place generally, and whether it can work.¹³

⁵ "Il n'est presque pas de question politique, aux Etats Unis, qui ne se résolve tôt ou tard en question judiciaire." 2 ALEXIS DE TOCQUEVILLE, *DE LA DÉMOCRATIE EN AMÉRIQUE* 181 (17th ed. 1888). Tocqueville used "America" and "the United States" interchangeably; in this Article I try to stick to the latter, but I have been unable to avoid "American" as a modifier or shorthand for "person located in the United States."

⁶ This Article focuses on sexual harassment and workplace discrimination in the law of the European Community and some of the laws of its member states; it compares these laws and related practices to the American experience. Because the newer term "European Union" has not yet achieved wide usage, and for the sake of consistency with cited materials, I have stuck with the traditional "European Community." The "European Community" is occasionally abbreviated "EC," in accord with the current convention; for historical reasons, however, the major founding document of the European Community is abbreviated "EEC Treaty." Notes 14, 19, and 21 explain various decisions made to keep this focus limited. Notes 50, 52, 54, and 59, and the text accompanying note 144 provide a brief glossary of some European Community jargon for the non-expert reader.

⁷ See Lorraine M. McDonough, Comment, *The Transferability of Labor Law: Can an American Transplant Take Root in British Soil?*, 13 COMP. LAB. L.J. 504 (1992).

⁸ See Maximilian Schiessl, *On the Road to a New German Reorganization Law—A Comparative Analysis of the Draft Proposed by the Insolvenzrechtskommission and Chapter 11 of the Bankruptcy Code*, 62 AM. BANKR. L.J. 233, 248 (1988).

⁹ See Alan Riding, *Europeans Discover Sexual Harassment, but They Don't Complain Much*, INT'L HERALD TRIB., Nov. 7, 1992, at 1.

¹⁰ See Anita Bernstein, *L'Harmonie Dissonante: Strict Products Liability Attempted in the European Community*, 31 VA. J. INT'L L. 673 (1991).

¹¹ See CHRISTIAN JOERGES, *FRANCHISING AND THE LAW: THEORETICAL AND COMPARATIVE APPROACHES IN EUROPE AND THE UNITED STATES* (1991).

¹² On the influence of American law generally, see Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991).

¹³ On borrowing, Montesquieu was pessimistic: "Les lois politiques et civiles de chaque nation . . . doivent etre tellement propres au peuple pour lequel elles sont faites, que c'est un très-grand hazard si celles d'une nation peuvent convenir a une autre." CHARLES SECONDAT DE MONTESQUIEU, *DE L'ESPRIT DES LOIS* 81 (Paris, Garnier Frères 1922) (1748). Compare Alan Watson, *Legal Transplants and Law Reform*, 92 LAW Q. REV. 79 (1976) and Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313 (1978) (arguing that borrowing can take place satisfactorily with no knowledge of the context of the foreign law, and listing eight

In this Article, I examine workplace sexual harassment¹⁴ as an instance of comparative law that has received little attention in the literature—the effect of borrowing on the donor. Comparative law typically looks at one vector: a nation gives and another accepts. As I have done previously, I propose that American law be reexamined after Europe has borrowed it.¹⁵ The enterprise seems necessary for several reasons. “The American law of sexual harassment,” whatever that entity may be, moves and changes constantly. This change is taking place now, fast.¹⁶ In a shrunken world, foreign influences easily join domestic ones. Thus the American law of sexual harassment cannot be understood without identifying the way that law has been seen and received outside of the United States.

Moreover, the receipt of sexual harassment law by the European Community and the member states is a rare example of borrowing between two entities that can be described approximately as coequals, even though one is a unified superpower and the other a supragovernment with equal power only when viewed as the sum of many states. The history of comparative law reform tells of conqueror and conquered,¹⁷ influential and influenced.¹⁸ Accord-

“factors” that influence reception of the foreign law) with O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) (arguing that the social and political context of donor law must be understood before successful borrowing can occur). See also McDonough, *supra* note 7 (applying Kahn-Freund and Watson approaches to the borrowing of labor law).

¹⁴ I limit my scope to the workplace, although sexual harassment exists in schools, housing, family and quasi-family relationships, prisons, and almost any setting where people with unequal power coexist. This narrower focus is suitable for comparative enquiry. Workplace conflicts predominate in regulations and case law in all countries that prohibit sexual harassment. Many countries’ laws do not even acknowledge the existence of sexual harassment outside the workplace. Hereinafter, I use “sexual harassment” to mean “workplace sexual harassment” except where a broader meaning is clear from the text or context.

¹⁵ See Anita Bernstein, *Looking at Europe for the Difference Between Strict and Fault-Based Liability*, 14 J. PROD. LIAB. 207 (1992).

¹⁶ Changes on the horizon that I see as I write may be either status quo or stale utopianism at the time of publication. Nonetheless, three examples present themselves. Some members of Congress appear seriously willing to make themselves legally accountable for claims of sexual harassment. See Timothy Egan, *Accusations Against Senator May Pose Test for Congress*, N.Y. TIMES, Nov. 23, 1992, at A10. A new tort of sexual harassment is taking shape in scholarly writing and may gain acceptance in the courts. See *infra* part I.B.3.b. Finally, legislation has been introduced in the California state assembly to outlaw the sexual harassment of women in public streets. See *A Move to Protect Women from ‘Street Harassment,’* N.Y. TIMES, July 2, 1993, at D9.

¹⁷ See, e.g., Sally F. Moore, *Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running “Their Own” Native Courts*, 26 LAW & SOC’Y REV. 11

ingly, it appears to have been naive to speak of comparison (even the metaphor of borrowing seems a euphemism) and thereby deny the pressure of power. By the 1980s, when Europe began to look to the United States to create its law of sexual harassment, donor and borrower had reached an approximate equality of importance and strength.¹⁹ Thus comparative sexual harassment law represents a different kind of comparative law, in a New World Order as it were, and it questions assumptions about reform by emulation. The genre of comparative law is expanded.

Comparing European and American sexual harassment law expands another genre, legal feminism,²⁰ by contributing a specific instance that can be studied closely.²¹ The data found here are comparable to other factual markers that anchor feminist theory—data such as the percentage of men's earnings that women earn and the availability of abortion and contraception. Within the important subject of international and comparative feminist scholarship,²² comparative sexual harassment law adds specificity. Sexual

(1992) (discussing the imposition of concepts such as the Rule of Law).

¹⁸ See *supra* text accompanying notes 5-12.

¹⁹ For this reason I limit my comparison to the European Community. For a wider comparative survey of legal approaches to sexual harassment covering Japan, Canada, and non-EC European countries as well as the Community member nations, see International Labour Office, *Combating Sexual Harassment at Work*, 11 CONDITIONS WORK DIG. 65-175 (1992).

²⁰ Because women experience sexual harassment much more often than men, the subject of sexual harassment fits within the genre of legal feminism; and, for the same reason, I observe the academic convention of referring to recipients of harassment with feminine pronouns.

²¹ I have chosen to focus on sexual harassment rather than the larger subject of sex discrimination in the workplace for two reasons. First, comparative sex discrimination law is a topic of encyclopedic complexity, too large for an article. See *infra* notes 135, 138-42 and accompanying text (offering a partial list of EC directives and proposals that pertain to women's employment). Perhaps more important, workplace sexual harassment is not merely a subset of employment discrimination law, and it warrants its own study. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 357-66 (1992) (describing sexual harassment as an experience that takes place between individuals); Ellen F. Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333 (1990) (repudiating group-based approaches to sexual harassment); see also *infra* part III.A (proposing that sexual harassment be regarded as a detrimental workplace condition).

²² For a sample, see SUSAN BASSNETT, *FEMINIST EXPERIENCES: THE WOMEN'S MOVEMENT IN FOUR CULTURES* (1986); HESTER EISENSTEIN, *GENDER SHOCK: PRACTICING FEMINISM ON TWO CONTINENTS* (1991); JOYCE GELB, *FEMINISM AND POLITICS: A COMPARATIVE PERSPECTIVE* (1989); YAYORI MATSUI, *WOMEN'S ASIA* (1989); GILLIAN ROSE, *FEMINISM AND GEOGRAPHY* (1993); *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* (Chandra Talpade et al. eds., 1991).

harassment law in all countries is a written law (although it extends, of course, beyond what can be read in the codes and rules). It includes regulation, party-initiated dispute resolution, exhortation, punishment, and an array of legal, equitable, and novel remedies. Because of its breadth—a breadth that gets wider under comparative study—sexual harassment law connects feminist theory with a range of topics. Race is a prominent example.²³ Connections such as these enhance feminist theory.

As I elaborate below, however, the enhancement of feminist theory by these connections is offset by a related concern. Attention to the European experience suggests that feminist reformers can increase the number of influenced listeners by showing how a problem they have identified extends beyond the feminist agenda. In a place where feminists have less influence than they do in the United States, this expansion was necessary. Applied in the United States, the expansion could win over new supporters and create a more powerful political alliance. Feminists, however, risk the loss of some control over the reform effort. I conclude that the benefits of expansion outweigh the drawbacks, that widening the understandings of sexual harassment would result in overall improvement of the law.

A word on improvement of the law. One comparativist assumption is that comparing begets improving. Here I wish to refine that assumption, and again sexual harassment becomes a challenging topic for comparative law. At least at present, and perhaps indefinitely, American and European attitudes toward sexual harassment are different. An observer cannot look with equal favor on both sets of laws because each reflects contrary value choices about confrontation, power, the merits of informal or extralegal dispute resolution, and the roles of men and women. I

²³ In European and American workplaces, women of color are more vulnerable than white women to sexual harassment. See MACKINNON, *supra* note 1, at 53; MICHAEL RUBENSTEIN & INEKE M. DE VRIES, *HOW TO COMBAT SEXUAL HARASSMENT: A GUIDE IMPLEMENTING THE EUROPEAN COMMISSION CODE OF PRACTICE 11* (1993). In scholarship many writers have described the challenge of responding to the problem of sexual harassment without neglecting related questions of race. See, e.g., CATHARINE MACKINNON, *ONLY WORDS* 63-64 (1993) (discussing themes common to racial and sexual harassment); *RACE-ING JUSTICE, EN-GENDERING POWER* (Toni Morrison ed., 1992) (collection of essays assembled after Hill/Thomas hearings); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 592 (1990) (arguing that most scholarship about sexual harassment excludes the experience of nonwhite women); see also *infra* part III.B.1.b.

do not, therefore, envision improvement in the sense of a middle ground between two traditions.

Improvement, should it come, emerges rather from the study of American and European contributions to the subject, which I detail in the two succeeding parts of this Article. In Part I ("From West to East"), I describe sexual harassment—both the concept and the domain of legal regulation—as an American initiative, showing where American contributions lie, and the degree to which they have been received in Europe. The European contribution, I argue in Part II ("From East to West"), consists of skepticism. Some experts question the authority of the Community to make law in this area; Europeans are dubious about party-initiated law as a cure for society's infirmities; and in Europe little faith appears to exist in the ability of courts to discern whether an accused harasser was at fault.

Comparative sexual harassment law, as we will see, does not fit easily in scholarly paradigms of improvement, cultural obstacles to borrowing, adaptation, or other familiar experiences, although it contains elements of all of these. Europe neither copied nor rejected the American offering. It responded to American influence receptively, but also with doubt. These European contributions, as I describe them, appear slight at first glance. They are not comprehensive and ambitious, like the American offerings; nor do they purport to refute the substance of American initiative. But this doubt is more than mere rejection: it has vital, forward-moving properties. European skepticism can be melded with American initiative so that American (and also European) reformers can better achieve the sexual harassment law they want.

Questions of European Community jurisdiction comprise the best-documented example of European skepticism. When feminists and other reformers began to create Community-wide law to help prevent and remedy sexual harassment for the benefit of hundreds of millions of Europeans, they met with a plausible and cogent response: the European Community exists to promote economic union, not a cultural or ideological agenda. In reaction to doubt about jurisdiction, partisans of sexual harassment legislation came up with pragmatic tactics and conceptual advances that moved sexual harassment into the legal domain of the Community.²⁴

²⁴ The history of American law reform also includes examples of this expansive approach. See *infra* text accompanying notes 330-34 (chronicling various efforts of American reformers to build linkages with other causes). However, the approach has been underutilized in the area of sexual harassment.

A second example of skepticism concerns litigation as a device for cultural and social reform. Because of their doubts about litigation—a skepticism that American feminist commentators often share—Europeans have found alternatives that give harassed persons more methods of recourse. Demurring on the question of fault, Europeans may appear either liberated from American zeal or deplorably lax in the presence of wrongdoing, depending on one's point of view. Regardless of the moral truth of the European posture, however, American fixation on fault has not always worked to the advantage of victims of sexual harassment.

Having identified some differences between the United States and the European Community on the question of sexual harassment, I turn next to applications. Part III of the Article explores the uses of comparative study: how Americans interested in the problem of sexual harassment can combine their initiative with European skepticism. Their challenge consists of extracting the best elements of a system that is hostile to civil litigation as a device for change, while retaining the benefits of American-style liability—that is, they must borrow eclectically. Some guidance for this comparison is available. While Americans see the problem of sexual harassment as either wrongful private conduct between two people or as sex discrimination, Europeans have shaped it as a problem of workers, and sited the problem in the workplace. In the United States, sexual harassment is a legal wrong; in Europe—with the exception of extreme situations that amount to blackmail or physical violence—sexual harassment is atmosphere, conditions, an obstruction, or trouble, with very little blame from the law. Not for a moment do I argue that this European view amounts to a superior approach. Indeed I condemn the occasional tendency of Americans to defer to Europeans in the belief that they are exceptionally advanced in matters of sex.²⁵ Given the existence of real differences between the two places, however, Americans ought to learn from the European contrast. Thus, in Part III, I modify the “atmosphere” perspective attributable to Europe and argue that sexual harassment could profitably be reconceived as detrimental workplace conditions. Accordingly, a role for regulation and other extrajudicial strategies becomes evident. Once seen as detrimental workplace conditions, sexual harassment could still be remedied with litigation.

²⁵ See *infra* text accompanying notes 348-54.

The additional perspective should enrich rather than supplant current American approaches.

Finally, I counsel caution. Part III and the Conclusion discuss various detriments as well as benefits of a comparative-law synthesis. But the endeavor offers promise. Using sexual harassment heuristically, I am writing in support of a new kind of comparative law that seeks not unified improvement but an enhanced pluralism.²⁶

I. FROM WEST TO EAST: AMERICAN INITIATIVE

Americans first named the problem of sexual harassment. In translation, this label has become known around the world. Almost simultaneously, Americans devised or refined key legal concepts to combat the problem: hostile-environment harassment, sexual harassment as sex discrimination, and sexual harassment as tortious conduct.²⁷ These innovations have stimulated change in Europe: all three concepts have achieved partial acceptance there, as I detail in this Part.

A. Naming and Recognizing Sexual Harassment

Linguistic advance was necessary to frame this problem.²⁸ The world followed an American lead: all foreign-language versions of this phrase are translations of American English—or, like the Japanese “*seku hara*,”²⁹ transliterations. The translation of “harassment” is often imprecise, perhaps because of the strongly American connotations of freedom and incursion that this word contains.³⁰

²⁶ An extensive tradition favors pluralism, in contrast to a unitary state-centered model, as an approach to legal ordering. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 4-6 (1991); PHILIPPE NONET & PHILLIP SELZNIK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 73-113 (1978) (discussing the need for a “responsive law” that adjusts to and takes into account diverse forces); JOSEPH V. REES, *REFORMING THE WORKPLACE: A STUDY OF SELF-REGULATION IN OCCUPATIONAL SAFETY* 7-8 (1988) (advocating scholarly tradition of legal pluralism over state-centered legal positivism). Joseph Rees traces this tradition to Grotius, and includes within it Lon Fuller and other theorists antagonistic to legal positivism. See REES, *supra*, at 7 & n.16.

²⁷ See *infra* part I.B.

²⁸ But see EPSTEIN, *supra* note 21, at 26-27 (arguing that common-law terminology covers the same ground).

²⁹ See Anne B. Fisher, *Japanese Working Women Strike Back*, *FORTUNE*, May 31, 1993, at 22.

³⁰ Cynthia Grant Bowman argues that one form of sexual harassment, street harassment, is fundamentally about freedom, in the Lockean, liberal-democratic sense

The closest equivalent of "harassment" in another language is the French *harcèlement*,³¹ the German *belästigung*,³² Spanish *acoso*,³³ Dutch *intimidatie*,³⁴ and Italian *molestia*,³⁵ for examples, are all not quite the same as harassment.

Immediately after the phrase was coined in America, its legal development began. In one landmark case, a federal court held that propositions followed by retaliation against a woman employee constituted sex discrimination.³⁶ In 1980, while the concept of sexual harassment was only beginning to be known in the United States and was unacknowledged elsewhere, the United States Equal Employment Opportunity Commission promulgated rules that prohibited sexual harassment in the workplace.³⁷ These rules included an ambitious definition of sexual harassment that included both coercion or abuse of power by a supervisor (generally known as "quid pro quo" harassment) and conduct that creates a hostile working environment.³⁸

In the ensuing years, American courts paid great attention to the task of naming and recognizing sexual harassment. Commentators

that informed the creation of the United States. See Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 520 (1993).

³¹ "[H]arassing." COLLINS-ROBERT FRENCH-ENGLISH ENGLISH-FRENCH DICTIONARY 207 (2d ed. 1993).

³² "[B]urden, annoyance, nuisance, bother." CASSELL'S ENGLISH AND GERMAN DICTIONARY 67 (1965).

³³ "[H]ounding, harassing; relentless questioning." COLLINS SPANISH-ENGLISH ENGLISH-SPANISH DICTIONARY 12 (3d ed. 1993).

³⁴ "Intimidation." CASSELL'S ENGLISH-DUTCH DUTCH-ENGLISH DICTIONARY 260 (1967).

³⁵ "[A]nnoyance, worry, trouble, bother." COLLINS-SANSONI ITALIAN DICTIONARY 1826 (1988).

³⁶ See *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

³⁷ See Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,677 (1980) (codified at 29 C.F.R. § 1604.11(a)-(g) (1993)) [hereinafter Guidelines].

³⁸ "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1993).

MacKinnon's book, published a year earlier, identified "quid pro quo" and "condition of work" as the two types of sexual harassment that occur in the workplace. MACKINNON, *supra* note 1, at 32, 40.

have criticized the federal cases for their various shortcomings;³⁹ but especially when compared to the law of the rest of the world, American case law reveals considerable progress over a short span of time. The Supreme Court agreed with the Equal Employment Opportunity Commission that sexual harassment was actionable under Title VII of the 1964 Civil Rights Act.⁴⁰ Courts agreed with the EEOC that corporate employers could be vicariously liable for the harassment of subordinates by supervisors.⁴¹ Appellate courts, even before the 1980 Guidelines were issued, overturned decisions that had refused to apply Title VII to claims of harassment.⁴² Other courts held that complainants had a claim for sexual harassment against their corporate employers even where the harassment was indirect, that is, where the employer required female employees to dress provocatively, so that they were subject to sexual harassment from customers or passersby;⁴³ and where a plaintiff alleged that she was denied promotions and pay increases because she refused to participate in the custom of quasi-consensual unions between female subordinates and male supervisors that prevailed in her office.⁴⁴

In 1991, other landmarks appeared. Amendments to Title VII authorized an expansion of the damages that plaintiffs could receive

³⁹ See, e.g., MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 764-67 (1994) (summarizing commentary on judicial attempts to create an objective approach to hostile environment claims); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1199-202 (1989) (detailing how courts have increased plaintiffs' burdens and refused to recognize certain harms); Pollack, *supra* note 2, at 55-69 (criticizing sexual harassment cases and discussing judicial doubt that sexual harassment is a serious evil).

⁴⁰ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986).

⁴¹ See *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1347 (10th Cir. 1990); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984).

⁴² See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (construing Title VII as "not intended" to provide remedy for sexually motivated harassment), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (finding hostile-environment harassment a mere "personal proclivity, peculiarity, or mannerism"), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977); *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974) (finding claim of quid pro quo harassment "not encompassed" by Title VII), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

⁴³ See *EEOC v. Newtown Inn Assocs.*, 647 F. Supp. 957, 958 (E.D. Va. 1986); *Marentette v. Michigan Host, Inc.*, 506 F. Supp. 909, 911-12 (E.D. Mich. 1980).

⁴⁴ See *Broderick v. Ruder*, 685 F. Supp. 1269, 1278-79 (D.D.C. 1988). This case was settled on terms that appear unusually favorable to the plaintiff. See *infra* note 250.

in sex discrimination cases.⁴⁵ The Ninth Circuit issued the first detailed holding that claims of sexual harassment brought under Title VII were to be evaluated in light of what a reasonable woman would think of the conduct or conditions.⁴⁶ Another court issued an opinion detailing the harm of sexual harassment, using summaries of expert psychological testimony.⁴⁷ A picture of inexorable progress is, of course, not warranted. For instance, one government study showed that sexual harassment of working women did not decrease in the 1980s.⁴⁸ However, public attention to the subject grew dramatically.

While many of these developments were taking place in the United States, sexual harassment remained a foreign notion in Europe. In 1983, according to Michael Rubenstein, an important European contributor to the field, the idea that workplace sexual harassment could form the basis for a sex discrimination claim was in Europe "merely an academic hypothesis."⁴⁹ In 1986, Rubenstein undertook a survey of European laws on a country-by-country basis at the behest of the Commission of the European Communities (the "Commission").⁵⁰ He found virtually no case law and very little

⁴⁵ See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(b)(1)-(3), 105 Stat. 1071, 1073 (codified at 42 U.S.C. § 2000e-5(k) (1988 & Supp. IV 1992)) (expanding recovery to include punitive damages and compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses").

⁴⁶ See *Ellison v. Brady*, 924 F.2d 872, 878-81 (9th Cir. 1991). Other circuits had adopted a reasonable woman standard before *Ellison*. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987). Because of its full treatment of this question, however, *Ellison* has become a landmark.

⁴⁷ See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502-07 (M.D. Fla. 1991).

⁴⁸ See U.S. MERIT SYS. PROTECTION BD., *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 2* (1988) [hereinafter *UPDATE*] (comparing 1980 and 1987 percentages of women who reported that they had been harassed); see also Louise F. Fitzgerald, *Science vs. Myth: The Failure of Reason in the Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1399, 1400-01 (1992) (summarizing 1980s data on the prevalence of sexual harassment).

⁴⁹ Michael Rubenstein, *Sexual Harassment: European Commission Recommendation and Code of Practice*, 21 INDUS. L.J. 70, 70 (1992) [hereinafter *Rubenstein, Recommendation*] (citing Michael Rubenstein, *The Law of Sexual Harassment at Work*, 12 INDUS. L.J. 1 (1983)). In Canada, however, sexual harassment was equated with sex discrimination at about the same time as in the United States, in a 1980 case known as *Cherie Bell*. *Bell v. Ladas & The Flaming Steer Steak House & Tavern, Inc.* 1 C.H.R.R. D/155 (Ont. Bd. of Inquiry 1980). See ARJUN P. AGGARWAL, *SEXUAL HARASSMENT IN THE WORKPLACE* 23-24 (1987) (discussing *Cherie Bell* and its holding that sexual harassment constitutes sex discrimination).

⁵⁰ The Commission is the administrative sector of the European Community. See

empirical research, trade union engagement, or other evidence of initiative relating to sexual harassment.⁵¹ Although sex discrimination in employment had been outlawed by a fully-implemented 1976 directive,⁵² no member state had used its implementing statute as a basis for combating sexual harassment.⁵³

As Europe began to face this issue on a Community level in the 1980s, it adopted a series of measures, lagging behind concurrent developments in America. A 1984 Council Resolution alluded to sexual harassment as a major problem affecting the dignity and rights of women,⁵⁴ several years after the United States' EEOC had made the same acknowledgment, and promulgated rules to fight the problem. The next important step in the Community, after the Commission received and published the Rubenstein report,⁵⁵ was the 1990 Council Resolution on the Protection of the Dignity of Women and Men at Work.⁵⁶ Borrowing the American-derived pair of concepts, *quid pro quo* and hostile working environment, this resolution marked the first time a Community document had provided any description of sexual harassment.⁵⁷

The Council resolution called on the Commission to draw up a code on workplace sexual harassment during 1991.⁵⁸ A code was duly prepared, and the Commission decided to attach it to an official recommendation, to enhance its status.⁵⁹ Called the Code

TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 155. Rubenstein recalls that Community officials did not use the term sexual harassment in their request. Telephone Interview with Michael Rubenstein, Consultant to the European Commission (Dec. 1, 1992).

⁵¹ See MICHAEL RUBENSTEIN, *THE DIGNITY OF WOMEN AT WORK: A REPORT ON THE PROBLEM OF SEXUAL HARASSMENT IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES* app., at 107-64 (1988).

⁵² See Council Directive 76/207, 1976 O.J. (L 39) 40 [hereinafter *Equal Treatment Directive*] (decreeing "the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions"). A directive is a Community law that announces an objective to be achieved within a stated period; the member states must adjust their own laws, usually with implementing statutes, to be consistent with this objective. See EEC TREATY art. 189.

⁵³ See RUBENSTEIN, *supra* note 51, at 25.

⁵⁴ See Council Recommendation on the Promotion of Positive Action for Women, 1984 O.J. (L 331) 34. The Council is the legislative body in the Community with the broadest lawmaking power. The other major legislature, the Assembly or Parliament, has a narrower role. See EEC TREATY arts. 137-53 (describing the powers of the Parliament and Council respectively).

⁵⁵ See RUBENSTEIN, *supra* note 51.

⁵⁶ 1990 O.J. (C 157) 3 [hereinafter 1990 Resolution].

⁵⁷ See Rubenstein, *Recommendation*, *supra* note 49, at 71. But as Rubenstein points out, this resolution never uses the term sexual harassment. See *id.*

⁵⁸ See 1990 Resolution, *supra* note 56, at 4.

⁵⁹ See Commission Recommendation of 27 November 1991 on the Protection of

of Practice, this annex set forth guidance on sexual harassment—what it means, what steps should be taken to prevent it, and how remedies should be provided—aimed at employers, employees, and trade unions.⁶⁰ An official commentary on the Code of Practice, released in June 1993, contains examples of sexual harassment and a list of relevant initiatives in member states.⁶¹

Although the Code of Practice offers great potential to unify and advance European Community law, it also demonstrates the ways in which EC law remains unequal to that of the United States. In most EC countries, sexual harassment cannot be the basis for criminal prosecution or private civil actions for damages.⁶² Neither the Community-wide law making sex discrimination illegal nor the Code of Practice contains any mention of sanctions. The idea that sexual harassment constitutes a legal wrong is not widely shared in Europe.⁶³ In sum, naming and recognizing sexual harassment must be credited to Americans, who have given the world unequalled leadership in this area.

B. *The Formation of Legal Concepts*

1. Hostile-Environment Harassment

Although Americans coined the phrases “quid pro quo harassment” and “hostile-environment harassment,” both phenomena began in the Old World. Literary works such as *Measure for Measure*, *Tosca*, *Tess of the D'Urbervilles*, *The Way We Live Now*, and *Candide*, among many others, demonstrate European familiarity with sexual

the Dignity of Women and Men at Work, 1992 O.J. (L 49) 1 [hereinafter Recommendation and Code]; see also Rubenstein, *Recommendation*, *supra* note 49, at 71 (noting enhancement of status). A Commission recommendation does not bind member states or their citizens. See EEC TREATY art. 189. National courts within the EC, however, are obliged to take recommendations into account when deciding disputes submitted to them. See Case 322/88, *Grimaldi v. Fonds des Maladies Professionnelles*, 1989 E.C.R. 4407, 4421 (discussing the legal effect of Commission recommendations).

⁶⁰ For a more complete summary of the Code, see *infra* text accompanying notes 258, 266-84.

⁶¹ See RUBENSTEIN & DE VRIES, *supra* note 23, at 17-32.

⁶² Sexual harassment, narrowly defined, is a crime in France and Spain. See Jamie Dettmer & Susan Ellicott, *Hearings Spark Debate on Meaning of Harassment*, THE TIMES, Oct. 15, 1991, at 11. For a discussion of the French statute, see *infra* note 127. Sexual harassment has been the basis of civil litigation in EC countries, notably Britain, Ireland, and Denmark. See *infra* text accompanying notes 83-88.

⁶³ See Riding, *supra* note 9, at 1, 7.

blackmail and coercion.⁶⁴ Hostile-environment harassment is also traceable to Europe; the historian Lin Farley connects it to the English industrial revolution. According to Farley, child-labor laws (which created a child care problem), combined with competition among factory workers for employment, led men to believe that women ought to be kept out of the workplace unless they were needed for work that men did not want.⁶⁵ Protective legislation, the rise of trade unions, disquisitions on the frail biology of women, and hostile-environment sexual harassment were all the direct results of this belief.⁶⁶ In this light, hostile-environment harassment is visible as a longstanding phenomenon with a relatively new American name.

Hostile-environment theory was introduced to American case law in a context distinct from sexual harassment. It originated in a challenge to the practice of segregating patients in an optometrist's office on the basis of their national origin and ethnicity.⁶⁷ The plaintiff, a Spanish-surnamed worker in the office, claimed that this practice was offensive and a violation of Title VII. The Fifth Circuit agreed, condemning work environments that are "heavily charged with discrimination," even where a challenged practice is not aimed directly at the employee.⁶⁸ Sexual harassment claims based on this theory began to be brought in the late 1970s, with the first successes occurring in 1980 and 1981, around the time of the EEOC Guidelines.⁶⁹ Hostile-environment sexual harassment received recognition by the Supreme Court in 1986.⁷⁰

⁶⁴ See THOMAS HARDY, *TESS OF THE D'URBERVILLES* 377, 390 (Bantam Books 1984) (1891); WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 4; *TOSCA* act 2 (Luigi Illica & Giuseppe Giacosa libretto, first performed 1900); 2 ANTHONY TROLLOPE, *THE WAY WE LIVE NOW* 197-98 (Mod. Lib. 1984) (1876); VOLTAIRE, *CANDIDE* 14-16, 57 (Robert M. Adams trans., 2d ed., 1991) (1759); see also Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction," 93 COLUM. L. REV. 374, 375-79 (1993) (discussing the theme of sexual coercion in nineteenth-century novels and opera libretti).

⁶⁵ See LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 29-30 (1978).

⁶⁶ See *id.* at 29-40.

⁶⁷ See *Rogers v. EEOC*, 454 F.2d 234, 237 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

⁶⁸ *Id.* at 239.

⁶⁹ See *Brown v. City of Guthrie*, 22 Fair Empl. Prac. Cas. (BNA) 1627, 1631 (W.D. Okla. 1980); see also *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981) (first appellate court opinion).

⁷⁰ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-68 (1986).

As American law defines the problem, this type of sexual harassment consists of unwelcome verbal or physical conduct of a sexual nature that has the purpose or effect of creating a hostile working environment.⁷¹ The definition recognizes several characteristics of the sexual references that occur at work. First, they can be unwelcome. Second, sexual references can cause harm even when harm is not the offender's purpose, as in quid pro quo harassment. Third, this conduct, "unreasonably interfering with an individual's work performance,"⁷² can ruin what would otherwise be a tolerable job. According to reformers, this simple American lesson needs to be learned in Europe. European experts allude to a common belief that any attempt to prevent or remedy hostile-environment harassment would import American puritanism and fear of sex into the continent,⁷³ creating drabness in the place where the slogan *vive la différence* was born. Flirtation and sensuality are part of the spice of life, it is said, and concern about hostile-environment harassment threatens to make life bland.⁷⁴

European working women, however, report in surveys that the EEOC Guidelines allude to real problems. When questioned, they refuse to divide sexual references at work into either blackmail or harmless, spice-of-life titillation.⁷⁵ The problem they live with is seldom the melodrama or literary tragedy of quid pro quo harassment but the hurt of a workplace in which women are treated contemptuously because they are women.⁷⁶

⁷¹ See Guidelines, *supra* note 37, § 1604.11(a).

⁷² *Id.*

⁷³ Telephone Interview with Ineke M. de Vries, Consultant to the Commission on Sexual Harassment (Apr. 5, 1993); Telephone Interview with Michael Rubenstein, *supra* note 50; Interview with Nathalie Wiaume, Equal Opportunities Unit, Commission of the European Communities, in Brussels, Belgium (Mar. 19, 1993).

⁷⁴ See MICHAEL RUBENSTEIN, PREVENTING AND REMEDYING SEXUAL HARASSMENT AT WORK 4 (2d ed. 1992); Riding, *supra* note 9, at 7.

⁷⁵ See RUBENSTEIN & DE VRIES, *supra* note 23, at 9 (citing finding that 93% of working women surveyed in Germany report firsthand experience of occurrences mentioned in questionnaire; 72% had experienced behavior that they or other working women consider harassment); *id.* at 12 (citing finding that 96% of women in "non-traditional" women's occupations in Britain had experienced sexual harassment); see also *id.* (citing study by the Women's Institute in Spain finding that 90% of young women in their first jobs had experienced sexual harassment); Anne T. Goldstein, *Sexual Harassment, Continental Style*, LEGAL TIMES, Apr. 12, 1993, at 19 (Supp.) (summarizing empirical data about sexual harassment in the EC).

⁷⁶ In both the United States and Europe, the magnitude of hostile-environment harassment remains underappreciated. One American estimate suggests that quid pro quo cases account for only five percent of all incidents of sexual harassment, even though quid pro quo still seems to many the quintessence of harassment. See Daniel

The ten years between promulgation of the EEOC Guidelines and official acknowledgment of hostile-environment harassment in the European Community represent an important period in the history of sexual harassment law. In this period, American initiative played a leading role. Virtually alone among the nations of the world, the law of United States recognized sexual harassment as a fact of workplace life and sought to devise remedies.

2. Sexual Harassment as Sex Discrimination

This doctrinal innovation, identified with Catharine MacKinnon, proposes that sexual harassment is a species of wrongful discrimination and unequal treatment.⁷⁷ Sex discrimination is explicitly prohibited by Title VII. Because sexual harassers intimidate and ill-treat their targets in part because of their sex, it is almost always true to say that the harm would not have occurred but for the sex of the target. Accordingly, the victim has suffered a detriment on the basis of sex—a detriment comparable to unequal pay, for example. Like the unequally-paid employee, MacKinnon has argued, this person ought to have a remedy available in Title VII.⁷⁸ Over the objections of some American critics,⁷⁹ the idea has taken hold. Courts began accepting the equivalence even before MacKinnon published its first lengthy explication.⁸⁰ The Supreme

Goleman, *Sexual Harassment: It's About Power, Not Lust*, N.Y. TIMES, Oct. 22, 1991, at C1, C12.

⁷⁷ See MACKINNON, *supra* note 1, at 6.

⁷⁸ See *id.* at 5-6.

⁷⁹ See EPSTEIN, *supra* note 21, at 357-66; see also *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting) (arguing that Title VII should not be applied to sexual harassment cases because of the "awkwardness of classifying sexual advances as 'discrimination'"), *aff'd*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); cf. Paul, *supra* note 21, at 335-36, 359-63 (favoring a tort remedy for sexual harassment). Critics point out that there is no evidence that Congress intended Title VII to cover sexual harassment; indeed, "sex" was added to the statute at the last minute. See Paul, *supra* note 21, at 346. Professor Paul argues that because it is seldom the case that every woman in a particular workplace experiences sexual harassment, the law ought to regard it as different from discrimination that burdens all members of a group, such as Jim Crow laws. See *id.* at 349-50. Several writers have mentioned the logical problem of the bisexual "equal opportunity" harasser, a point that MacKinnon's early work did not neglect. See MACKINNON, *supra* note 1, at 200-06. To some, the equating of sexual harassment with sex discrimination unfairly punishes the employer, an "almost universally unacknowledged victim." Paul, *supra* note 21, at 356; see also EPSTEIN, *supra* note 21, at 363 (arguing that the harassing acts of a supervisor are miscategorized as acts by the company, since the supervisor acts only to gain personal pleasure).

⁸⁰ See MACKINNON, *supra* note 1 and accompanying text.

Court has agreed;⁸¹ and as one critic has noted, sexual harassment as sex discrimination is now "the dominant view."⁸²

Harassment-as-discrimination has been partially accepted in Europe. The influence of this concept outside the United States first became evident in British case law. According to the leading case,⁸³ a decision of the Scottish Court of Session, *quid pro quo* harassment constitutes "detriment" within the meaning of the relevant British statute, the Sex Discrimination Act of 1975.⁸⁴ The rationale of the case is applicable to hostile environment claims as well.⁸⁵

In a lesser-known but earlier decision, the Labour Court of Ireland held that sexual harassment is a form of sex discrimination, stating that "freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect," and "any denial of that freedom [is] discrimination."⁸⁶ In a 1989 case, a woman in Denmark, "relieved of all her duties" by her foreman who had made sexual advances to her, was awarded 40,000 crowns as damages.⁸⁷ The Supreme Court of *Ostre Landsrets* found that this conduct violated the Community-wide prohibition of sex discrimination.⁸⁸

These ideas have also taken root in Portugal, where the *Comissao para a Igualdade no Trabalho e no Emprego* (Commission on Equality at Work and in Employment) declared in 1987 that sex discrimination laws were not applicable to combat sexual harassment at work.⁸⁹ Some years later, this commission reversed its position,

⁸¹ See *Meritor*, 477 U.S. at 57.

⁸² EPSTEIN, *supra* note 21, at 351 n.1.

⁸³ See *Strathclyde Regional Council v. Porcelli*, [1986] Sess. Cas. 137.

⁸⁴ See RUBENSTEIN, *supra* note 74, app. 3, at 46-49 (citing *Porcelli*, [1986] Sess. Cas. at 137; *Bracebridge Eng'g Ltd. v. Darby*, [1990] I.R.L.R. 3; *Wileman v. Minilec Eng'g Ltd.*, [1988] I.R.L.R. 144; and *Balgobin & Another v. London Borough of Tower Hamlets*, [1987] I.R.L.R. 401).

⁸⁵ In *Porcelli*, the harassers were co-workers, not supervisors. See *Porcelli*, [1986] Sess. Cas. at 137. For a discussion of this case, see Nicolle R. Lipper, Comment, *Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States*, 13 COMP. LAB. L.J. 293, 317 (1992).

⁸⁶ RUBENSTEIN, *supra* note 51, app. at 133 (quoting *A Worker v. A Garage Proprietor*, Labour Court 1985).

⁸⁷ At 1989 exchange rates, this amount was equivalent to about 6000 U.S. dollars. See *International Monetary Fund*, 42 INT'L FIN. STAT. 193 (1989). The award is sizeable by European standards. See *infra* note 112.

⁸⁸ See RUBENSTEIN & DE VRIES, *supra* note 23, at 28 (citing Judgment of Sept. 8, 1989, Supreme Court of *Ostre Landsrets*).

⁸⁹ See International Labour Office, *supra* note 19, at 138.

and Portuguese authorities now accept the principle of harassment-as-discrimination.⁹⁰ One writer has attributed this reversal to Commission reports which had contended that, in the absence of sexual harassment legislation, sex discrimination laws could and should be used for this purpose.⁹¹ In its administrative decision, the government of Portugal reacted to the American equating of discrimination with harassment and accepted the American-originated idea that sexual harassment is a practical, urgent problem requiring a solution.

A similar reaction to the idea of harassment-as-discrimination occurred at the Community level while the Code of Practice was being prepared. Some reformers sought to promulgate a sexual harassment directive (a directive being a stronger measure than the recommendation that was ultimately produced)⁹² on the grounds that existing legal remedies were inadequate and that few initiatives had been undertaken at the national level.⁹³ In declining to prepare a directive, the Commission contended that the measure would be superfluous because sexual harassment is contrary to the Community-wide law against sex discrimination.⁹⁴ As in the case of Portugal, the Commission first ignored or rejected the asserted equivalence of harassment with discrimination and then in effect reversed itself, seeing possibilities in the idea.

The potentially important implications of the Commission pronouncement may be expressed as a syllogism: If sex discrimination is unlawful everywhere in the Community, and sexual harassment is a form of sex discrimination, then sexual harassment is unlawful everywhere in the Community. Since the EC sex discrimination law has no sanctions attached, however, the power of this proclamation remains dormant.

3. Sexual Harassment as Tortious Conduct

More than any other country, the United States associates individual rights with private-law remedies.⁹⁵ American courts have offered a response to sexual harassment grounded in various

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *supra* notes 52, 59.

⁹³ See Rubenstein, *Recommendation*, *supra* note 49, at 70.

⁹⁴ See *id.*

⁹⁵ See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 161-62 (1991).

torts: intentional infliction of emotional distress, invasion of privacy, assault, battery, even false imprisonment. The array of private-law remedies available—at least in theory—is wider in the United States than anywhere else. Moreover, a new common-law tort of sexual harassment is percolating in American scholarship.⁹⁶ Because American tort law has always been receptive to innovations proposed in academic writing, experience suggests that this new tort has reasonable prospects for judicial acceptance.⁹⁷ The American expression of individual rights through tort law has been, and will continue to be, influential in other countries.

a. *Dignitary Torts*

Although dignitary torts have a venerable pedigree in Europe,⁹⁸ they are especially important and numerous in American law. Victims of sexual harassment can choose from several of these torts in an effort to win full monetary damages and, perhaps, to impose a stigma on individual harassers.⁹⁹ Some of these torts—battery,

⁹⁶ See *infra* note 114.

⁹⁷ The most famous instance of such initiative is the tort of invasion of privacy, proposed by Louis Brandeis, who was later to become a Justice of the Supreme Court, and Samuel Warren, who was annoyed by the intrusion of reporters at a wedding. See Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890); see also Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) (arguing that the standard consumer contract is coercive, thereby establishing an intellectual basis for enterprise liability); Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978) (proposing a market-share approach to the causation problem in toxic torts).

⁹⁸ See, e.g., BÜRGERLICHES GESETZBUCH [BGB] § 825 (F.R.G.) (providing that “[a] person who by cunning, by threats, or by the abuse of a relationship of dependence, induces a woman to permit extra-marital cohabitation” is liable to compensate her for injury); *I. de S. et ux. v. W. de S.*, Y.B., 22 Edw. 3, fol. 99, pl. 60 (1348) (allowing cause of action for assault).

⁹⁹ In addition to dignitary torts, some American states recognize a tort of wrongful discharge, which could be applied when the harassed plaintiff's employment was actually or constructively terminated. See *Hale v. Ladd*, 826 S.W.2d 244, 245-46 (Ark. 1992) (allowing a cause of action for wrongful discharge when the plaintiff was dismissed after rebuffing the defendant employer's sexual advances); *Foster v. Albertsons, Inc.*, 835 P.2d 720, 726-27 (Mont. 1992) (recognizing a cause of action for retaliatory discharge relating to sexual harassment). In Europe, where workers' rights enjoy greater protection, wrongful discharge law is a more important weapon against sexual harassment. See, e.g., International Labour Office, *supra* note 19, at 91, 97, 103, 106, 113, 125, 138, and 144 (describing the use of unjust dismissal law for sexual harassment cases in Denmark, France, Germany, Greece, Italy, the Netherlands, Spain, and Portugal). Another non-dignitary tort possibility, rarely used in sexual harassment cases, is tortious interference with contract. See *Kyriazi v. Western Elec.*

assault, false imprisonment—are not particular to the United States, but have been used most extensively there. Other causes of action— invasion of privacy and intentional infliction of emotional distress—are American innovations.

When sexual harassers touch their victims in a harmful or offensive manner, claims of battery may arise. American courts have accepted battery as a proper theory of recovery in sexual harassment cases, particularly those involving sexual touching.¹⁰⁰ Assault, where the plaintiff must prove that she perceived an imminent harmful or offensive contact, is also used in sexual harassment cases, although in American practice never without another tort, usually battery.¹⁰¹ A California court found one defendant-harasser liable for false imprisonment: he had clamped the plaintiff, a waitress who worked in his restaurant, between his legs, refusing to release her.¹⁰²

American courts have also deemed invasion of privacy and intentional infliction of emotional distress to be tortious conduct. Both of these torts are recognized in the Restatement and in most states. They may be deemed American-created in that they are framed more precisely, and are more frequently invoked, than are foreign civil-code references to violation of the rights of the person-

Co., 476 F. Supp. 335, 336 (D.N.J. 1979) (noting that the harassment suffered by plaintiff interfered with her ability to fulfill contractual responsibilities). The most creative suggestion of all comes from Professor Bowman, who suggests that the "prima facie tort"—a seldom-used catchall covering any intentional and unjustified yet lawful act—could be deployed in sexual harassment cases. See Bowman, *supra* note 30, at 573 n.293.

¹⁰⁰ See *Pease v. Alford Photo Indus., Inc.*, 667 F. Supp. 1188, 1203 (W.D. Tenn. 1987); *Ford v. Revlon, Inc.*, 734 P.2d 580, 586 (Ariz. 1987); *Byrd v. Richardson-Greenshields Sec., Inc.* 552 So. 2d 1099, 1104 (Fla. 1989); *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 39 (Iowa 1993).

¹⁰¹ In Britain, however, which does not recognize independent (i.e., nonparasitic) causes of action for emotional harm, one attorney used assault creatively as the legal basis for a sexual harassment claim. The plaintiff in this case contended that the defendant's loud, violent threats put her in imminent apprehension of a battery. The High Court allowed this claim of assault, rejecting the defendant's assertion that the case was one of employment discrimination and, therefore, had to be heard in the Industrial Tribunal, where damages would have been capped at £10,000. Because the assault claim was permitted to reach the High Court, where damages are unlimited, the plaintiff was able to obtain a favorable settlement: £25,000 and the right to speak freely about the case. Telephone Interview with Denise Kingsmill, Solicitor (Apr. 14, 1993). After the settlement, the European Court of Justice struck down this cap on damages as violative of the Equal Treatment Directive. See *Marshall v. Southampton & South West Hampshire Area Health Auth.*, 3 W.L.R. 1054, 1091 (E.C.J. 1993).

¹⁰² See *Priest v. Rotary*, 634 F. Supp. 571, 583-84 (N.D. Cal. 1986).

ality.¹⁰³ Common-law jurisdictions other than the United States have not produced such innovations.

The subdivision of invasion of privacy that applies to sexual harassment is intrusion upon seclusion, an encroachment into private affairs that would be highly offensive to a reasonable person.¹⁰⁴ Sexual harassment plaintiffs have had mixed results with this cause of action: some courts appear eager to constrain it, often limiting it to intrusion into physical space.¹⁰⁵ Other courts have used the tort more liberally. In one case, a plaintiff alleged that her supervisor had called her repeatedly at home to make sexual advances; the court, ruling on a motion to dismiss, held that this contention stated a cause of action for invasion of privacy.¹⁰⁶ Going further, the Alabama Supreme Court has alluded to the plaintiff's "emotional sanctum," invaded when an employer repeatedly pestered an employee with demands for sex and questions about the sex life she shared with her husband.¹⁰⁷ The court permitted the claim for intrusion.¹⁰⁸

Intentional infliction of emotional distress is the major theory of redress in tort cases alleging sexual harassment. Using this tort, the plaintiff must prove that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused her severe emotional distress.¹⁰⁹ To many judges and observers, this is the tort that best fits the actual experience and injury of sexual harassment, although the technical requirements of other torts might be met as well.¹¹⁰ Judicial opinions ruling in favor of

¹⁰³ For a comparative summary, see Pierre-Dominique Ollier & Jean-Pierre Le Gall, *Various Damages*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 10, §§ 70-75 (André Tunc ed., 1986). Ollier and Le Gall point out that, in general, civil-law countries protect dignitary interests through their criminal law, and even in common-law countries, few legal systems permit separate actions for injury to feelings and mental suffering. See *id.* §§ 70-72 & n.531.

¹⁰⁴ See RESTATEMENT (SECOND) OF TORTS § 652B (1976).

¹⁰⁵ See Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1478 (1986). Schoenheider discusses *Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872 (S.D. Ga. 1983), as an example of this fearful tendency. See Schoenheider, *supra*, at 478. In addition to asserting that the intrusion-upon-seclusion tort ought to be confined to "physical areas," the court denied plaintiff's claim on the ground that, having submitted to her supervisor's advances, she "waived whatever right to privacy she had as to her personal seclusion or solitude." *Cummings*, 561 F. Supp. at 884.

¹⁰⁶ See *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 528 (D.D.C. 1981).

¹⁰⁷ *Phillips v. Smalley Maintenance Servs., Inc.*, 435 So. 2d 705, 711 (Ala. 1983).

¹⁰⁸ See *id.* (rejecting the argument that a finding of liability hinges upon whether or not the defendant violated the plaintiff's physical, as opposed to emotional, space).

¹⁰⁹ See RESTATEMENT (SECOND) OF TORTS § 46 (1976).

¹¹⁰ See Barbara E. Hadsell, *Maximizing Damages Recovery in a Sexual Harassment*

plaintiffs emphasize the extreme and outrageous conduct of defendants and the great emotional suffering of plaintiffs.¹¹¹

Using both traditional common-law concepts and newer torts, then, American judges have helped to shape the idea that sexual harassment is an invasion against the person, a physical and emotional injury for which money damages are appropriate. Tort concepts acknowledge the physical integrity of a worker, the existence of an emotional sanctum that deserves respect, and the right to be free from outrageous mistreatment. Combined with American rules that permit very high compensatory awards, burdensome discovery, jury trials, and punitive damages, these tort concepts warn potential offenders that they violate the sanctity of a person at great peril. No other country in the world has put so high a price on sexual harassment.¹¹² Although Europe has declined to emulate this potential for a steep penalty, it has been impressed with the seriousness that this American penalty represents.¹¹³

b. *The Nascent Tort of Sexual Harassment*

Several American writers wish to see the courts create a new common-law or statutory tort of sexual harassment.¹¹⁴ Others, making a similar argument, urge that common-law tort paradigms rather than employment discrimination law govern the problem of

Case, 17 A.L.I.-A.B.A. COURSE MATERIALS J. 7, 8 (1992) (noting that while sexual harassment may be actionable under a variety of tort theories, recovery is most often sought for emotional harm).

¹¹¹ See *Poff v. Oak Tree Mortgage Corp.*, 61 Fair Empl. Prac. Cas. (BNA) 1562, 1564 (E.D. La. 1993); *Godfrey v. Perkin-Elmer Corp.*, 794 F. Supp. 1179, 1189 (D.N.H. 1992); *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (Ariz. 1987); *Linebaugh v. Sheraton Michigan Corp.*, 497 N.W.2d 585, 588-89 (Mich. Ct. App. 1993).

¹¹² Consider that until recently in Britain, the EC country with the most American-like sexual harassment law, the forum for sexual harassment cases permitted awards of only up to £10,000 (about 15,000 U.S. dollars), and this maximum was seldom approached. The £25,000 settlement discussed above at note 101 is almost legendary in England and the European Community. I know of no large awards or settlements in wealthy EC countries such as Germany, Italy, and France. Cf. AGGARWAL, *supra* note 49, at 170 (quoting from two cases where awards of 2500 Canadian dollars were justified by elaborate references to the plaintiffs' extreme suffering). Sexual harassment claims have enriched very few American litigants, but awards and settlements run much higher in the United States than in Europe.

¹¹³ See *infra* note 127 and accompanying text.

¹¹⁴ The principal contributors are Paul, *supra* note 21; Schoenheider, *supra* note 105; and Michael D. Vhay, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328 (1988).

workplace sexual harassment.¹¹⁵ Many of these commentators offer definitions of sexual harassment and further clarification.

As of this writing, no court has accepted the new tort. The suggestion is of more than utopian interest, however. By arguing that sexual harassment violates individual rights, these commentators keep alive an intellectually useful complement or counterpoint to the claim that sexual harassment is sex discrimination. Some writers seek to supplement employment discrimination law with their new tort while others seek to preclude it. Both approaches contribute an individual-rights perspective to an area of law where employment discrimination principles dominate.

One commentator has pointed out the uneasy fit between sexual harassment and employment discrimination law.¹¹⁶ In addition to the famous analytical question of the bisexual harasser, who targets men and women with equal animus or lust, harassment-as-discrimination raises another, more realistic, problem of logic: unwelcomeness. Sexual harassment is the only subcategory of American federal antidiscrimination law where the victim must prove that the discrimination was distasteful or unwelcome, and must share her subjective feelings with the court.¹¹⁷ As such, it is a Title VII anomaly. Because of these conceptual failings, Michael Vhay proposes a comprehensive overhaul of sexual harassment law in which employment discrimination law would continue to protect workers from discriminatory harassment.¹¹⁸ The concept is especially well suited to hostile environment cases. For situations involving sexual advances, employment discrimination law works less well than would a new sexual harassment tort, which would address overtures made in inappropriate contexts.¹¹⁹

Other commentators see sexual harassment as an injury to be found within the domain of tort law. Krista Schoenheider argues for a new tort that would free plaintiffs from the burdens of establishing *prima facie* cases of battery, invasion of privacy, or

¹¹⁵ The leading exponents of this view are Judge Robert Bork and Richard Epstein. See *supra* note 79.

¹¹⁶ See Vhay, *supra* note 114, at 337-53.

¹¹⁷ See *id.* at 347-48.

¹¹⁸ See *id.* at 356-60.

¹¹⁹ See *id.* Vhay adds a third category: advances that are so outrageous that they ought to be actionable no matter what the context. See *id.* at 360-62. To remedy this evil, he argues for vigorous use of the existing tort of intentional infliction of emotional distress. See *id.*

intentional infliction of emotional distress.¹²⁰ Her expansive approach is countered by Ellen Frankel Paul, the leading critic of harassment-as-discrimination, who has proposed a new tort that would have the effect of limiting the actionability of workplace sexual harassment.¹²¹ Because harassment-as-discrimination is a "defective paradigm," Paul argues, it ought to be supplanted by a new tort for sexual harassment.¹²² Patterned after the Restatement version of the tort of intentional infliction of emotional distress,¹²³ her tort imposes stringent proof requirements on a plaintiff.¹²⁴ It is not clear whether this proposal gives victims any remedies that they do not already have under the widely-available emotional distress tort. As Paul points out, however, the creation of a new tort would send a strong message that society condemns sexual harassment.¹²⁵

This point may be applied to the new-tort academic literature itself. Authors considering how best to fashion a sexual harassment tort bring together the individual rights theme expressed in dignitary tort law and the insight that sexual harassment is, or can be, employment discrimination. Paul, Schoenheider, and especially Vhay have unpacked workplace sexual harassment law to reveal its struggle between the two traditions.¹²⁶

Whether or not American courts will accept some version of a new common-law tort, it is unlikely that another country will borrow the idea for itself; outside the United States, the influence of this academic writing is conceptual. But the conceptual message nonetheless carries power. In the United States, when any behavior is said to warrant its own tort, that behavior has received a deep stigma that can be exceeded only by criminalization.¹²⁷ The

¹²⁰ See Schoenheider, *supra* note 105, at 1485-94.

¹²¹ See Paul, *supra* note 21, at 359-63.

¹²² *Id.* at 336-59.

¹²³ See *id.* at 361.

¹²⁴ Hostile-environment harassment must be "persistent" and, in the eyes of "a reasonable person," "extreme and outrageous." *Id.* at 362. The harasser must have acted intentionally or recklessly and the victim must have suffered "economic detriment and/or extreme emotional distress." *Id.*

¹²⁵ See *id.* at 363.

¹²⁶ See generally Vhay, *supra* note 114, at 353-55 (arguing that "sexual harassment" encompasses several discrete wrongs and that aggregating these wrongs has led to confusion and misunderstanding).

¹²⁷ It is probable that American opprobrium expressed in new-tort writing influenced, or was at least related to, the recent creation of a criminal law against sexual harassment in France. See Code Penal [C. PÉN.] art. 222-32-1 (Fr.) (applying only to harassment aimed at obtaining favors of a sexual nature—that is, *quid pro quo*

nascent tort is an idea not only of intellectual vitality but subtle practical consequences as well.

II. FROM EAST TO WEST: EUROPEAN SKEPTICISM

Rights-consciousness and tort law have a long tradition in the member nations of the EC, but as methods for redressing sexual harassment, they appear radical and excessive to some European observers. A widely held view in the Community is that sexual harassment amounts to less of a problem than Americans make of it.¹²⁸ Another widely held view—about which there is even more consensus—is that American devices, including legal doctrine, designed to respond to claims of sexual harassment may be inappropriate for Europe.¹²⁹

Beginning with the premise that European nations and the EC take sexual harassment seriously, this Part of the Article addresses the latter kind of skepticism by discussing in turn some of the doubts expressed in the Community about American-style approaches to sexual harassment. In calling this skepticism “European,” I merge several entities, including Community decisionmakers, the laws, customs, and institutions of member states, and public opinion. Although they are distinct, these entities have a common perspective: all have shared in the reaction to American initiatives in remedying sexual harassment.

A. Community Law: Jurisdictional Doubt

1. The Objection Identified

Opponents of Community-wide sexual harassment legislation have brought a wide range of arguments to the debate in Europe. Of these arguments, jurisdictional doubt is the one most pertinent to American observers.

harassment); see also International Labour Office, *supra* note 19, at 97 (attributing increased interest in this problem in France to developments in Canada, the United States, and the European Community).

¹²⁸ See Riding, *supra* note 9, at 1 (describing European legislators' and officials' reluctance “to go too far toward . . . American excesses” and alluding to “the desexualization of the United States”).

¹²⁹ See, e.g., *id.* (noting the views of a French government official).

a. *The Principle of Specific Attribution of Powers*

Because the European Community is a federal supragovernment of limited powers, its lawmaking must be justified with reference to foundational principles. No general power enables the Community to carry out tasks that lie outside the objectives stated in the founding treaties.¹³⁰ These treaties contain scant mention of human rights, let alone feminism, and express no commitment to protecting human rights or individual freedom¹³¹—an omission that creates jurisdictional difficulty for lawmakers seeking to advance the equality of the sexes in the Community.

These lawmakers have built a stance, if not quite a jurisdictional basis, to support Community involvement in equal opportunity for men and women. EC institutions have formally affirmed the dignity of women at work. The European Parliament has issued a resolution decrying "violence against women," using the word "violence" in its French-feminist sense to include several types of oppression, including workplace harassment.¹³² Later, Parliament issued another resolution, more to the point, on the protection of the dignity of women at work.¹³³ The Community Charter of the Fundamental Social Rights of Workers, adopted at the Strasbourg European Council (a gathering of the heads of state and government of eleven member nations), urged in 1989 that "action should be intensified" to promote workplace equality.¹³⁴ Although the EEC Treaty remains unamended, all the major elected EC institutions have thus asserted a commitment to women's rights, thereby giving this cause a measure of democratic legitimacy that supports the work of the unelected Commission.

For its part, the Commission has proclaimed a series of medium-term action programs to promote equal opportunities for women and men.¹³⁵ Focusing primarily, although not exclusively, on the

¹³⁰ See KLAUS-DIETER BORCHARDT, *THE ABC OF COMMUNITY LAW* 8 (3d ed. 1991).

¹³¹ See *id.* at 12. The European Court of Justice has declared with increasing frequency, however, that Community citizens enjoy unenumerated fundamental rights. See, e.g., Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, 1987 E.C.R. 3719, 3754 (citing Convention on Human Rights); Case 130/75, *Prais v. Council of the European Communities*, 1976 E.C.R. 1589, 1589 (recognizing plaintiff's right to freedom of religion in her search for employment with the Community).

¹³² 1986 O.J. (C 176) 73-83.

¹³³ See 1991 O.J. (C 305) 14-15.

¹³⁴ Council Resolution, 1991 O.J. (C 142) 1 (citing Community Charter of the Fundamental Social Rights of Workers).

¹³⁵ See COMMISSION OF THE EUROPEAN COMMUNITIES, *COMMUNITY LAW AND*

workplace, these measures strive to make meaningful the protections of prior Community legislation and to build support for new laws. The jurisdictional basis of these initiatives is the EEC Treaty provision that Community institutions are empowered to carry out the objectives of the Community where the Treaty does not confer the necessary specific powers for this purpose.¹³⁶

The only textual reference to equality of the sexes in the founding treaties, however, concerns equal pay for men and women.¹³⁷ How much reform can this provision support? The Community has used the equal pay article to buttress new legislation expanding the rights of women in the workplace, but this expansion has achieved only limited results. The first new directive, promulgated in 1975, stuck closely to the language of the EEC Treaty.¹³⁸ Elaborating on the principle of equal pay, this directive prohibited any pay discrimination based on sex, ordered that all job classifications be egalitarian, and decreed that all provisions contrary to the principle be deleted from collective bargaining agreements and individual employment contracts.¹³⁹ A year later came a directive on equal treatment;¹⁴⁰ this measure strayed further from the foundational language, making a crucial jump from "pay" to "treatment."¹⁴¹ Later directives continued the reference to equal treatment.¹⁴²

But these extensions cannot continue indefinitely. Even those working within the Commission on equal treatment initiatives acknowledge that any directive on the subject would rest on a very

WOMEN 88-102 (Supp. No. 25, Women of Europe 1987) (describing first medium-term action program for the period 1982-1985 and second program for the period 1986-1990). A third medium-term action program covers the period 1991-1995. See 1991 O.J. (C 142) 1 [hereinafter Third Action Program].

¹³⁶ See EEC TREATY art. 235.

¹³⁷ See *id.* art. 119. This provision was aimed at preventing distortion of competition—the possibility that an employer could reduce costs by hiring women at low wages—and was not intended primarily to promote equal treatment of men and women. See COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 135, at 1-2.

¹³⁸ See Council Directive 75/117, 1975 O.J. (L 45) 19 (directing member nations to introduce means of legal redress for violations of the "principle of equal pay" of Article 119).

¹³⁹ See Council Directive 75/117, arts. 1, 3 & 4, 1975 O.J. (L 45) 19-20.

¹⁴⁰ See Equal Treatment Directive, *supra* note 52.

¹⁴¹ *Id.* at 40.

¹⁴² See Council Directive 86/613, 1986 O.J. (L 359) 56 (implementing equal treatment for the self-employed); Council Directive 86/378, 1986 O.J. (L 225) 40 (implementing equal treatment of the sexes in occupational social security schemes); Council Directive 79/7, 1979 O.J. (L 6) 24 (implementing equal treatment of men and women in the field of social security).

controversial jurisdictional basis.¹⁴³ The existing equal treatment directives rely on equating equal pay with equal treatment. A sexual harassment directive grounded in the equal pay provision would rely on additional analogies: sexual harassment as sex discrimination as unequal treatment as unequal pay. The chain becomes more attenuated with each new link. Although the principle of specific attribution of powers does not specifically prohibit lawmaking based on this kind of reasoning, it implies an ultimate limit on how far lawmakers may go.

b. *Subsidiarity*

A complement to the principle of specific attribution of powers is "subsidiarity," which refers to the federalist principle favoring greater power for member state governments in all areas in which they are competent, with the Community exercising power only where strictly necessary. The principle is of foundational significance.¹⁴⁴ Subsidiarity has been invoked to oppose directives aimed at improving social welfare, the position being that member states are capable of creating their own legislation, and that no Community interest requires harmonization of these laws.¹⁴⁵

¹⁴³ Telephone Interview with Michael Rubenstein, *supra* note 50; Interview with Nathalie Wiaume, *supra* note 73.

¹⁴⁴ The Treaty on European Union, often referred to as the Maastricht Treaty, imposes the principle of subsidiarity on all types of Community action:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Treaty on European Union, Feb. 7, 1992, art. 3b (Maastricht Treaty), 31 I.L.M. 247, 258.

¹⁴⁵ In the "spirit" of subsidiarity, the Commission withdrew three directives it had previously proposed, announced that it was "further considering withdrawing" numerous others, and weakened its planned directives in other areas. Conclusions of the Presidency, Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union, Dec. 12, 1992, at 26-28 (on file with author). Directives withdrawn due to considerations of subsidiarity concerned compulsory food labels, radio frequencies for telecommunication with aircraft, and radio frequencies for land transportation. *See id.* at 26. Subjects of directives on the list to be withdrawn included conditions of animals in zoos, temporary importation of motor vehicles, and a network of information centers on agricultural markets. *See id.* Proposals were officially weakened in the area of public takeover bids, the definition of "shipowner," labeling of shoes, liability of suppliers for services, and protection of persons in relation to data processing. *See id.* at 27. After "consultations with interested parties," the Commission withdrew its plans for

Applied to sexual harassment, this principle would require proponents to show that existing laws are deficient because they afford citizens varying levels of protection. Furthermore, the divergence must be significant. For instance, an Englishwoman might hesitate to take a job in southern Europe because of what she has heard of office behavior there,¹⁴⁶ but this possibility offers feeble support indeed for Community-level intervention.¹⁴⁷

Even critics of subsidiarity—who see the term as a politically laden excuse for reactionary obstruction—agree that harmonization can burden member states.¹⁴⁸ Harmonization decrees from Brussels that require lawmaking, fact-gathering, adjudication, monitoring of systems, and the dissemination of information can be expensive and awkward to obey, especially where the necessary infrastructure is unsteady. The frequent requirement of ongoing contact with the Commission raises a tangle of practical questions: Which bureau in the member state must report? What if another directive establishes overlapping requirements—must the same data be gathered and reported twice? The notion of restraint inherent in subsidiarity is a reasonable one, in light of the complications that always accompany harmonization.¹⁴⁹ In the area of sexual harassment, even advocates of Community action recognize the merits of challenges to Community-level intervention based on the principle of subsidiarity.

2. The Objection Refuted

Jurisdictional obstacles have forced proponents of Community law to consider the ways in which sexual harassment conflicts with foundational principles. Unlike their American counterparts, proponents of Community-level action against sexual harassment have been compelled to fit their initiative within circumscribed powers. This effort connects sexual harassment with a wider range

initiatives in several other areas, including regulation of gambling. *Id.* at 28.

¹⁴⁶ Michael Rubenstein suggested this example, adding his opinion that it was a weak justification for lawmaking. Telephone Interview with Michael Rubenstein, *supra* note 50.

¹⁴⁷ The principle at stake in this kind of hesitation is the freedom of workers to move within the Community. See EEC TREATY art. 48.

¹⁴⁸ Interview with Virginia Graham, Director of Communications, Bureau Européen des Unions du Consommateurs (European Consumers Union), in Brussels, Belgium (Oct. 30, 1992).

¹⁴⁹ See Bernstein, *supra* note 10, at 676-703 (discussing issues and problems accompanying Community attempt to harmonize products liability law).

of subjects—a connection that helps to reveal the nature of sexual harassment as a social, economic, and moral problem. As a device for change, this approach has achieved tangible results.

The most straightforward justification of a Community law is social progress—equality in the workplace—and that justification has been endorsed by several institutions of the Community.¹⁵⁰ But this basis for reform ultimately brushes against the obstacles described above: the principle of specific attribution of powers, possible redundancy given the Equal Treatment Directive, and subsidiarity. Advocates of reform, in their creative responses to this conflict, have fashioned at least four conceptual advances.

a. *Workplace Health and Safety*

In contrast to the American approach, Europeans describe sexual harassment as a danger to health and safety in the workplace. Ample jurisdictional support exists for the Community to act expansively in this area;¹⁵¹ working conditions have always been regarded as part of the economic policy that justified the formation of the Community.¹⁵² Divergences in workplace health and safety controvert the principle of unification.¹⁵³

Encouraged by the 1986 amendments to the EEC Treaty that mention health and safety,¹⁵⁴ the Community was able to retreat from its weaker “action program”¹⁵⁵ justification for workplace equality laws and emphasize the benefits to health and safety that would result from the abolition of discrimination. The usefulness of this rationale is evident from the adoption of a directive to

¹⁵⁰ See, e.g., Third Action Program, *supra* note 135, at 2-3 (containing Council Resolution inviting member states to implement the third medium-term action program on equal opportunities for women and men); 1990 Resolution, *supra* note 56, at 3-4 (containing statement by Council on the protection of the dignity of women and men at work); 1986 O.J. (C 176) 73, 79 (containing Parliament resolution of June 11, 1986, noting that “sexual harassment can be seen as non-respect of the principle of equal treatment with regard to access to employment”); Equal Treatment Directive, *supra* note 52, arts. 3-5 (affirming the principle of equal treatment in the workplace).

¹⁵¹ Foundational support appears in the EEC Treaty, which empowers the Council to adopt directives establishing requirements for improving the health and safety of workers. See EEC TREATY art. 118a.

¹⁵² See FRITZ FABRICIUS, HUMAN RIGHTS AND EUROPEAN POLITICS: THE LEGAL-POLITICAL STATUS OF WORKERS IN THE EUROPEAN COMMUNITY 3-5 (1992).

¹⁵³ See P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 627-28 (Laurence W. Gormley ed., 2d ed. 1989).

¹⁵⁴ See *supra* note 151.

¹⁵⁵ See *supra* note 135.

protect pregnant women and new mothers¹⁵⁶—in a year when “it [was] almost impossible to get a social welfare directive passed.”¹⁵⁷ This directive protects the jobs of women who must avoid hazards to their reproductive health, forbids employers to require that pregnant women or women who have recently given birth or are breastfeeding perform night work, guarantees fourteen weeks of maternity leave, and prohibits discrimination against these female workers.¹⁵⁸ Structured to emphasize the health and safety arguments and downplay any reference to discrimination,¹⁵⁹ this directive is a telling demonstration of which jurisdictional reasoning is flourishing in the Community.¹⁶⁰

Advocates of sexual harassment legislation appear aware of the importance of this theme. According to several European experts, sexual harassment is a workplace menace. The Dutch Ministry of Social Affairs has compared it to the risk of stumbling over equipment, or of excessive noise—dangers that responsible employers try to minimize.¹⁶¹ In his influential scholarship, Rubenstein has used the health and safety argument to make a different analogy: employers are expected to ensure the health and safety of their workers prospectively, and not merely to rely on remedies for the harm (such as disease or trauma) that may occur. Similarly, women are entitled to a workplace that is not “polluted by sexual harassment,” in addition to legal recourse after the harm is done.¹⁶²

¹⁵⁶ See Council Directive 92/85, 1992 O.J. (L 348) 1 (introducing measures to encourage improvements in the safety and health at work of pregnant women and new mothers) [hereinafter Directive 92/85].

¹⁵⁷ Telephone Interview with Michael Rubenstein, *supra* note 50.

¹⁵⁸ See Directive 92/85, *supra* note 156, arts. 5, 7, 8 & 10.

¹⁵⁹ The Preamble to the directive begins with a health and safety justification and only later moves to other elements of its rationale. The directive's first provisions pertain directly to workplace health. Only near the end does one find reference to maternity leave and employment rights. See *id.* at 1-5.

¹⁶⁰ An indirect demonstration of the point is made by the languishing of a draft directive easing the burden of proof for litigants who complain of unequal pay or treatment. See Commission 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) 5. With no reference to workplace health or safety, this directive has stagnated, despite its jurisdictional basis in several action programs and other Community initiatives.

¹⁶¹ See RUBENSTEIN, *supra* note 51, at 29, 142.

¹⁶² *Id.* at 37. In Rubenstein's words:

Member States would not normally expect employees to work with hazardous substances or dangerous machinery with no recourse until they have contracted a disease or suffered an injury. They should not ask women to continue to work in an environment polluted by sexual harassment with

Both American and European data indicate that sexual harassment can harm the health of its victims. European research links sexual harassment to a variety of physical and emotional ailments.¹⁶³ According to an American report, one-third of the women who had been sexually harassed while working for the U.S. government reported that the harassment had aggravated a physical or emotional condition.¹⁶⁴ American case law on sexual harassment indicates that many, perhaps most, successful plaintiffs make convincing allegations of severe emotional or physical injury.¹⁶⁵ In Europe, the Dortmund Institute found that sexual harassment was a significant source of harm to workplace health and safety.¹⁶⁶ The European Commission has reached the same conclusion.¹⁶⁷ Although both European and American sources are available to support the point, however, the idea has more influence in Europe.

Why has the subject of workplace health and safety been more influential in European than American analyses of sexual harassment? A quick response is that because private law is so unimportant in Europe when compared with the United States, even a small amount of influence looks large; indeed, the practical effects of the workplace health and safety insight in Europe have not been extensive. But this response does not explain the American repudiation of an idea that has been in print since the 1979 publication of MacKinnon's book, or even earlier.¹⁶⁸ The idea that sexual harassment can be classified as a danger to workplace

no means of redress other than the possibility of compensation for the damage they suffer.

Id.; see also Stan Gray, *Sharing the Shop Floor*, in BEYOND PATRIARCHY: ESSAYS BY MEN ON PLEASURE, POWER, AND CHANGE 216, 227 (Michael Kaufman ed., 1987) (analogizing right to safe workplace to right to choose abortion).

¹⁶³ See RUBENSTEIN & DE VRIES, *supra* note 23, at 13-14, 37-38 (summarizing findings in Belgium and the Netherlands). For more vivid descriptions of painful experiences, see MACKINNON, *supra* note 1, at 25-55.

¹⁶⁴ See generally U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT (1981) (supplying 1980 data).

¹⁶⁵ See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986) (alleging rape and physical symptoms); *Ford v. Revlon, Inc.*, 734 P.2d 580, 583 (Ariz. 1987) (alleging suicide attempt and other physical effects); see also Pollack, *supra* note 2, at 69-70, 84 (criticizing American courts for denying redress to all but the most severely-harmed plaintiffs).

¹⁶⁶ Telephone Interview with Michael Rubenstein, *supra* note 50.

¹⁶⁷ See Agnès Hubert, *Foreword* to RUBENSTEIN & DE VRIES, *supra* note 23, at 4 (noting that stress induced by sexual harassment causes employees to take sick leave).

¹⁶⁸ See MACKINNON, *supra* note 1, at 159 & n.48.

health and safety seems hardly to have occurred to American reformers.

The answer lies in the tension between viewing sexual harassment as a discrete wrong amenable to civil litigation and viewing it as an instance of collective harm, with neither victims nor wrongdoers sharply identified, with the concept itself being merged with other concepts. A wrongful-conduct approach dominates the entire perception of sexual harassment. When sexual harassment is seen as a legal wrong, tort concepts predominate and the concept of workplace hazard becomes harder to keep in mind.

The dominance of tort principles is evident at both tactical and theoretical levels. As a matter of tactics, those in the United States who seek greater protection against sexual harassment in the workplace must emphasize the wrongful aspects of this conduct, and understate the extent to which it is a workplace hazard, because of the potential conflict with workers' compensation. Usually workers' compensation is an exclusive remedy for injured workers, precluding an employee with a claim recognized under this system of insurance from making the same claim in a lawsuit. Creative lawyering can work, and has worked, around this difficulty.¹⁶⁹ But the deeper problem is one of ingrained dichotomous thinking, so that an occurrence cannot be both a tort and a routine condition of work.¹⁷⁰ The dichotomy tells advocates of reform that if they pursue the workplace-health approach they will lose more of their strength in tort than they will gain elsewhere, while at an intellectual level the wrongful-conduct approach displaces ideas about workplace conditions.

Wrongful-conduct hegemony also makes it difficult for American reformers to agree that sexual harassment is a problem of workplace conditions. Tort concepts suggest distinctions to Americans that

¹⁶⁹ Compare the hard-to-distinguish case of *Peckham v. Peckham Materials Corp.*, 536 N.Y.S.2d 873, 874 (App. Div. 1989) (allowing tort lawsuit against employer based on helicopter crash on return from golf outing, where plaintiff sought to escape workers' compensation) with *Ezzy v. Workers' Compensation Appeals Bd.*, 194 Cal. Rptr. 90, 95-96 (Ct. App. 1983) (allowing workers' compensation payment, in accordance with plaintiff's wish, to summer associate injured in law firm softball game).

¹⁷⁰ MacKinnon argues that the paradox of workplace sexual harassment is its banality and its resemblance to conduct not widely recognized as wrongful. See MACKINNON, *supra* note 1, at 219. Her father, Judge George MacKinnon, shared the conventional view: sexual overtures at work, he wrote in an early hostile-environment opinion, derive from "social patterns that to some extent are normal and expectable." *Barnes v. Costle*, 561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring).

have less resonance in Europe: the very success of tort remedies for sexual harassment has entrenched an approach that interferes with concepts of workplace health. Consider a hypothetical claimant who says that hostile-environment harassment has caused her various symptoms of middling severity—insomnia, shortness of breath, mild depression, and headaches. She suggests that her workplace is unsafe and unhealthy. Tort-trained American lawyers would likely be skeptical. As they know from their legal education, effects such as these are at least arguably mental or emotional rather than “physical,” and American tort law only reluctantly acknowledges the claim of a plaintiff whose injuries have no physical manifestation: that is, either tangible physical injury or an impact.¹⁷¹ A woman’s silence or passivity in response to sexual conduct evokes the tort concept of consent and its attendant burdens on plaintiffs.¹⁷² Thoughts of tort create questions of causation—can this claimant prove that her symptoms were a direct and proximate result of sexual harassment?—that an American observer would want resolved before condemning the workplace as unhealthy. In contrast, a European can look at sexual harassment without the distortion attributable to American thinking about wrongful conduct.

b. *Economic Arguments*

In addition to identifying health and safety justifications, reformers have begun to connect the remedying of sexual harassment with the central purpose of the Community: the improvement of the economic union of the member states. Such a linkage creates powerful jurisdictional support for lawmaking.

Although some costs are better documented than others,¹⁷³ sexual harassment is widely acknowledged to be costly and burdensome. American reports estimate conservatively that sexual harassment cost the U.S. government \$267 million over the two-year period from May 1985 to May 1987, and \$180 million for the two-year period from May 1978 to May 1980.¹⁷⁴ These estimates are

¹⁷¹ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 361-65 (5th ed. 1984).

¹⁷² See Mary Jo Shaney, Note, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109, 1128 (1986).

¹⁷³ Measures aimed at reducing or repairing sexual harassment have not been proven to result in financial saving, because of incomplete data. In theory, one could construct an anti-harassment apparatus so expensive that condoning harassment would be cheaper. Better data on the costs of sexual harassment are needed to save this debate from immersion into ideology and preexisting beliefs.

¹⁷⁴ See U.S. MERIT SYS. PROTECTION BD., *supra* note 164; UPDATE, *supra* note 48,

of costs to the government *qua* employer;¹⁷⁵ no attempt has been made to assess other quantities such as lost tax revenues or medical costs covered by the government in transfer payments. Although hard numbers are not available, writers argue plausibly that sexual harassment has a direct impact on the profitability of enterprises.¹⁷⁶ Sexual harassment causes absenteeism in two senses of the term: the harassed worker is likely both to take time off from work and to function poorly while physically present at her job.¹⁷⁷ An employer who condones sexual harassment—whose main criterion for employees becomes their willingness to tolerate harassment—will likely end up with workers who have weaker traditional qualifications and who are, therefore, less productive.¹⁷⁸

Although employers and governments pay some of the price for sexual harassment, women pay more. An early American study showed that two-thirds of harassed female workers lost their jobs as a result of the harassment.¹⁷⁹ Not only is this turnover expensive to employers, and probably to government as well, but its costs are also devastating to the workers themselves. Workers who choose to stay in jobs where they are harassed absorb most of the costs. Often they must live with humiliation, depression, and an anger that taints

at 40. A majority of respondents studied in 1980 said that the sexual harassment they encountered in the federal government was comparable to what they had encountered while working for other employers, suggesting that the cost estimates are of general validity. See U.S. MERIT SYS. PROTECTION BD., *supra* note 164.

¹⁷⁵ The figures represent the costs of replacing employees who left work because of sexual harassment, medical insurance benefits and sick leave, and reduced productivity. See UPDATE, *supra* note 48, at 40-41.

¹⁷⁶ See RUBENSTEIN, *supra* note 51, at 3; see also Ronnie Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 69, 69 (citing estimate that sexual harassment costs the average Fortune 500 company \$6.7 million annually in absenteeism, turnover, and lower productivity).

¹⁷⁷ See Lipper, *supra* note 85, at 299-300 (citations omitted).

¹⁷⁸ See Suzanne E. Andrews, *The Legal and Economic Implications of Sexual Harassment*, 14 N.C. CENT. L.J. 113, 169 (1983). It is difficult to estimate the extent to which condoning sexual harassment as a prerequisite for harassers enables employers to retain talented, productive harassers as employees. A worker with a taste for harassment might accept lower wages if he is freer to harass. But because sexual harassment distracts workers and takes up their time—whether they are victims or perpetrators—it is reasonable to assume that choosing to condone harassment as a prerequisite for harassers is not a profitable strategy for an employer.

¹⁷⁹ Forty-two percent felt compelled to quit their jobs when the harassment became intolerable, and 24% were fired for failing to accede to demands or for complaining about the harassment. See Christine O. Merriman & Cora G. Yang, Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 84 n.6 (1984) (citing Working Women's Inst., *Sexual Harassment on the Job: Questions and Answers* (1980) (unpublished manuscript)).

their relationships with men;¹⁸⁰ they "risk losing promotions, seniority, and better job assignments."¹⁸¹ Sexual harassment thus amounts to a tax on women who venture into the workplace.¹⁸²

Sexual harassment also distorts competition in several senses of the term:¹⁸³ the competition for workplace success between men and women, the competitive strength of employers who pay some of the costs of harassment, and, perhaps, the economic competition within a government entity such as the Community. Proponents of change in the EC have not asserted these arguments forcefully, in part because they appear difficult to make when compared to a simpler appeal to fairness, and in part because the distortions are indirect.¹⁸⁴ The combination of American-culled data and European jurisdictional pressure may, in the future, give these arguments intense power.

c. *The Dignity of a Worker*

A third conceptual expansion refers to "dignity," a term often found in European scholarly writing but encountered less frequently in the United States.¹⁸⁵ Although no precise definition is available, "dignity" apparently refers to human rights, minimally stated. To say that a worker deserves to be treated with dignity is not to promise her rewards, equality of opportunity, unlimited potential of advancement on her merits, or even fairness. Most workers would want more than mere dignity at work, and justice demands more

¹⁸⁰ See MACKINNON, *supra* note 1, at 47-48.

¹⁸¹ Lipper, *supra* note 85, at 299.

¹⁸² For example, Wendy Pollack has written that as a journeyman carpenter she used to seek jobs where the level of sexual harassment would be tolerable, rather than jobs that would challenge or increase her technical skills. See Pollack, *supra* note 2, at 37. She adds that many women who have qualified for high-paying, blue-collar employment leave the trades for lower-paying work because of sexual harassment. See *id.* at 37-38.

¹⁸³ At a speech in London at which I was present, delivered on June 25, 1993, Agnès Hubert, head of the Equal Opportunities Unit of the European Commission, made strong, on-the-record statements about the relationship between sexual harassment and economic competitiveness. Hubert, an economist by training, declared that "European competitiveness depends on the optimal use of human resources," and to this end the workplace needs to be "friendlier to women," to "become a mixed-sex environment." She also said that mixed-sex work settings were more productive than single-sex settings.

¹⁸⁴ Telephone Interview with Michael Rubenstein, *supra* note 50.

¹⁸⁵ See RUBENSTEIN, *supra* note 51, at 1 (noting that in Europe sexual harassment is discussed with reference to the "dignity and the rights of women").

than this minimum. Dignity is a conceptual advance, then, in that it delineates a smaller ideal.¹⁸⁶

Appeals to "dignity" may resonate with persons who cannot listen to "feminism," "women's rights," "sexism," "sexual harassment," and the like. The old-fashioned word offers reassurance and is more familiar to many people than the concept of sexual harassment.¹⁸⁷ Apologists for sexual harassers often claim to have tradition on their side;¹⁸⁸ an opposite tradition can be traced back to the most venerable sources.¹⁸⁹

With its echo of a well-known phrase, "the dignity of labor," dignity connects harassed workers with a history of documented unjust treatment. Thus, efforts to prevent or remedy sexual harassment are associated with the rights of workers in general.¹⁹⁰ Western Europe has traditionally insisted that its workers have certain freedoms, rights, and entitlements because they are workers. One of the "four fundamental freedoms" of the Community is the freedom of movement for workers.¹⁹¹ Workers are encouraged to "seek employment and change their place of employment according to their own ideas and interests throughout the entire territory of the Community."¹⁹² The European Court of Justice held that this guarantee has direct effect: individuals are entitled to have this right enforced in the courts of the member states.¹⁹³ Linked via

¹⁸⁶ As such, it is analogous to the small donation that a fundraiser is pleased to accept, with the belief that if a contributor has acknowledged the goal and thinks of herself as a supporter of the endeavor, more support will follow.

¹⁸⁷ For example, "fewer women will say that they have experienced 'sexual harassment' than will say they have experienced 'unwanted sexual advances.'" RUBENSTEIN & DE VRIES, *supra* note 23, at 9.

¹⁸⁸ See, e.g., *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984) (declaring that Title VII was not designed "to bring about a magical transformation in the social mores of American workers"), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) ("The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions."), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

¹⁸⁹ See *Genesis* 1:27 (stating that men and women are created in the image of God); see also BORCHARDT, *supra* note 130, at 11 (connecting European Community human rights law with eighteenth-century universalist declarations).

¹⁹⁰ See *supra* note 134 and accompanying text (discussing the equal treatment of women mentioned in the Community Charter of Fundamental Social Rights of Workers).

¹⁹¹ See EEC TREATY art. 48.

¹⁹² BORCHARDT, *supra* note 130, at 11.

¹⁹³ See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, 1347. According to one writer, the importance of the direct effect of any Community law "can scarcely be overemphasized." BORCHARDT, *supra* note 130, at 42. Direct effect turns "the

the concept of dignity to one of the most important freedoms of the Community, the idea of a right to workplace respect connects progressive visions of progress with a longstanding tradition.

d. *Decentralization as a Conceptual Advance*

Just as reformers reached into other domains of law and tradition to create linkages, they also were willing to jettison an idea that hindered rather than advanced their strategy. In response to the cry of subsidiarity, reformers withdrew from the plan of a directive and the harmonization of national laws that goes with directives. They substituted a recommendation with an attached code of practice, in the hope that the softer tone of suggestion rather than command would do more good in the workplace.¹⁹⁴

In discarding, or at least putting aside, their plans for a directive, reform partisans took a gamble. They quieted the criticism about subsidiarity that had threatened to destroy any attempt at EC-level reform. But their decision foreseeably resulted in some decentralization of the effort to combat sexual harassment. Directives must each be implemented at the national level, and the Commission has the right and duty to watch the nations vigilantly to determine whether implementation has proceeded in the proper manner. Implementation that proceeds too slowly or that does not track the Brussels-written original language can be—and not infrequently has been—challenged formally in the European Court of Justice.¹⁹⁵ In contrast, a recommendation provides no basis for this centralized power. To make their reform work, partisans had to trust people they did not know and could not control.

freedoms of the common market into rights that may be enforced in a court of law." *Id.*

¹⁹⁴ See *supra* note 59 and accompanying text; see also Rubenstein, *supra* note 49, at 74 (predicting that should the milder recommendation prove ineffective, pressure for a directive would increase).

¹⁹⁵ See EEC TREATY art. 169. The Commission paid rigorous attention to a well-known directive, on products liability. It took Italy and Britain to the Court of Justice for passing implementing legislation that did not track closely enough the language of the directive, and also brought proceedings against six other countries for failing to meet the deadline for implementation. See Bernstein, *supra* note 10, at 675 n.17, 708 (citations omitted).

B. *Skepticism About Fault*

American sexual harassment law rests on firm beliefs about morality and fault. Although a source of moral instruction and inspiration, these beliefs have been received with European skepticism as well. Some of the skepticism can be explained as simple lack of progress; some of it, however, helps to shed light on the weaknesses of American remedies for sexual harassment.

1. Barriers to Litigation

The American tradition of vindicating individual rights through private-law actions in the courts conflicts with a different tradition in Europe. This tradition is expressed in the lower number of full-fledged civil lawsuits in Europe, per capita, than in the United States.¹⁹⁶ Aggrieved Europeans are kept out of the civil courts with hurdles that have struck various observers as antidemocratic and repressive,¹⁹⁷ as the admirable restraints of a potential litigation explosion,¹⁹⁸ as good insurance against an insurance crisis,¹⁹⁹ and as a sound tradition that ought nevertheless to be somewhat liberalized.²⁰⁰ The barriers work. Injured persons are discouraged from suits by the virtual absence of contingency fees, the frequent requirement that losers reimburse winners for their costs and fees, relatively low awards to successful plaintiffs, the

¹⁹⁶ Tremendous controversy surrounds this point—especially because “lawsuit” is hard to define across cultures—but most researchers and scholars agree that Europe is less litigious than the United States. For a dissenting view, see Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 7 (1986) (noting that per capita use of the courts is roughly the same in the United States as in England and Denmark); for elaboration of the point that efforts to measure litigiousness or to count lawsuits are exceedingly difficult, see Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1154-55 (1992). To generalize about “Europe” is, of course, imprecise, since litigation behavior varies greatly from nation to nation.

¹⁹⁷ See JOANNE DOROSHOW, *THE CASE FOR THE CIVIL JURY: SAFEGUARDING A PILLAR OF DEMOCRACY* 3, 13 (1992).

¹⁹⁸ Cf. WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 2 (1991) (declaring that excessive litigation is the only feature of American society that “hardly anyone admires”).

¹⁹⁹ See Patrick Thieffry et al., *Strict Product Liability in the EEC: Implementation, Practice and Impact on U.S. Manufacturers of Directive 85/374*, 25 TORT & INS. L.J. 65, 88-89 (1989) (discussing how features of European legal system limit excessive liability claims).

²⁰⁰ See BEUC: *Community Consumer Policy in a State of Paralysis*, EUR. ENV'T, May 4, 1993, at 5 [hereinafter BEUC] (stating that consumers need greater access to legal services for protection).

absence of punitive damages, lack of access to a jury, endemic delays, and conservative discovery rules.²⁰¹ An effort at the Community level and in the nations to increase "access to justice"²⁰² has set modest goals and moves toward them slowly. Whether manipulated by cynical elites to stay in their place or simply peaceable, Europeans show less desire than Americans to flood the courts.²⁰³

Because European victims of sexual harassment lack the financial leverage over their adversaries that they would have in the United States, they are at one undeniable disadvantage. "It pays to discriminate" in Europe, an English lawyer observes, where an employer can expect to escape monetary punishment.²⁰⁴ The disadvantage is not confined to simple exclusion from the courts. Once harassment occurs, any claimant who wants more of a remedy from the employer than he is immediately willing to give is forced either to retreat or, in economists' terms, to bargain in the shadow of a law that is not in her favor.²⁰⁵ Most sexual harassment claimants make only modest demands for redress, but from the

²⁰¹ These generalizations apply to most, but not all, nations of the European Community; exceptions exist. For instance, in Luxembourg, each side pays its own legal and court fees (except witness fees). See Gavin Souter, *More Uniform Legal Rules, Procedures Urged for E.C.*, BUS. INS., Jan. 27, 1992, at 79, 81 (quoting a privately-prepared survey report). Greece permits contingency fee agreements; Britain is beginning to do so as well; and in other countries, the ban on these agreements can be evaded. See Roxanne B. Conlin & Clarence King, Jr., *Revisiting the 'Loser Pays' Issue*, NAT'L L.J., Aug. 3, 1992, at 27, 28 (discussing recent changes in British law); Souter, *supra*, at 81. Similarly, discovery is relatively liberal in Britain and Ireland. See Conlin & King, *supra*, at 28.

²⁰² In a Council document known as the Sutherland Report, one of 38 proposals concerned increased access to legal services for consumers. Telephone Interview with Marco Gasparinetti, Consumer Policy Unit, Commission of the European Communities (Jan. 13, 1993); see also *BEUC*, *supra* note 200, at 5 (noting that access to legal services is the focus of the Sutherland Report's proposals to help provide better consumer protection).

²⁰³ Judge Earl Johnson of the California Court of Appeal has argued that Americans enjoy less access to the courts than Europeans because court-appointed lawyers are more widely available for civil suits in Europe. See Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341, 341-45 (1985). The connection between court-appointed lawyers and access is certainly debatable; despite their formal right to counsel in many countries, Europeans are still discouraged (and thus, in effect, barred) from suing because of many factors, particularly financial risk and their inability to recover sizeable awards.

²⁰⁴ Telephone Interview with Denise Kingsmill, *supra* note 101. But see *supra* text accompanying notes 173-78 (discussing the costs of sexual harassment to employers). The problem is largely one of agency and organizational behavior, where individuals employed in a firm cannot perceive all of the costs of harassment.

²⁰⁵ I am grateful to Tom Heller for this Coasean point.

employer's point of view the cure can be costly, much more expensive than the expected cost of litigation in Europe. By contrast, an American employer knows that the legal expenses for a routine, uneventful Title VII lawsuit might amount to many thousands of dollars.²⁰⁶ The court of law, with its power to take money, is an important weapon for victims of sexual harassment, no matter what kind of relief they seek.

As American feminists have pointed out, however, American victims of sexual harassment pay a price for this weapon.²⁰⁷ This price can also be seen in terms of barriers to litigation. While European recipients of sexual harassment are kept out of the courts by obvious expressions of skepticism about the value of open access—they usually cannot afford a lawyer, nor conduct complete party-initiated discovery, nor recover much money—Americans have their own obstacles. Like her European counterpart, an American victim may take comfort in knowing that workplace sexual harassment is illegal. Yet she faces parallel problems of locating and convincing a lawyer, refuting archaic prejudices, and, if she prevails, extracting meaningful damages from a legal system that does not often regard her injury as important. This is not to say that American and European litigants suffer from equal barriers to litigation: American courts are more accessible. The ways in which they are closed, however, deserve attention.

The victim of sexual harassment is a vulnerable player within the courts. Sexual harassment protections in America are almost completely the product of the judiciary; as a statute, Title VII gives virtually no guidance about this type of sex discrimination. Tort remedies necessarily develop in the courts and demand judicial cooperation. When the concept of sexual harassment was new, the EEOC played a leadership role, but during the 1980s and early 1990s, the agency turned away from such progress.²⁰⁸ Reliance on

²⁰⁶ See Vincent J. Apruzzese, *Selected Recent Developments in EEO Law: The Civil Rights Act of 1991, Sexual Harassment, and the Emerging Role of ADR*, 43 LAB. L.J. 325, 333 (1992).

²⁰⁷ See Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 278 (1993) (describing the hostility and disbelief that complainants face); Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367, 1376-77 (1992) (comparing Anita Hill's treatment by the Senate Judiciary Committee to a "lynching"); see also *infra* text accompanying notes 233-38.

²⁰⁸ Even before the Reagan and Bush administrations, EEOC officials openly expressed their indifference to civil rights for women. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 252-53 (1991).

the courts means dependence on unrepresentative and often conservative institutions.

Liberal discovery rules, strategically valuable to plaintiffs because of the burdens they impose on defendants, increase the settlement value of cases but also increase the hardship of litigation for plaintiffs. Because the plaintiff generally claims emotional harm, and because her case is always about sex, a defendant can make a strong argument for the relevance of inquiry into the plaintiff's sexual and emotional life.²⁰⁹ A plaintiff, however, seldom has a justification in the discovery rules to pry into the life of any defendant.²¹⁰ Ordinary Americans who know almost nothing about the law usually know this much: anything they have to hide (such as an abortion, a difficult divorce, treatment for mental illness, a rocky employment history) would not remain hidden for long if they were to become plaintiffs in a personal injury lawsuit.

(relating the absence of significant EEOC action on sex discrimination in the 1960s); see also Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1133 (1993) (noting the EEOC's opposition to several aspects of the Civil Rights Act of 1991); Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035, 2055 & n.140 (1992) (discussing pro-employer stance by the EEOC on retroactivity question). In the *Meritor* case, the EEOC filed a brief arguing for limited employer liability. See Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 18, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979). The arrival of a Democratic administration in 1993 marked a political shift in the agency.

²⁰⁹ Discovery disputes sometimes present plaintiffs with no-win possibilities. Even if the judge or magistrate refuses to allow the defendant to pursue a scurrilous line of inquiry, the very presentation of the inquiry can force the plaintiff to endure slurs and name-calling (that are not actionable under defamation law). See, e.g., *Priest v. Rotary*, 98 F.R.D. 755, 758-59 (N.D. Cal. 1983) (rejecting an attempt by defendant to prove that plaintiff frequently lived with men for economic gain); *Knoetsen v. Superior Ct.*, 273 Cal. Rptr. 731, 741 (Ct. App. 1990) (rejecting an attempt by defendant to discover information about sexual attack on plaintiff during her childhood); *Mendez v. Superior Ct.*, 273 Cal. Rptr. 636, 638-39 (Ct. App. 1988) (rejecting an attempt by defendant to introduce evidence at trial that plaintiff had had extramarital affairs).

²¹⁰ In one case where three women sued a man for sexual harassment, the attorney for the defendant issued deposition subpoenas to several men: the plaintiffs' current lovers, the father of one plaintiff's child, a photographer alleged to have taken "sexually suggestive pictures of one or more of the plaintiffs," and a psychologist who had been treating one of the plaintiffs. *Mitchell v. Hutchings*, 116 F.R.D. 481, 483 (D. Utah 1987). Although the court quashed several of the subpoenas and limited the scope of discovery, any reader of Federal Rules Decisions can enjoy salacious gossip about Lynn Mitchell, Tiffany Musser, and Wendy Weston, whereas it is quite impossible to tell from the opinion anything about Hutchings, even what he was alleged to have done. See *id.* at 485-86; see also *Bailey v. Unocal Corp.*, 700 F. Supp. 396, 397 (N.D. Ill. 1988) (omitting name of alleged harasser, even though he was a named defendant).

Countless claims are suppressed because of well-founded beliefs about civil discovery.

A victim of harassment who is willing to sue despite this threat to her privacy will often appear to lawyers (even her own lawyers) and judges to be a less-than-ideal plaintiff. The very existence of her claim might suggest to some that she did not do enough to avert the harm, that she did not report it in time, or that she must be a troublemaker who deserved unpleasant consequences such as negative job evaluations. Double binds tug in several directions. Women have been blamed for quitting the jobs where they were harassed, and blamed for not quitting; blamed for complaining about the harassment, and for the failure to complain.²¹¹ A woman who was devastated by sexual references must be a thin-skinned prude, and a woman who lived through them with composure obviously did not suffer any damage that a court could redress.²¹² What else did she expect? She entered an all-female harassment trap like a waitress job, or a harsh workplace that was virtually all-male, or a hotel room for a meeting at the summons of her white-collar boss. She ought to have known what would await her.

These prejudices are not mere ephemera floating around a lawsuit: American judges have written some of them into employment discrimination doctrine.²¹³ Justice Rehnquist in *Meritor* invited defense attorneys to bring the plaintiff's dress, conversation and workplace demeanor into court, so that it could be determined whether she was the sort of person who would welcome sexual advances on the job.²¹⁴ Apparently to close the courthouse doors

²¹¹ See Deborah L. Rhode, *Sexual Harassment*, 65 S. CAL. L. REV. 1459, 1465 (1992) ("If a woman doesn't make a strong contemporaneous complaint, the assumption is that harassment didn't occur; if she does make the protest, she's overreacting, strident, humorless, and oversensitive.").

²¹² See Coombs, *supra* note 207, at 299 (noting how Anita Hill's poise during the Thomas confirmation hearings counted against her).

²¹³ See, e.g., *Ukarish v. Magnesium Elektron*, 31 Fair Empl. Prac. Cas. (BNA) 1315, 1321 (D.N.J. 1983) (denying relief to a woman who appeared to "condone, if not participate," in workplace sexual banter); *Gan v. Kepro Circuit Sys.*, 28 Fair Empl. Prac. Cas. (BNA) 639, 640-41 (E.D. Mo. 1982) (denying relief to woman who had used "sexually explicit" and "crude and vulgar" language with her colleagues); *Halpert v. Wertheim & Co.*, 27 Fair Empl. Prac. Cas. (BNA) 21, 23 (S.D.N.Y. 1980) (noting the toughness of the plaintiff and ruling in favor of the defendant). These cases are old, but their dicta have not been repudiated. For discussion of this issue, see Dawn D. Bennett-Alexander, *Lower Court Interpretations of the Meritor Decision: Putting Flesh on the Supreme Court's Sexual Harassment Skeleton*, 6 WIS. WOMEN'S L.J. 35, 42-60 (1991).

²¹⁴ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68-69 (1986). Wendy Pollack has

to a bogeywoman—the hypersensitive, priggish, and litigious worker—judges have required that, in Title VII cases, sexual harassment must be extreme, persistent, or outrageous, even though no such limitation exists in the statute.²¹⁵ The Sixth Circuit has provided a virtual assumption-of-risk defense, preventing recovery under Title VII in a case where the plaintiff voluntarily took a job in a harsh environment.²¹⁶ As commentators have pointed out, such a holding is unthinkable in other employment contexts such as race discrimination or workplace health and safety.²¹⁷

Tort claims offer great power, but to judges rather than plaintiffs.²¹⁸ The American-created causes of action, invasion of privacy and intentional infliction of emotional distress, raise subtle hurdles. As mentioned previously, many judges are skeptical of the privacy tort and believe it ought to be used sparingly.²¹⁹ A cause of action for intentional infliction of emotional distress requires outrageous conduct, and judges have wide latitude to decide that cruel, ugly,

written the pithiest critique of this part of the *Meritor* holding: "If Vinson's speech or dress was inappropriate for the work environment, she should have been told, not raped." Pollack, *supra* note 2, at 56. Contrast a British decision refusing to take into account the fact that the claimant had posed for a tabloid newspaper in "a flimsy costume." *Wileman v. Minilec Eng'g Ltd.*, [1988] I.R.L.R. 144, cited in RUBENSTEIN, *supra* note 74, at 48.

²¹⁵ See *Meritor*, 477 U.S. at 67 (citing to lower court cases that require the plaintiff to show the severity and persistence of the harassment); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992) (noting that harassment must be severe or pervasive, repeated, and continuous to constitute a claim under Title VII); *Graham v. American Airlines, Inc.*, 731 F. Supp. 1494, 1502 (N.D. Okla. 1989) (finding that the plaintiff failed to show that the sexual harassment was severe, persistent, or pervasive enough to create a hostile workplace environment). To an extent that remains uncertain at this point, these proof requirements have been reduced by *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993).

²¹⁶ See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620-21 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

²¹⁷ See *Vhay*, *supra* note 114, at 348 (noting that no other area of discrimination law demands "such a high level of moral blame before finding liability"); see also Lisa Rhode, Note, *The Sixth Circuit's Double Standard in Hostile Work Environment Claims*: *Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988), 58 U. CIN. L. REV. 779, 799-801, 804-07 (1989) (arguing that it is inconsistent for the Sixth Circuit to require plaintiffs to prove that they were actually offended in sexual harassment cases, while presuming such offense in racial harassment cases, since in both types of cases the conduct must be offensive to a reasonable person).

²¹⁸ The existence of a legal claim does not necessarily imply progressive potential. Obsolete causes of action such as breach of promise, seduction, criminal conversation, and alienation of affections could in theory have been used to advance feminist goals, see *Larson*, *supra* note 64, at 380-82, but in real experience did not. I am grateful to Stephen Sugarman for raising this point.

²¹⁹ See *supra* notes 104-05 and accompanying text.

and willful behavior does not quite meet that standard.²²⁰ And no matter which tort a plaintiff uses to express her complaint of workplace sexual harassment, she faces the possibility that the court will deem her claim barred by workers' compensation.²²¹

For both employment discrimination and tort claims, courts tend to require a showing of tremendous harm done to a flawless plaintiff. Wendy Pollack has identified the elements of a winning case: findings that the offensive conduct was overtly sexual; physical contact or physical harm; several victims, or at least several witnesses, testifying for the plaintiff; and more than one harasser or a harasser who was a supervisor.²²² Victorious plaintiffs usually have extraordinarily shocking stories to tell. Lawsuits that result in courtroom triumph or sizeable settlements are literally exceptional cases. In sum, there is a great gap between what women call sexual harassment in response to surveys and what American courts are prepared to remedy.

The remedy itself is also uncertain for the small number of plaintiffs who convince courts that they have suffered a legal wrong. For many years, plaintiffs could not receive punitive or non-economic damages under Title VII; the Civil Rights Act of 1991, which made these damages available, also capped them.²²³ Tort law offers the possibility of unlimited damages, but a tort claim does not give the victim whatever benefits of expertise and support the EEOC provides.

Courts provide an inadequate remedy in a larger sense as well. The party-initiated, bipolar design of civil litigation captures part of the sexual harassment picture: a victim brings a wrongdoer to justice and exacts recompense. But an important part is missing. Workplace sexual harassment appears to most observers to be a collective harm. It is overwhelmingly collective to those who see it

²²⁰ One commentator offers as an example *Hooten v. Pennsylvania College of Optometry*, 601 F. Supp. 1151 (E.D. Pa. 1984), where the plaintiff alleged that the defendants had made disparaging remarks about her status as a wife and mother, overloaded her work schedule so that she would make errors, and did not come to her aid when she collapsed at work. *See id.* at 1153. The court would not permit the claim to reach a jury, holding as a matter of law that the complaint did not allege sufficient outrageousness to support a claim for intentional infliction of emotional distress. *See id.* at 1155; Schoenheider, *supra* note 105, at 1483-84.

²²¹ *See* Jane B. Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1379-80 (1993) (surveying state court decisions).

²²² *See* Pollack, *supra* note 2, at 69.

²²³ *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(a), (b)(3), 105 Stat. 1071, 1072-73 (codified at 42 U.S.C. § 1981a(a), (b)(3) (Supp. III 1991)).

as abuse of powerless women by powerful men. Less controversially, it is collective in the sense that it takes place within an organization. The employer plays an ongoing (if sometimes passive) role in sexual harassment, and often the individual harasser is a repeat offender. Plaintiffs often report that they were impressed with the communal aspects of their problem, and that they could not have endured their legal battle but for their conviction that they were improving the lives of other workers. Thus, litigation acknowledges the collective nature of harm to some degree, but it is so hard on the individual litigant that she must regard herself as something of an anomaly, or perhaps a hero, in order to proceed.²²⁴

Like a Cold War nuclear weapon, litigation has undeniable power as a threat and a device of destruction. But if it is true that victims of harassment do not want a weapon but rather cessation of the harassment and possibly some disciplining of the offender,²²⁵ litigation does not serve their aims well. The filing of a lawsuit usually takes place after the worker has done something drastic to stop the harassment. Although the plaintiff herself will seldom be harassed again by the same individual, litigation does not prevent the harassment from recurring. The offender will suffer scandal and embarrassment—often no more than what the plaintiff will experience—but may well escape discipline. Usually, the best comfort to a victorious plaintiff is the hope that both specific and general deterrence will result. To this end, litigation is uniquely valuable. As an ordinary remedy, it warrants the skepticism with which Europeans regard it.²²⁶

²²⁴ See generally DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 236 (1989) (emphasizing, in the context of sexual harassment, the critical-theory contention that "overreliance on rights can disempower").

²²⁵ See RUBENSTEIN, *supra* note 51, at 27.

²²⁶ For a more detailed assessment of the harmful effects of blame and fault-finding in sexual harassment litigation, see *infra* part II.B.2. American feminists frequently discuss the value of litigation in advancing an agenda. Professor Coombs has argued that telling nonlitigation stories about sexual harassment and rape may be a more promising avenue of progress than the courts, in light of the Clarence Thomas confirmation hearings and William Kennedy Smith rape trial. See Coombs, *supra* note 207, at 303-14. But see Larson, *supra* note 64, at 445-53 (defending her optimism about the progressive potential of a new tort of sexual deceit and addressing procedural objections to such a tort).

2. Repudiating the American Focus on Blame

In the American morality drama, the claimant, the harasser, and occasionally the employer play principal roles, all as individuals.²²⁷ Their fault, or lack thereof, is critical to their fate.²²⁸ Because of the bipolar nature of civil liability law, the parties win when they show they are not at fault and lose when they fail to exonerate themselves. The dominance of employment discrimination principles over tort principles in sexual harassment litigation has blurred the individualist, win-lose line somewhat, especially in its provision for remedies other than money damages. But claims of sexual harassment are ultimately resolved in the United States with reference to fault.

European and American observers agree that a fault-based approach works well in the so-called easy cases, those involving force or blatant abuse of power. A subtler understanding becomes difficult, however, because the majority of instances of sexual harassment in the workplace do not involve aggression so obvious as rape or quid pro quo demands. The fault paradigm is less suited to address hostile-environment sexual harassment.

American sexual harassment doctrine points up this problem in its major controversies. The most famous of these is the reasonable man/reasonable woman/reasonable person dilemma. Although this question is not directly addressed to the fault inquiry, it attempts to fix blame: Did the person who created or tolerated the challenged condition thereby create a hostile environment? A harasser must have violated a standard of reasonableness in order to be culpable

²²⁷ Contrast one European approach. A trade union in Denmark advises persons who believe they are being harassed to "regard the person harassing you as a problem for the working environment—not as your personal responsibility." RUBENSTEIN & DE VRIES, *supra* note 23, at 53 (citing *How to Deal With Sexual Harassment?*, a publication of HK, the Danish clerical workers union).

²²⁸ American employment discrimination is, of course, not fault-based in several senses of the term; I use "fault" more colloquially here to refer to the truth-seeking function of a lawsuit. Because all litigation seeks to determine whether a defendant is or is not culpable, and all employment discrimination cases must refer to incidents involving complaining witnesses, the question of fault (which in sexual harassment cases is never limited to the defendant) is pervasive in employment discrimination case law. Later in this Article I place American sex discrimination law in the middle of a fault continuum, with fault in the sense of tortious conduct at one end and a pure focus on workplace conditions (one concern of Title VII) at the other. See *infra* part III.A. For analysis of the tension between collective concerns and private-law concepts of wrongdoing in civil rights litigation, see Sheldon Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 GEO. L.J. 1719, 1738-44 (1989).

for creating a hostile environment. But a gender divide sometimes separates perceptions of what is offensive and thus blameworthy.²²⁹ To remind a man of his sexuality, as MacKinnon points out, is to pay tribute to his power, because no tension exists among the many domains in which a man can be powerful, admirable, and strong.²³⁰ But to remind a woman of her sexuality while she is at work is to send the message that she is merely an object, rather than a skilled worker and a complete person.²³¹ Exceptions to these generalizations exist; the degree to which an individual woman or man subscribes to this gender-linked approach to sexual references cannot be fully known to another person until the recipient has had a chance to respond to the challenged conduct. Fault thus becomes difficult to adjudicate, as lawyers and judges, who are predominantly men, either apply an ill-fitting "reasonable man" standard to the conduct or struggle to imagine a woman's reasonable response to gestures, talk, and images of sex.²³²

While the putative harasser faces a jumble of conflicting ideas about what kind of conduct is reasonable, offensive, or blameworthy, the claimant is constrained to defend her own conduct by virtually proving her own lack of fault. Under current doctrine,

²²⁹ The major empirical work in the area is BARBARA GUTEK, *SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS* (1985). Gutek found that a majority of men but a minority of women found sexual advances at work to be flattering; a majority of women but a minority of men found sexual advances at work to be insulting. See *id.* at 96-97.

In contrast, according to a British study, men and women were in virtual agreement when asked, in a telephone survey, to say whether certain types of conduct do or do not constitute sexual harassment. See Michael Rubenstein, *Harassment Policies Show Growing Sophistication*, *EQUAL OPPORTUNITIES REV.*, Nov.-Dec. 1992, at 32, 33.

²³⁰ See MACKINNON, *supra* note 1, at 171.

²³¹ See *id.*; see also Hadsell, *supra* note 110, at 11; Morrison Torrey, *We Get the Message—Pornography in the Workplace*, 22 SW. U. L. REV. 53, 87-89 (1992). In her study of sexual overtures at work, Gutek found that usually when a woman made advances to a man she had singled him out based on "friendliness or attraction," whereas in the majority of advances made by men, one habitual initiator approached many women. GUTEK, *supra* note 229, at 88. Gutek also found that woman-to-man advances almost never harmed a man's career and that women tended to approach men of equal or higher rank at work, see *id.* at 158, whereas in man-to-woman advances the woman was usually a subordinate, younger and more physically attractive than the man, see *id.* at 61-63.

²³² Cf. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1232 (1990) (asserting that "the homogeneous image of society that results from the traditional equation of reasonableness with societal consensus is simply too harmful, excluding all but the dominant elite, to justify retention").

conduct that is welcome is not actionable under Title VII, and unwelcomeness is an element of the plaintiff's prima facie case.²³³ A claimant often must refute allegations that she enjoyed the conduct, went along with it, encouraged it, or failed to communicate her displeasure when presented with ambiguous behavior.²³⁴ Courts allow defendants to introduce evidence that the claimant wore provocative clothes to work, laughed at or told risqué jokes, or appeared pleased to flirt.²³⁵ Other civil-rights plaintiffs—African-Americans steered away from housing, older workers terminated from their jobs, or high school girls deprived of athletic programs—are presumed to have regarded the discrimination as unwelcome. One might infer some displeasure from the very filing of a complaint.²³⁶

The problem, of course, is that sex discrimination—the disparate treatment of women and men—sometimes deserves respect. Most Americans approve of, or at least condone, the search for intimate partners and expect the seekers to eliminate either men or women from the pool of candidates. If a sexual union can express an

²³³ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986). Faint rumblings from some appellate courts suggest a partial rejection of this proof requirement, although *Meritor* is quite clear on the point. See Ann C. Juliano, Note, *Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1571-72 (1992) (discussing departures from the unwelcomeness requirement in Third and Ninth Circuits). The majority opinion in *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993), reaffirms the unwelcomeness requirement in passing. See *id.* at 369.

²³⁴ See Hadsell, *supra* note 110, at 10-11 (discussing a claimant's sensitivity to such allegations).

²³⁵ See, e.g., *Meritor*, 477 U.S. at 68-69 (approving lower court's decision to admit into evidence testimony about claimant's "dress and personal fantasies" (quoting *Vinson v. Taylor*, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985))).

²³⁶ There will always remain the possibility of a complainant who, out of animus or perhaps mental instability, brings a charge of sexual harassment based on conduct that was genuinely welcome at the time, or that simply never happened. Professor Estrich argues that this scenario is very rare, and attributes its persistence in the public mind to sexism. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 815-16 & n.5 (1991). She draws an analogy between sexual harassment and rape. See *id.* at 850-51. Going further, MacKinnon suggests that concern about false claims may stem "from a perception that this cause of action challenges the whole structure of sexual subordination." MACKINNON, *supra* note 1, at 98. More data are needed. Although the subject of false claims of rape has been studied empirically, I found nothing comparable in the area of workplace sexual harassment; thus, in off-the-record interviews, I sought the opinion of several individuals with investigation experience. They responded that false claims are indeed very rare, and that the false claims they knew of were brought by employees who had recently been disciplined or terminated. See also Sandroff, *supra* note 176, at 69 (reporting that a majority of Fortune 500 executives surveyed agreed that most harassment complaints they receive are valid).

appropriate kind of discrimination, then an overture, always necessary to start a relationship, can also be appropriate. Even when no relationship follows from an overture, a recipient might have enjoyed the chance, or perhaps the flattering message she might infer from the approach.²³⁷ Other types of sexual conduct—jokes, displays, statements—that cannot be construed as courtship deserve less respect; but some workers welcome them. Thus the exceptional proof requirement has a basis in reality, but it has the effect of blaming the victim; it fails to recognize that a harassed person might hope to ease tension by treating the harassment lightly. This approach also crudely divides women along an infamous axis: either she asked for it or she did not, the overtures were either welcome or unwelcome, either she or the putative harasser is to blame.²³⁸

In general, Europeans seem somewhat less confident than Americans of their ability to draw this distinction accurately. Much of their skepticism and reluctance may originate from an inadequate commitment to feminism. Some of it may have another origin. Europeans, generally speaking, are more likely to believe that outsiders, particularly courts of law, are ill-qualified to sort out the merits of all but the simplest sexually charged situations.²³⁹ They generally regard fault in this context as murky and difficult to determine.

²³⁷ It is more likely that she found the message offensive. Gutek writes that although women usually find propositions at work to be insulting, the idea that overtures are welcome or flattering to women is nonetheless widely held, even among women. See GUTEK, *supra* note 229, at 96-99.

²³⁸ One commentator offers a doctrinal solution to this problem. She suggests that sexual conduct in the workplace be viewed as "presumptively unwelcome," thereby shifting the burden of persuasion to the defendant to show that a claimant invited the sexual conduct, after the claimant has proved that the conduct at issue occurred. 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, 862 n.29 (1993). While such a change in doctrine would represent progress, it would also retain a focus on welcomeness that does not serve plaintiffs well, and its impact in practice would be slight. See *supra* note 205 (identifying a mild trend toward an easier burden of proof for plaintiffs in sexual harassment cases).

²³⁹ See, e.g., *Wileman v. Minilec Eng'g Ltd.*, [1988] I.R.L.R. 144. Although Mr. Justice Popplewell rejected the defense argument that the claimant's having posed in a salacious tabloid photo was relevant to the question of whether she had suffered from the defendant's prurient remarks, see *id.* at 7, he also deemed irrelevant the plaintiff's evidence that the defendant had made similar remarks to other female employees, see *id.* at 10. Many Americans would likely consider both of these points pertinent to a claim of harassment and feel confident that they could use them to help reach determinations of fault.

Fault is a simple issue to those who view the workplace as an arena of domination, subordination, sexual privilege, and brute force—if a woman complains, the man is at fault; fault is also a simple issue to those who believe male perquisites should be unbounded. But these views are too far from the mainstream to help decide cases. Americans disagree on how asexual the workplace ought to be. The issue of welcomeness, for example, is often difficult to resolve for those who do not believe that sexual communication between supervisors and subordinates is inherently coercive. In this ideological middle-ground, an outsider might judge that some employee regarded her supervisor's conduct with a mixture of pleasure and anxiety. Or an employee might accept an overture with the belief that, overall, acceptance would be preferable to rejection, without even asking herself whether she is being coerced.²⁴⁰ Another possible scenario is the welcome advance that becomes unwelcome later.²⁴¹ Easy cases make for easy blame, but one prominent feminist criticism of current American case law is that it apparently recognizes as harassment only the easiest cases.²⁴² A meaningful remedy for sexual harassment must acknowledge the existence of lesser but still significant harms.

While the legal system slowly attempts to locate blame and pin it down, American working women are absorbing much of this criticism themselves. One study found that many harassed women blamed themselves for poor work when harassment made their work suffer, they blamed themselves for poor evaluations when these evaluations were punishment for not cooperating with the harassment, and they sometimes came to believe that prior good evaluations were based on their physical attractiveness rather than skill.²⁴³ Another study found that a majority of both men and women think that women dress to be sexually attractive at work and that if a person is propositioned at work, he or she could have done

²⁴⁰ See Vhay, *supra* note 114, at 345-46 (discussing the complex nature of unwilling submission to sexual advances, wherein the victim may be "choosing the lesser of two evils: enduring harassment or suffering the consequences").

²⁴¹ See Apruzzese, *supra* note 206, at 334 (offering the example of a voluntary office relationship that has ended).

²⁴² See Estrich, *supra* note 236, at 847 (arguing that hostile-environment case law has shielded "all but the most extremely offensive workplaces" from the possibility of liability); Pollack, *supra* note 2, at 69-70 (declaring that while courts are curbing the most outrageous behavior, sexual harassment remains a workplace menace).

²⁴³ See Joy A. Livingston, *Responses to Sexual Harassment on the Job: Legal, Organizational, and Individual Actions*, 38 J. SOC. ISSUES 5, 16-17 (1982).

something to prevent the proposition.²⁴⁴ Corporate managers reported in an early survey that they expected good female employees to handle whatever harassment they may encounter.²⁴⁵ Judges have taken the trouble to write about the objectionable traits of female complainants.²⁴⁶

When I first decided to write this Article in November 1992, the media were reporting similar chastisement. Anita Hill was continuing to be called a perjurer, a dupe, an insane person, a publicity hound, and a woman scorned for having accused Clarence Thomas of sexual harassment, notwithstanding the lack of evidence to support these accusations.²⁴⁷ A female federal judge, in a speech, deplored the fuss that women make over sexual harassment and implied that this publicity, more than harassment itself, has poisoned the workplace for women.²⁴⁸ David Mamet, one of the most gifted American playwrights of the day, declared that claims of sexual harassment are a weapon of the forces of political correctness.²⁴⁹ It is not a coincidence that the United States has both the most advanced sexual harassment doctrine in the world and also the world's most varied, numerous, famous, and successful victim-blamers.

Several American victims of harassment, of course, have escaped character assassination, disbelief, and self-blame; many plaintiffs

²⁴⁴ See GUTER, *supra* note 229, at 98.

²⁴⁵ See Collins & Blodgett, *supra* note 2, at 90 (citing a 1980 joint survey between *Harvard Business Review* and *Redbook* magazine, in which a majority of male managers agreed or partly agreed with the statement "a smart woman employee ought to have no trouble handling an unwanted sexual approach").

²⁴⁶ See, e.g., *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 426 (E.D. Mich. 1984) (characterizing the losing plaintiff, Vivienne Rabidue, as "rude and uncooperative"), *aff'd*, 805 F.2d 611, 615 (6th Cir. 1986) (stating that Rabidue was "a capable, independent, ambitious, aggressive, intractable, and opinionated individual . . . a troublesome employee"), *cert. denied*, 481 U.S. 1041 (1987); *Halpert v. Wertheim & Co.*, 27 Fair Empl. Prac. Cas. (BNA) 21, 27 (S.D.N.Y. 1980) (rejecting Title VII sexual discrimination claim brought by "independent, aggressive, and successful" plaintiff).

²⁴⁷ See Jane Mayer & Jill Abramson, *The Surreal Anita Hill*, THE NEW YORKER, May 24, 1993, at 90 (reviewing DAVID BROCK, *THE REAL ANITA HILL: THE UNTOLD STORY* (1993)).

²⁴⁸ "Many of these accusations are, in anybody's book, frivolous. . . . Frivolous accusations reduce, if not eliminate, not only communication between men and women but any kind of playfulness and banter. Where has the laughter gone?" David Margolick, *At the Bar*, N.Y. TIMES, Dec. 4, 1992, at B20 (quoting speech by Judge Maryanne Trump Barry).

²⁴⁹ See *Playwright of Oaths and Testosterone*, THE INDEP., July 3, 1993, at 16 (describing Mamet's play, *Oleanna*, as written "in response to what he sees as the McCarthyite feminist witch-hunt of sexual harassment legislation and political correctness").

have been vindicated.²⁵⁰ Moreover, the great awareness of sexual harassment that exists in America might be worth the price of more turmoil and less psychic peace. The fault-based civil liability system is not a failure. But because it coexists with cultural misogyny, this system can contribute its own harm to victims of sexual harassment. In a society that holds women responsible—and often culpable—for the consequences of sex, faultfinding in sexual harassment cases will often lead to the blaming of victims.²⁵¹

American moral outrage has taught, and continues to teach, the world about what harms women. The cost of the lesson has been overreliance on fault as a source of ultimate truth. To be proper accusers, claimants must present themselves as without sin—a requirement that has little to do with the reality of sexual harassment in the workplace. Even where complainants appear unimpeachable, courts and individual onlookers are reluctant to apply to harassers the blunt instrument of faultfinding.

A pluralistic, eclectic approach to preventing and remedying sexual harassment would require turning away from the American attempt to wield moral authority and would partially deprive victims of the comforting chance to fix blame on a wrongdoer. But this comfort is an illusion for many victims. They might be better served, and better understood, if the legal system would borrow some European skepticism regarding fault. Although this posture can have the effect of condoning exploitation and abuse, it is also

²⁵⁰ See, e.g., Sharon W. Walsh, *SEC Agrees to Outside Review in Sexual Harassment Case*, WASH. POST, June 17, 1988, at A1 (discussing court-approved settlement awarding plaintiff back pay with interest, attorneys' fees, promotion to a higher government-service grade, the choice of a new position in one of two offices, the removal of negative evaluations from her personnel file, and a permanent injunction against retaliation); see also Apruzzese, *supra* note 206, at 336 (describing \$3.1 million jury verdict for two police officers, \$500,000 settlement for college coach, and \$250,000 punitive damages award for stockbroker).

²⁵¹ A related point concerns the success of male plaintiffs against female defendants in cases involving sexual harassment. One of the largest recoveries in sexual harassment history was the million-dollar verdict that a man won in his suit against a female supervisor. See Lauren Blau, *Man Awarded \$1 Million for Allegations of Sexual Harassment by Woman Boss*, L.A. DAILY J., May 20, 1993, at 2. In Britain, during the era of the £10,000 cap on amounts recoverable in industrial tribunals for sexual harassment, see *supra* note 112, one man was awarded £150,000 for defamation from a woman who had accused him of sexual harassment. See Adam Sage, *Slander Award is No Surprise to Libel Lawyers*, THE INDEP., Oct. 26, 1991, at 3. One need not deny the harm that these male plaintiffs suffered to question whether men's and women's dignitary interests receive equal respect in the courts, and, if these disparities are typical, to infer a judicial tendency toward holding women responsible for sex in the workplace.

skeptical that a woman "asked" for anything by wearing a short skirt.²⁵²

3. Non-Fault Responses to the Problem of Sexual Harassment in Europe

While in the United States several firms and women's groups have devised extrajudicial responses to sexual harassment,²⁵³ in Europe these responses are more prominent. Non-fault approaches comport with the wider European vision of sexual harassment described above: a problem linked to other concepts rather than to an actionable wrong. More than their liberal-feminist American counterparts, Europeans have faith in informal techniques as remedies for sexual harassment. The EC Code of Practice officially endorses informal methods as well, and urges prevention; in some ways, the EC Code is a more vital and useful document than its American cousin, the EEOC guidelines. Trade unions also play a role among the non-fault responses to sexual harassment, although this role has not yet matured.

a. *The Formal/Informal Distinction*

Europeans have honed the concept of the "informal" approach to sexual harassment complaints. By contrast, in American law, a serious distinction between formal and informal procedures, with an attendant argument that both can be of use, is often regarded with suspicion;²⁵⁴ and much of this uneasiness comes from feminist quarters.²⁵⁵ The venerated Due Process Clause of the Four-

²⁵² See RUBENSTEIN, *supra* note 74, at 15 ("Having read all the reported American cases brought under Title VII of the Civil Rights Act and all the UK cases brought before Industrial Tribunals, my distinct impression is that questions of purported 'provocation' arise much less frequently in the UK.").

²⁵³ See, e.g., Bowman, *supra* note 30, at 571 (describing attempts to educate women in self-help measures); see also Kara Swisher, *Laying Down the Law on Harassment*, WASH. POST, Feb. 6, 1994, at H1, H5 (describing strategies that experts recommend to employers, including a written anti-harassment policy, clear definitions of sexual harassment, and training programs).

²⁵⁴ Perhaps the reason lies in the history of the nation as the world's first government to announce its repudiation of hereditary privilege and courtly pomp. Cf. U.S. CONST., art. I, § 9, cl. 8 (forbidding government to bestow titles of nobility and expressing disapproval of foreign gifts and titles bestowed on officers of the United States). Accordingly, there is no need to respect the concept of informality, since formality, its opposite, has been reconceived as the procedures demanded by due process guarantees.

²⁵⁵ See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL*

teenth Amendment equates procedural formality with protection from arbitrariness.²⁵⁶ But if informal procedures need not displace formal ones, attention to European innovation in this area can improve the position of persons vulnerable to sexual harassment.

A primary European contribution is a distinction between informal and formal methods of resolving harassment complaints. According to a Dutch expert, an informal method refrains from trying to judge the validity of the complaint of harassment, whereas a formal method points toward the goal of determining fault.²⁵⁷ An employee who wants only that the harassment stop and who has no interest in official blame would prefer an informal approach to a formal one. Such a preference is likely to be found in cases where a fault-based inquisition has not yet caused the employee to suffer, or where the objectionable conduct is not quite outrageous. Many victims of sexual harassment do not want to wield the sword of fault, to choose between doing nothing and acting affirmatively to cause another worker to be punished.

A peril of informal methods, however, is that they may leave the victim, the harasser, and the firm without guidance. Without elaboration, the meaning of "informal methods" remains unknown. Moreover, just as a person can commit harassment without animus or even awareness of harm, a victim may attempt informal self-help alone, without advice, in an effort unintelligible to the perpetrator or the firm. Europeans have made an effort to say what informal methods are. "An informal settlement," according to the official guide accompanying the EC Code of Practice, "seeks to remedy the situation by directly confronting the harasser or by going through

AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 310-18 (1985) (arguing that women are at a disadvantage when marital property is divided by negotiation between the spouses); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-50 (1991) (arguing that "the rigid orthodoxy" required by mediation harms women); cf. Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 953-64 (1990) (pointing out connections between belittling terminology such as "housekeeping" and the belittling of women in civil procedure). One writer identifies a "taste for cooperation" in women that disadvantages them in negotiations and thus in their ownership of property. See Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 428 & n.26 (1992).

²⁵⁶ See generally Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1672-73 (1985) (criticizing alternative dispute resolution movement for slighting procedural rights).

²⁵⁷ See Ineke M. de Vries, *Informal Methods of Resolving Problems 2* (1993) (unpublished manuscript, on file with author). "In principle," she emphasizes, "the person who is harassed decides whether a complaint is to be handled formally or informally." *Id.*

an intermediary.”²⁵⁸ Although not a precise definition, it is a workable one, indicating the goal of cessation rather than fault-finding.

More precision is evident in an informal device used in England called “the challenge technique,” whereby a complainant, accompanied by a friendly co-worker, confronts the harasser and says that she finds the behavior objectionable.²⁵⁹ The challenge technique is informal in that it does not aim at finding fault, yet formal in that detailed written descriptions of the procedure are available for recipients of harassment and their advisor-companions. The suggested actions resemble regulations: the claimant is advised to put on paper what behavior she finds offensive and what she hopes to achieve in the meeting. She enlists the aid of a friend. She asks to be heard in full, then listens. She is advised that if at any time during the meeting the friend calls a recess, she is to leave without protest. After the meeting, she takes notes.²⁶⁰ Unlike most of the infinite other types of informal methods, the challenge technique has a name and written ground rules.

Perhaps the most salient characteristic of the European informal approach is that it views the participation of third parties as central to a resolution. While the fault model aligns victim against harasser, or accuser against accused, European informal methods as described always involve other participants. “Confidential counselors” or “sympathetic friends” are expected to play active roles.²⁶¹ “[D]on’t take on the fight single-handed,” the Danish clerical workers union warns its members; “you are bound to lose.”²⁶² In an adversarial model, other employees of the company are viewed in terms of deciding blame—they can be agents of the employer, witnesses, or negligent supervisors—and they are peripheral rather than central, the question being whether *A* harassed *B*. The bipolar alignment is inherently formal; skepticism about fault fits more

²⁵⁸ RUBENSTEIN & DE VRIES, *supra* note 23, at 53. “If you [the alleged harasser] are approached informally, the aim of the meeting is to resolve the situation and to avoid formal procedures, which might result in disciplinary action for yourself.” *Id.* at 51 (extract from Humberside County Council [U.K.] Personal Harassment Code of Practice).

²⁵⁹ See Eve Featherstone, *Informal Methods of Resolving Problems 2* (1993) (unpublished manuscript, on file with author).

²⁶⁰ See *id.* app. 1.

²⁶¹ See RUBENSTEIN & DE VRIES, *supra* note 23, at 57.

²⁶² *Id.* at 53 (citing *How to Deal With Sexual Harassment?*, a publication of HK, the Danish clerical workers union).

consistently with an informal approach and a larger stage with many players.

Informal methods do not offer the harassed worker the American jackpot of money damages and favorable publicity, but, of course, this prize eludes almost all Americans as well. Most harassed workers do not dream of a windfall. One European researcher found that sex discrimination claimants "will not want financial compensation, but rather a termination of the discriminatory act or acts."²⁶³ Some recipients of harassment ask for even less—an "ear," impartial attention to their story from a sympathetic outsider, or reassurance that they are not oversensitive or crazy.²⁶⁴ Many will complain only to intimates;²⁶⁵ and, it can be assumed, many accounts of harassment have never been told to anyone. Thus even "informal" channels can look dauntingly formal to harassed workers, who are in need of a wider range of complaint options than they may now have in the United States.

b. *Emphasizing Prevention: The Commission Recommendation*

The Code of Practice, discussed above, stresses prevention over the formal resolution of disputes. In mild language, the Code recommends that employers act to prevent sexual harassment in several ways. Employers are urged to issue a policy statement condemning sexual harassment and to communicate this policy to all employees. Employees should also be told that they have an enforceable right to be treated with dignity; managers should receive special training in the subject.²⁶⁶ Because preventive measures will not always work, employers should designate someone to provide advice and assistance to employees who complain about sexual harassment. In addition to informal methods for dispute resolution, a formal grievance procedure should exist, and it should provide an alternative in case circumstances make formal grievance proceedings unsuitable. Employers are expected to view violation of their sexual harassment policies as a disciplinary offense.²⁶⁷

²⁶³ FERDINAND VON PRONDZYSKI, IMPLEMENTATION OF THE EQUALITY DIRECTIVES § 7, at 34 (1987).

²⁶⁴ Interview with Anne Simpson, Acting Coordinator, Women Against Sexual Harassment, in London, England (July 20, 1993).

²⁶⁵ Interview with Maureen Rooney, National Women's Officer, Amalgamated Engineering and Electrical Union, in London, England (July 8, 1993).

²⁶⁶ See Recommendation and Code, *supra* note 59, at 5-6.

²⁶⁷ See *id.* at 7.

The tone of the entire Code is moderate; nowhere does it tell anyone—employer, trade union, or member state—that it must do anything.

American comparativists should not dismiss the Code of Practice, however, simply because it lacks sanctions and binding force. A look at the American experience shows some potential for the Code. In the United States, the promulgation of the 1980 EEOC Guidelines combined with the *Meritor* decision probably encouraged many employers to create sexual harassment policies.²⁶⁸ The Guidelines do not bind federal courts, although in practice they have been influential;²⁶⁹ even less do they impose a direct duty on employers to take steps against sexual harassment. Yet they have helped to change the landscape of American employment. The hortatory pressure of a formal Commission recommendation may approximate, as closely as possible, the indirect pressure of the Guidelines in the United States.²⁷⁰

The Code of Practice also deserves American attention because of its progressive definition of sexual harassment: “[u]nwanted 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, verbal, or non-verbal conduct.”²⁷¹ This definition, although not prettily written, in some ways outshines both its American counterpart and other European phrases. Unlike the American EEOC definition, the Code’s language covers the situation where a harasser treats workers with contempt because they are women, although without resorting to conduct of “a sexual nature.”²⁷² Unlike definitions on the law books in European

²⁶⁸ See Lipper, *supra* note 85, at 337 (noting that many American employers have imported “the language of the EEOC Guidelines into their formally promulgated policies” on sexual harassment).

²⁶⁹ See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (praising Guidelines as “a body of experience and informed judgment”).

²⁷⁰ It is always difficult to tell, in hindsight, which pressures made a difference and which merely accompanied change. For future exploration of this problem, consider Japan. In a 1993 news story, spokespersons for three major Japanese companies—Sony, Yamaichi Securities (which, in a well-publicized incident, refused to reprimand male employees who peeked into the women’s bath at a firm retreat), and Mitsubishi Trading Company—all declared that the firms had no sexual harassment policies and no intention of creating any. See Merrill Goozner, *Japan Discovers Sex Harassment*, CHI. TRIB., Jan. 31, 1993, § 1, at 26. Eventually, Japanese employers will relent, and the change of their posture may shed light on the question of what makes companies begin to care about sexual harassment.

²⁷¹ See Recommendation and Code, *supra* note 59, at 4 (citation omitted).

²⁷² Guidelines, *supra* note 37, at 74, 677. American judges have decided that this

nations, the Code acknowledges the existence of hostile-environment harassment. Although these improvements are small and technical, they illustrate the larger benefit of pluralism: more definitions eventually lead to greater precision in identifying harms.

c. Trade Union Involvement: A Developing Role

The Code of Practice encourages trade unions to help remedy sexual harassment at an early stage,²⁷³ thereby tapping a European resource. Because workers enjoy greater unionization, job security, and workplace rights in Europe than in the United States, trade union involvement can be a meaningful remedy for sexual harassment.²⁷⁴ It would offer little to an American worker, who typically is not a member of a union and can be terminated without cause.²⁷⁵ But this situation may change. American trade unions have perceived the benefit to organizing that a stance against sexual harassment provides.²⁷⁶ It appears safe to predict that American unions will either continue to expand into areas of concern to women workers, sexual harassment preeminent among them—or else

behavior falls within the conduct proscribed by the EEOC Guidelines, although to reach this result they have had to apply the Guidelines definition beyond its literal meaning. *See, e.g.,* *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 n.6 (3d Cir. 1990) (reading the EEOC Guidelines as illustrative examples); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (noting that the EEOC Guidelines do not claim to be exhaustive). An earlier interpretation had required plaintiffs to prove “predicate acts” that were “clearly sexual in nature.” *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987). The EEOC has tried to solve this problem by writing new guidelines that proscribe gender-based harassment not sexual in nature. *See* Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (1993) (to be codified at 29 C.F.R. § 1609).

²⁷³ *See* Recommendation and Code, *supra* note 59, at 1.

²⁷⁴ This generalization holds for all EC countries except France and Spain, which have a low rate of union membership. *See* INTERNATIONAL LABOUR OFFICE, WORLD LABOUR REPORT 55 (1992).

²⁷⁵ In Australia, Belgium, Canada, France, Germany, Israel, Italy, Spain, and the United Kingdom, according to a comparative study, termination of employment requires good cause, usually a serious breach of “trust and interpersonal cooperation on which the employment relationship is based.” HOYT N. WHEELER & JACQUES ROJOT, WORKPLACE JUSTICE: EMPLOYMENT OBLIGATIONS IN INTERNATIONAL PERSPECTIVE 367 (1992). This standard is roughly equivalent to the rights of the 16% of American workers who are union members. *See id.* at 367-70.

²⁷⁶ Departing from their nineteenth-century history of resistance to the rights of working women, *see* FARLEY, *supra* note 65, at 29-34, trade unions have become engaged in feminist causes. A Supreme Court case involving women’s workplace rights, *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), was brought by a trade union.

disappear.²⁷⁷ Should these unions come back to health, attention to European experience may permit a powerful combination of American innovation and European trade-union strength.

Unlike her American counterpart, in most European countries an aggrieved worker can take her story to a union representative or official.²⁷⁸ She states her complaint, and then together with the union representative, tries to resolve the problem through negotiations with management. Because the employer cannot, as in the United States, simply fire the harasser or the aggrieved worker without some trouble, incentive exists to reach a peaceful settlement.

European experts indicate that trade unions have thus far not taken the lead in preventing or remedying sexual harassment, but they expect a stronger role to evolve.²⁷⁹ Union leaders are beginning to be educated about the magnitude of sexual harassment through the increased presence of women's officers at the national level, especially in the wealthier nations of northern Europe. Moreover, unlike many other items on the trade union agenda, sexual harassment has "usually proved to be an area of cooperation and consensus rather than a source of conflict between both sides of industry."²⁸⁰ Given that unions are likely to stay healthy in Europe, at least in the near term,²⁸¹ and given also that education efforts have met with very little backlash within the male leadership of the unions,²⁸² there is every reason to think that trade unions will expand their territory in this area.

Until a strong role for the trade union develops, its principal benefit to harassed workers is its separate status in the workplace:

²⁷⁷ See William Serrin, *Women Are Turning to Collective Action as a Key to Power and Protection*, N.Y. TIMES, Jan. 31, 1985, at C14 (quoting labor leaders).

²⁷⁸ Stories of sexual harassment can reach union officials by other means as well. Maureen Rooney, the official with chief responsibility for sexual harassment issues in the Amalgamated Engineering and Electrical Union in Britain, has heard of much workplace sexual harassment not from aggrieved female workers, but from friendly male colleagues, who phone to say that a woman is being harassed "and I told her to complain, but she won't." Interview with Maureen Rooney, *supra* note 265.

²⁷⁹ See *id.*; Telephone Interview with Ineke M. de Vries, *supra* note 73.

²⁸⁰ RUBENSTEIN & DE VRIES, *supra* note 23, at 34.

²⁸¹ European unions made substantial gains in membership during the 1970s and then lost millions of members in the 1980s; as of the early 1990s, union membership was either stable or slightly on the increase in OECD nations (24 industrialized countries, including all twelve member nations of the EC). See INTERNATIONAL LABOUR OFFICE, *supra* note 274, at 55-56.

²⁸² Interview with Michael Rubenstein, Consultant to the European Commission, in Surrey, England (July 5, 1993).

a source of power apart from individuals and management.²⁸³ When unionized, workers have for their use an organization dedicated to eliminating dangers in the workplace, documenting the history of workers so that individuals need not start from ground zero in redressing their injuries, and amplifying complaints that are well founded. This description is, of course, an ideal not widely shared in the United States, as the 1984 presidential election result attests.²⁸⁴ In Europe, however, the ideal has vitality for workers; it may yet flourish in the American future.

III. THE PROMISE AND LIMITS OF SYNTHESIS

American initiative and European skepticism can combine to produce useful new perspectives on the problem of sexual harassment. As noted in the Introduction, cultural differences and contrary value choices in America and Europe preclude one universally appropriate synthesis. The suggestions I offer in this Part are some of the many possibilities available. Arguing always in favor of pluralism rather than a centralized approach, I illustrate in Section A one combination where Americans can avail themselves of European lessons. Section B adds other possible applications of the comparativist approach and discusses its benefits and dangers.

A. *The Third American Paradigm: Sexual Harassment as Detrimental Workplace Conditions*

American approaches to sexual harassment reflect two major paradigms; or, put another way, workplace sexual harassment may be seen as an important subcategory of two sociolegal concerns. One of these is the subjugation and dominance of women by men. In this first paradigm, workplace sexual harassment becomes sex-

²⁸³ The argument in favor of regulatory "tripartism," where a union or other organization plays a role in the relationship between regulator and regulated, rests in part on the belief that unions can provide "an information base for the weaker party" and a "power base" to accomplish what rights-rhetoric alone cannot. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 59 (1992).

²⁸⁴ Walter Mondale, strongly supported by organized labor, was defeated by the incumbent, President Ronald Reagan, who had destroyed the PATCO air-traffic controllers union in 1981 during his first term in office. "Landslide" is a term frequently invoked to describe Reagan's 1984 victory. See Tom Wicker, *In the Nation: After 1984, What?*, N.Y. TIMES, Nov. 23, 1984, at A35 (noting that "Reagan's landslide defeat of Walter Mondale" forced Democrats to reexamine their future political strategy).

based employment discrimination, and Title VII provides suitable focuses and remedies. The second paradigm, an alternative or complement to the first, perceives sexual harassment as extremely rude, essentially private conduct between employees—conduct that is sometimes, but not generally, attributable to a heedless employer. According to the second paradigm, the appropriate remedy lies in tort law.

Europeans and the European Community have not fully accepted either paradigm, although they have shown more approval of the first one. While sexual harassment as sex discrimination has taken hold in British case law²⁸⁵ and achieved partial endorsement at the Community level and in scattered sites around the continent,²⁸⁶ some rejection of the idea has also taken place.²⁸⁷ Meanwhile, tort-based, private-law remedies—the approach that can be seen as most American—continue to go unused in Europe.²⁸⁸ To an American observer, this result may seem odd. Is Europe feminist or antifeminist? In American scholarship, the two paradigms divide fairly neatly along a feminist axis, with the sex-discrimination paradigm demanding a degree of allegiance to radical feminism.²⁸⁹ Tort theorists such as Paul and Epstein, who have written candidly about their aversion to radical feminism,²⁹⁰ favor a wrongful-conduct approach. By most indicators, Europe seems to lag behind

²⁸⁵ See *supra* notes 83-86 and accompanying text.

²⁸⁶ See *supra* notes 86-88 and accompanying text; see also text accompanying note 94 (describing partial acceptance of sex discrimination concept at Commission).

²⁸⁷ See *supra* text accompanying note 89 (describing Portuguese rejection); cf. *supra* note 127 (noting French decision to criminalize quid pro quo harassment, rejecting broader possibilities).

²⁸⁸ See *supra* part II.B.1.

²⁸⁹ By "radical" I refer to commitment to fundamental change, from the roots. The sex-discrimination paradigm is radical because it condemns an entire social condition and views women and men as players in a historical, political drama. A tort approach, by contrast, regards the players as individuals and pays little attention to root causes in society.

²⁹⁰ See Paul, *supra* note 21, at 347-48; see also EPSTEIN, *supra* note 21, at 271-74. Here I reject the cynical speculation that Paul and Epstein have no real commitment to a tort approach but merely want to stop Title VII because it offers a practical remedy to injured women. There is little, if any, basis for this conclusion. Epstein, a leading torts scholar, does want to stop Title VII, but he has been advocating a vital role for private-law civil liability for more than twenty years. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). Paul comes to the problem of sexual harassment from the vantage point of "individual responsibility," a background that would lead her sincerely to reject group-based conceptions of sexual harassment. See ELLEN F. PAUL, *EQUITY AND GENDER: THE COMPARABLE WORTH DEBATE* 127-29 (1989).

in its commitment to feminism, yet when faced with competing American alternatives, it has manifested a preference for the more radical-feminist of the two.

Because a feminist/antifeminist matrix is inadequate to explain the European choice, another theory becomes necessary. I contend that the relative success of the sex-discrimination paradigm is best explained by its collectivist—as contrasted to individualist—focus. The sex-discrimination paradigm focuses on the workplace as an organism and sees people in terms of their group membership. It is, of course, more consistent with European skepticism about fault than the wrongful-conduct paradigm. Stronger trade unions and multipolar participation in problems of harassment also comport with this collectivist perspective.

The next extension of the argument is that the sex-discrimination paradigm has succeeded only partially in Europe because it is insufficiently group-oriented. Consider where the success has lain: primarily at the Community level, where institutions agree that, in principle, sexual harassment is sex discrimination. Few plaintiffs have prevailed with this notion, but the Community has demonstrated a serious interest in eradicating sexual harassment via its fully-accepted equal treatment law. The sex discrimination paradigm, as I view it, lies midway between the wrongful-conduct paradigm and a distant, theoretical ideal where sexual harassment is prevented and remedied without litigation.

Thus, I offer another paradigm, beyond sex discrimination: sexual harassment as detrimental workplace conditions, to be cured with devices other than litigation.²⁹¹ I emphasize as strongly as I can that, although I put forward this thought as a recommendation for change, I think that *access to the courts should always be a vital*

²⁹¹ Contrast the language of Title VII, which prohibits sex discrimination in "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1988). This third paradigm makes no reference to actionable discrimination. It perceives hostile-environment sexual harassment as an environment, an ambient condition.

Two colleagues helped me fashion this concept. Stephen Sugarman first suggested the tripartite schema. Marty Malin pointed out that, despite references in the EEOC Guidelines and the statute, Title VII is not aimed fundamentally at curing detrimental workplace conditions, and that *UAW v. Johnson Controls, Inc.* illustrates the point. In *Johnson Controls*, the Supreme Court held that a fetal protection policy that barred women from jobs hazardous to their reproductive health was sex discrimination. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197-200 (1991). The Court thus permitted the company to continue its detrimental workplace conditions, which incidentally, Professor Malin adds, were more of a barrier to women's employment than the fetal protection policy.

option for victims of sexual harassment. With this "third American paradigm," I do not argue for the abolition of any formal remedies currently available.²⁹² The paradigm of detrimental workplace conditions is offered rather in an effort to improve the perception of sexual harassment as it really exists, with no intent to gainsay the wrongful-conduct or sex discrimination paradigms.

1. The Domain of the Paradigm

The detrimental-conditions approach is both wider and narrower than the two other paradigms, as I detail below.

a. *Elimination of the Quid Pro Quo/Hostile-Environment Dichotomy*

The traditional division between quid pro quo harassment and hostile-environment harassment is ready for reexamination. It rests on a now unrealistic view of the workplace. After the rapid growth of sexual harassment law in the United States and its attendant publicity, almost every person savvy enough to acquire power at work knows better than to fulfill the prima facie requirements for quid pro quo harassment.²⁹³ If a supervisor wants simply to have sex, then crude demands backed by explicit threats are risky and counterproductive. This is not to say that traditional quid pro quo harassment does not happen in the workplace—only that it is by now virtually deviant behavior.²⁹⁴ Moreover, the isolation of quid pro quo harassment makes no sense to many women, who may hear a tacit threat in even a polite overture from someone who can fire or discipline them. To some, even classic hostile-environment situations—involving sexually explicit pinups, for example, or obscene name-calling—look like men threatening women.²⁹⁵

²⁹² Although a nice idea in theory, in practice remedies tend to compete for the same turf. For my general thoughts on this conflict, see *supra* text accompanying notes 168-72; for suggestions on resolving it, see *infra* part III.A.4.

²⁹³ The quid pro quo plaintiff must prove that an actual threat existed and that the detriment she suffered was causally related to her response to the threat. See Estrich, *supra* note 236, at 834. This burden makes "all but the most perfect plaintiffs unable to establish the requisite nexus, and all but the most perfectly stupid defendants able to rebut successfully a prima facie case." *Id.*

²⁹⁴ Cf. Torrey, *supra* note 231, at 57 n.17 (noting trend away from "overt expressions of sexual aggression" and tendency of harassers to adapt to new technology, using electronic mail, answering machines, and computer software as media of harassment).

²⁹⁵ For illustrative cases, see *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1556 (11th Cir. 1987) (involving threats of reprisal from a male supervisor to a female

Regardless of the descriptive value of a quid pro quo category, however, the detrimental-conditions paradigm is not concerned with the relatively rare incidents of harassment that fall squarely within the label. Thus, the detrimental workplace conditions paradigm of sexual harassment—to merge the Code of Practice and EEOC definitions—covers conduct based on sex that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Some variations of quid pro quo harassment will fall within this definition, but the paradigm focuses on conditions of employment rather than the fault-laden concepts of abuse of power, extortion, or sexual blackmail.

b. *Emphasis on the Workplace*

As mentioned previously, sexual harassment takes place in a variety of settings.²⁹⁶ The wrongful-conduct paradigm is unconcerned with a workplace/nonworkplace distinction; the sex-discrimination paradigm applies only to workplace discrimination. Even more than the sex-discrimination paradigm, the detrimental workplace conditions paradigm is sited only in the workplace.²⁹⁷

The sex-discrimination paradigm connects sexual harassment with broader discrimination. Within this paradigm, harassment on the job is an expression of the evil of inequality that civil rights legislation in general sought to eradicate. The harassed worker suffers a detriment because of her sex. This detriment is related to the harassment she may experience in the street, the lower pay she likely receives, the unequal educational opportunities she may have had, and the lesser power she may have in her intimate relationships with men. The detrimental workplace conditions paradigm, by

employee who spurned his repeated sexual advances); *Jeppsen v. Wunnicke*, 611 F. Supp. 78, 83 (D. Alaska 1985) (refusing to recognize a distinction between quid pro quo cases and hostile work environment cases). See also GUTEK, *supra* note 229, at 119 (arguing that sexual harassment is sometimes used by men to encourage women to leave a worksite); Marlisa Vinciguerra, Note, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1718-19 (1989) (arguing that all workplace sexual harassment invoking a threat of economic detriment is quid pro quo harassment).

²⁹⁶ See *supra* note 14.

²⁹⁷ An example of a situation where the two paradigms do not overlap is the harassing interview that takes place away from the workplace, at a job fair or university. Title VII would probably apply, but the detrimental workplace conditions paradigm would not.

contrast, connects harassment to different workplace hardships: excessive noise, poor ventilation, physical obstacles, and toxic chemicals in the air. Neither paradigm tells the complete story of workplace sexual harassment; both provide separate framing devices in which the problem can be bounded.

2. Innovative Regulation

Catharine MacKinnon once wrote, rather cursorily, that hostile-environment harassment could be perceived as a harm within the jurisdiction of the Occupational Safety and Health Administration (OSHA) without doing violence to the 1970 workplace-health statute.²⁹⁸ Her proposal has received very little attention in the literature. As I have argued, the reasons for this neglect pertain to the American conception of sexual harassment as either wrongful conduct or sex discrimination. These two ways of seeing sexual harassment obstruct the detrimental-conditions paradigm.²⁹⁹

On further study, MacKinnon's idea appears plausible. First, sexual harassment is, as she suggests, consistent with the language of the statute that established OSHA.³⁰⁰ Although there is no evidence that Congress had sexual harassment in mind when it sought to regulate workplace hazards, this argument has not stopped American courts from equating sexual harassment with discrimination outlawed by Title VII. Indeed, a statutory reference to the "psychological factors involved"³⁰¹ in occupational safety and health is more than exists in the Civil Rights Act of 1964 to support the sex-discrimination paradigm. The official purpose of OSHA is to address the problem of workplace health and safety, nothing narrower than that.³⁰² The agency, founded only in 1973³⁰³ and altered several times by political forces since then,

²⁹⁸ See MACKINNON, *supra* note 1, at 159.

²⁹⁹ Another reason for the neglect is that American labor law is highly subspecialized, so that few practitioners or academics pay equal attention to OSHA law and sexual harassment. Moreover, the discipline was somewhat preoccupied with the task of defending a precarious status quo during Republican presidential administrations, when sexual harassment law was burgeoning.

³⁰⁰ See MACKINNON, *supra* note 1, at 159 n.48.

³⁰¹ 29 U.S.C. § 669(a)(1) (1988) (describing the scope of authorized research); see also *id.* § 669(a)(4) (referring to "motivational and behavioral factors").

³⁰² "The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden . . . in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. § 651(a) (1988).

³⁰³ See STEPHEN BREYER, REGULATION AND ITS REFORM app. 1 (1982).

does not have a long heritage of only one approach to regulation that would make it unable to function in this new domain.³⁰⁴ Case law, moreover, supports a broad mandate.³⁰⁵

Although the mandate of OSHA is broad enough to cover sexual harassment, current practices of the agency were never tailored to fit the problem and should not be used in this context. A "rule-book" approach, whereby inspectors visit a worksite and impose citations with fines attached, cannot readily be applied to sexual harassment.³⁰⁶ Moreover, because OSHA currently has no experience in regulating sexual harassment, its personnel are unprepared to act in this area.

Regulation of workplace sexual harassment, therefore, ought to be innovative and flexible rather than traditional in its methods, taking guidance from a literature written after the American national debate on deregulation.³⁰⁷ In particular, workplace sexual harassment is amenable to regulation where firms rather than government decide specific standards. The role of government is to require that these standards be written and to ensure that in practice they work to reduce the hazard regulated. This type of control, known in the literature as mandatory self-regulation, falls somewhere between the traditional rulebook approach (used by

³⁰⁴ As early as 1954, one study of workers' compensation noted how quickly radical proposals such as this one become familiar. See HERMAN M. SOMERS & ANNE R. SOMERS, *WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY* 49-53 (1954). Even the concept of "occupational disease," as distinguished from "industrial accidents," was once considered a bold expansion of the effort to insure workplace safety; the authors add that early fears of excessive liability if occupational disease were considered a workplace hazard "usually turned out to be unsupported by the facts." *Id.*

³⁰⁵ See *AFL-CIO v. OSHA*, 965 F.2d 962, 973 (11th Cir. 1992) (holding that OSHA is entitled to regulate hazards that present "significant risk of material health impairment"); *California Stevedore & Ballast Co. v. Occupational Safety and Health Review Comm'n*, 517 F.2d 986, 988 (9th Cir. 1975) (mandating that employers must "eliminate all foreseeable and preventable hazards").

³⁰⁶ See 29 U.S.C. §§ 657-659 (1988) (outlining OSHA regulation procedures for inspections, citations, and penalties). Most outside assessments of OSHA's overall performance agree that inspection and enforcement are weak points in a record that includes some strengths (for example, occupational injuries and illness rates declined during the 1980s). See Thomas F. Walton & James Langenfeld, *Regulatory Reform Under Reagan—The Right Way and the Wrong Way*, in *REGULATION AND THE REAGAN ERA: POLITICS, BUREAUCRACY AND THE PUBLIC INTEREST* 41, 50-55 (Roger E. Meiners & Bruce Yandle eds., 1989).

³⁰⁷ See AYRES & BRAITHWAITE, *supra* note 283; REES, *supra* note 26.

OSHA and other agencies) and voluntary self-regulation (used by the American accounting profession).³⁰⁸

Ian Ayres and John Braithwaite have outlined the virtues of mandatory self-regulation in contrast to traditional regulatory practices, and much of their analysis is pertinent to workplace sexual harassment, even though this hazard has never been regulated in the traditional government-controlled manner.³⁰⁹ Ayres and Braithwaite argue that a company will feel a sense of commitment to rules that it writes; when the firm has generated its own regulations, both acceptance and execution of the rules improve.³¹⁰ The salutary effect of the EEOC Guidelines illustrates this potential. These Guidelines spurred voluntary self-regulation within American firms;³¹¹ the Code of Practice may have a similar effect in Europe.³¹² Within a detrimental workplace conditions paradigm, the United States could take a small step further and require firms to write and enforce rules about hostile-environment harassment.

Another benefit of mandatory self-regulation is the likelihood that the rules that industry creates will be innovative, responsive, and tailored to real needs.³¹³ Companies differ from one another and will require different regulations. Judges, regulators, and academics have their own assumptions of what workers need—assumptions that may be grounded in dubious stereotypes.³¹⁴ As Ayres and Braithwaite point out, moreover, companies may choose to write relatively strict rules, imposing more demands than would universalistic rules written by outsiders.³¹⁵ The rules themselves can be revised expeditiously as a company needs change. Mandatory self-regulation is still new, but applica-

³⁰⁸ See AYRES & BRAITHWAITE, *supra* note 283, at 112.

³⁰⁹ See *id.* at 112-13.

³¹⁰ See *id.* at 113 (citations omitted).

³¹¹ See *supra* note 268 and accompanying text.

³¹² See Rubenstein, *Recommendation*, *supra* note 49, at 73 (characterizing the Code as "a strong incentive for employers to develop a proactive approach to the problem of sexual harassment").

³¹³ See AYRES & BRAITHWAITE, *supra* note 283, at 113.

³¹⁴ A fictional anecdote illustrates this point. In David Lodge's novel set around an English manufacturing plant, the managing director is persuaded to put the question of pinups to a vote among the factory workers. Somewhat to his surprise, the workers—mostly men, many of Indian and Pakistani origin—vote to remove them. See DAVID LODGE, *NICE WORK* 245 (1988).

³¹⁵ See AYRES & BRAITHWAITE, *supra* note 283, at 111.

tions have already emerged; workplace sexual harassment is a suitable domain for this increasingly effective approach.

3. Expertise and Professionalization

Continuing the analogy to workplace safety, experts in workplace sexual harassment could begin to develop professional norms for themselves and become a community. The origins of the American Society of Safety Engineers ("ASSE"), as described by Joseph Rees in his study of innovative workplace regulation, can serve in some respects as a model.³¹⁶ Safety engineering became a profession in typical fashion: practitioners, dismayed by what they saw in their ranks, sought to define themselves using standards of exclusion.³¹⁷ Experts in workplace sexual harassment, as well as lay observers, generally believe that not everyone who gives advice about sexual harassment is qualified to do so.³¹⁸ The corporate response to sexual harassment is still in its early stages. As the corporate response matures, employees responsible for preventing and remedying sexual harassment will have the opportunity to acquire the expertise and confidence that accompany professionalization.

Expertise in workplace sexual harassment can be the basis for a profession because it is not a mere subcategory of another specialty, but rather embraces and extends beyond employment discrimination law, critical legal theory, counseling, and management principles. Again, following the lead of ASSE as described by Rees, the profession of workplace sexual harassment experts would rest on two separate bases. ASSE demands competence in both engineering and management principles;³¹⁹ the professional expert in workplace sexual harassment would by analogy be competent in the major subtopics—law, union rules where applicable, psychology, and negotiation—as well as management principles. Ultimately, when it is ready to be formed, this profession would consist of people who are the best able to identify, prevent, and cure sexual harassment as it occurs in the workplace. They would defer neither to theory nor to transient corporate indifference to

³¹⁶ See REES, *supra* note 26, at 88-93.

³¹⁷ See *id.* at 89.

³¹⁸ I frequently heard this observation in my interviews, although few people will say so in print. For an on-the-record acknowledgment, see Audrey Magee, *Harassment at Work Dominates Women's Seminar*, IRISH TIMES, Mar. 22, 1993, at 4.

³¹⁹ See REES, *supra* note 26, at 92.

the problem. Professionalization implies a degree of independence from both feminist or antifeminist ideology, and management's short-term priorities.³²⁰

No workplace management in the world is ready to cede autonomy to self-defined experts in sexual harassment, even though the self-defined profession of safety engineering is widely accepted. The analogy to engineering falters because hazards of engineering and design are widely regarded as neutral, apolitical, and undeniable, while those of hostile-environment harassment are not. When a cutting machine lacks a guard and a worker consequently loses a finger, all would agree that the firm has a problem. Hostile-environment harassment, however, generally implies differences of opinion among workers. Sexual harassment looks completely different from hazards that are conventionally explained in terms of engineering or design.

But note what the two domains have in common. First, it is a modern notion—a construct of post-industrial enlightenment—that a firm must reflect on the error of its ways and make a change after a worker is maimed by a machine. The victim of an unguarded sharp edge in 1870, like a harassed worker in 1970, was tacitly encouraged by an indifferent legal regime to blame himself. He assumed the risk, as Vivienne Ravidue and others were said to have done,³²¹ or he was not free from fault, like the harassed worker

³²⁰ The drawbacks of increased professionalization are well known. See IVAN ILLICH ET AL., *DISABLING PROFESSIONS* 11-41 (1977) (arguing that all professions create dependency); cf. Michael Lewis, *J-School Confidential*, NEW REPUBLIC, Apr. 19, 1993, at 20 (ridiculing Joseph Pulitzer for seeking to create a profession of journalism). It is certainly possible that professional experts in sexual harassment would prove to be pompous, foolish, obfuscatory, or simply wrong. But experience has shown that this subject is not understood in commonsense fashion. Many people profess to be confused about it, disagreement runs rife, and little common ground is acknowledged. See *infra* part III.B.1.d. Formed slowly and with powers that would increase only after the profession has proved itself, this entity could fill a real void.

³²¹ See *Ravidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 (6th Cir. 1986) (holding that in context of a society that publicly "condones" and "commercially exploits" sexually-oriented materials, alleged harasser's "obscenities, although annoying, were not so startling" as to affect plaintiff's psyche adversely enough for plaintiff to prevail), *cert. denied*, 481 U.S. 1041 (1987).

In one New York case, a woman complained that her 1924 workplace conditions caused her to develop tuberculosis. See *Wager v. White Star Candy Co.*, 217 N.Y.S. 173, 174 (App. Div. 1926). She received a verdict of \$2000, but the Appellate Division, reversing, held that she had encountered the injury voluntarily:

The plaintiff was fully aware of the conditions under which she worked, and continued in the employment from June to December in spite of such knowledge. It is from her testimony that we learn that the walls of the

who quit or did not quit, complained or did not complain;³²² regardless of blame, the injury was "personal," a discrete event between two parties.³²³ Neither civil liability nor workers' compensation nor workplace safety regulation offered relief. Rees puts the maiming machine in its context. His ASSE engineers ask: Why was the guard missing? How was an unguarded machine allowed to remain on the shop floor?³²⁴ The safety professional attributes injury not to some pure realm of technology but rather to a flaw in the working relationships of the firm. The distinction that some observers would draw between the "hard," "physical" injury that concerns workplace safety professionals and the "soft," "emotional" injury that would concern workplace harassment professionals is undermined by the professional beliefs of the safety engineers themselves.³²⁵

Once seen in terms of detrimental workplace conditions, sexual harassment could be merged into a richer concept of safety regulation. A dialogue between safety professionals and harassment professionals could begin to explore the ground common to both

cellar were wet to the touch; that a cesspool backed up liquids which wet the floor; that the cellar was devoid of windows to light or air it; that dead rats were left about; that the odors were vile; that no fires were kept in the upstairs room; that the plaintiff worked in a drafty place; that the upstairs room was damp. It is common knowledge that such conditions are deleterious to health. The plaintiff was chargeable with such knowledge. We think that the plaintiff, as a matter of law, assumed the risk attendant upon her remaining in the employment, and that the recovery may not stand.

Id. at 175 (citation omitted).

³²² See Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1771 (1981) (identifying harsh doctrinal limitations on ability of workers to recover for injuries); see also *supra* notes 211-17 and accompanying text.

³²³ See, e.g., *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271 (1911) (invalidating workmen's compensation act on the ground that federal and state constitution require a plaintiff to prove fault in order to justify any taking from the defendant); *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (holding that harassment was a personal matter between two employees), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1860-1960: THE CRISIS OF LEGAL ORTHODOXY* 11 (1992) (summarizing nineteenth-century view).

³²⁴ See REES, *supra* note 26, at 93.

³²⁵ Making a related point, the trade-union activist Stan Gray has written that in traditionally male workplaces, attitudes toward health and safety are mingled with tension about gender. See Gray, *supra* note 162, at 219-20. Some male workers, according to Gray, will not cooperate with safety regulation because dangerous workplace conditions reinforce their concept of "masculine superiority." *Id.* Safety standards in the workplace thus reflect cultural influences.

groups. Experts in psychological stress of the workplace, serving as intermediaries or interpreters in this dialogue, might explain the harms of sexual harassment. It is even possible to imagine safety experts and harassment experts working together in a new ASSE, where intangible and psychological harms of all kinds in the workplace would receive attention. The detrimental workplace conditions paradigm suggests new types of teamwork that an engineer of the future might join with pride.³²⁶

4. Is the Paradigm Attractive to Its Constituencies?

In order to have any real-life effect, the detrimental workplace conditions paradigm must reassure both employers and employees that it will not unduly obstruct their interests. Employers would oppose a change that adds regulation without a tradeoff of reduced costs; employees would worry about the preemptive effect of a regulatory approach. Fault-based notions of sexual harassment are so influential that constituencies naturally identify themselves as plaintiffs or defendants, even if they have never been involved in a lawsuit.

The political demands of a fresh approach to workplace sexual harassment are beyond the scope of this Article, which suggests changes in perception rather than new distributions of power; but even before political needs are identified, the paradigm could become an attractive alternative for both potential plaintiffs and potential defendants in the American fault-based system. For employers, self-regulation offers benefits even if it will not preempt lawsuits by employees. The primary potential benefit is that self-regulation should result in less harassment and thus less litigation.³²⁷ But other benefits ought to emerge as well. Writing their own rules, firms would attempt to reduce their costs, and once the costs of sexual harassment become better documented, mandatory self-regulation should eventually emerge as a money-saver. Innovative cures for this subcategory of detrimental workplace conditions

³²⁶ Cf. Samuel Florman, *Existential Pleasures of Engineering*, TECH. REV., Apr. 1984, at 6 (meditating on humanistic aspects of engineering); Michele Landsberg, *Engineer Has Designs on Feminism*, TORONTO STAR, Mar. 8, 1991, at F1 (discussing increased attention to women's issues in engineering profession).

³²⁷ Because the costs of liability are far more obvious to management than "the costs of lowered commitment and productivity, diminished job satisfaction, and turnover," GUTEK, *supra* note 229, at 158, the hope of reduced litigation is of major importance in promoting the paradigm.

would lead to favorable publicity. Ethical investment criteria could encourage publicly-traded companies to favor a meaningful policy. Firms that are successful at mandatory self-regulation might, and should, receive additional latitude concerning the regulation of other aspects of their activity.

Although employers are entitled to assurance that mandatory self-regulation will not impose burdens on them unilaterally without any related benefit, employees should not have to forfeit their current remedies in the courts. The old bargain of workers' compensation, trading tort remedies for insurance, need not dominate current thinking. Shared understandings have moved forward since the creation of workers' compensation such that, for instance, the concept of externalities is widely understood: detrimental workplace conditions impose social costs, and somebody has to bear them. As comparative study tells us, furthermore, no immutable logic demands the torts-insurance tradeoff of workers' compensation.³²⁸ Eventually, a new bargain may appear fair. If mandatory self-regulation develops a track record revealing good faith on the part of management, yet burdensome litigation persists, political actors might negotiate some compromise in the legislature, making lawsuits slightly more difficult to bring.³²⁹ But preserving full American access to the courts during the slow development of this third paradigm remains important.

B. *Comparison and Progress*

A third American paradigm is only one application of the type of comparativism described in the preceding Parts of this Article. The process of comparativism itself poses independent opportunities to strengthen the American approach to workplace sexual harassment. The improvement of legal theory and policymaking also follows from the applied comparativism described. But this approach poses dangers as well.

³²⁸ One researcher who studied 30 industrialized countries with workers' compensation found that in 21 of them this form of insurance was not the sole remedy for a jobsite injury. See C. ARTHUR WILLIAMS, JR., AN INTERNATIONAL COMPARISON OF WORKERS' COMPENSATION 200 (1991).

³²⁹ Cf. Victor E. Schwartz & Liberty Mahshagian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 OHIO ST. L.J. 387, 392-93 (1987) (describing tradeoff whereby persons injured by vaccines receive no-fault compensation in exchange for reduced opportunities available in tort lawsuits).

1. Some Benefits of Comparativism

Ongoing comparison to Europe offers at least four sources of improvements to Americans who seek to create a better law of sexual harassment. It provides an encouraging example of what can be achieved in a difficult climate, a lively federalist laboratory, a unique lens through which to view American culture generally, and a way out of a political impasse.

a. *An Encouraging Precedent*

The European experience elaborated above in Part II is heartening for Americans because of its successes in a legal environment that pays little official heed to the priorities of feminism. Having learned from American initiative, European reformers accepted the concept of hostile-environment harassment and agreed that sexual harassment was sex discrimination. But jurisdictional objections threatened to hamper any meaningful improvement of European Community law. Pressed by subsidiarity and the principle of specific attribution of powers, reformers built associations with disparate concepts. The associations helped to expose sexual harassment for what it really is or might be. This tactic and accompanying intellectual revelation is available to American reformers as well. It can build alliances with other causes, thereby providing a renewable source of encouragement.

Arguments that sexual harassment is a threat to health and safety, a violation of human rights, and a burden on commerce serve several purposes. They hark back to principles of fundamental significance. They bridge the feminist cause with other causes and show how women in the workplace are not only women but also workers whose health and safety must be protected, human beings with human rights, and economic actors within an international economic union.

Occasionally Americans have achieved spectacular results using a similar linkage. Martin Luther King, Jr., with what appeared to be simplicity, invoked the Declaration of Independence and the United States Constitution, and white Americans had no rebuttal.³³⁰

³³⁰ King was the greatest American exponent of linkage with texts as a device for reform. See MARTIN LUTHER KING, JR., *The Ethical Demands for Integration*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 117 (James M. Washington ed., 1986) (citing the Declaration of Independence and the Constitution); see also DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING,*

Although sexual harassment has always existed, the concept did not crystallize until after readers of Title VII of the Civil Rights Act, notably Catharine MacKinnon, called it unlawful discrimination.³³¹ The Civil Rights Act itself is an example of this kind of linkage: the congressional power that permitted the law to be promulgated was the power to regulate interstate commerce.³³² American civil rights advocates, like European advocates of sexual harassment legislation, have often gone beyond appeals to social justice and shown the relationship between their proposed reform and business.³³³

Linkage with texts asserts that a reform does not depart from present law; what appears to be change is indeed mandated by a current legal tradition. When it succeeds, this linkage achieves a political consensus, uniting those who would change with those who would preserve. As a political strategy, of course, the tactic has its perils. It might seem to concede that every reform proposal must have a textual basis for purposes of jurisdiction, hampering initiatives such as the Commission's social action programs. Moreover, having been used in the United States by religious fundamentalists, gun-control opponents, and antiabortion activists, the tactic may strike feminist reformers as inherently reactionary and dangerous. Yet it appears indispensable to reform efforts.³³⁴

American reformers have already used linkage in their successful effort to show that sexual harassment can be sex discrimination and thus violative of a civil rights statute. The efforts need not stop here. Following the European lead, proponents could link their

JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 169 (1986) (discussing King's proposal for a Second Emancipation Proclamation); DAVID L. LEWIS, KING: A BIOGRAPHY 178 (2d ed. 1978) (quoting King's allusions to the "Hebraic-Christian tradition" and the Constitution).

³³¹ See MACKINNON, *supra* note 1, at 208-13.

³³² See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249 (1964) (stating that Congress based the Civil Rights Act on its power under the Fourteenth Amendment and the Commerce Clause).

³³³ See RICHARD KLUGER, *SIMPLE JUSTICE* 88 (1976) (describing the effect of racial segregation on wages); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 853-57 (1991) (describing the effects of race and sex discrimination in unregulated retail markets).

³³⁴ The American constitutional conflict over abortion may be viewed as a problem of unpersuasive attempts to create linkage with texts. Constitutional guarantees of substantive due process or equal protection require a tendentious reading in order to support a guaranteed right to abortion. The attempt to find privacy in the Bill of Rights, though slightly easier, poses similar difficulties. See LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 92-95 (1990).

agenda to a variety of texts and doctrines. The connection between sexual harassment and the cost of doing business has implications for corporation law, including duties owed to shareholders. Tax policymakers might consider how sexual harassment results in the unemployment or underemployment of taxpaying workers, and its harm to corporate profits. Health law suggests conceptual analogies to—and pragmatic alliances with—efforts of environmentalists, administrators, and health care cost-cutters to reduce the amount of costly harm flowing from the workplace.

Predictably, opponents will protest that this expanded attempt to prevent and remedy sexual harassment violates American analogues to subsidiarity and the principle of specific attribution of powers. These protests will often contain some truth. Especially until better data are gathered, for example, the connection between sexual harassment and financial harm to business will remain controversial and, to critics, too vague to permit an extension of financial-regulatory power. Potential allies may decline to form alliances. Some linkages will simply be unconvincing. But the connection between sexual harassment and other domains of law and American society will become more and more evident, despite the occasional lapses of the linkage technique. Sexual harassment is a problem of money, health and safety, and morality. To isolate it as a women's issue is not only to choose a weak tactic³³⁵ but also to conceal a large portion of the truth. The European experience has identified some new alliances to be made, and it has shown the promise of linkages created in response to jurisdictional doubt.

As the European experience suggests, decentralization is a necessary complement to linkage. The creation of a detrimental workplace conditions paradigm is one example of decentralization. When seen as a problem of workplace conditions, sexual harassment extends beyond the relatively narrow range of feminists, antidiscrimination lawyers, and harassed individuals who now comprise the majority of people interested in the subject. These groups may be called on to give up some of their control of the sexual harassment agenda in exchange for a greater consensus that the problem is important. European experience offers instruction about the value of this bargain. I have argued that in Europe decentralization advanced the effort against sexual harassment, but one might view the acceptance of a Community-wide recommendation rather than

³³⁵ See *supra* text accompanying notes 23-24, 156-60, 187-90.

some alternative (like a directive) as a setback.³³⁶ At a minimum, however, the European decision to decentralize the struggle against sexual harassment reveals benefits—which may or may not offset what was lost—that ought to encourage American reformers.

b. *The Federalist Laboratory*

Louis Brandeis, himself a law reformer and a pioneer of modern American comparative law,³³⁷ is associated with the insight that within a federal union, states can function as laboratories, testing and living with a legal idea.³³⁸ States in a federal union can be enough like one another to make comparison meaningful, while pursuing different solutions to problems. Not every approach will succeed, but failures are pertinent, and successes even more instructive, to observers.

Although Brandeis focused primarily on intra-American comparativism, today an advocate of the federalist laboratory would note the increased homogeneity of populations in American states since the time of Brandeis and perhaps view Europe as a livelier variation on this theme. Like the United States, the European Community was fashioned out of states that all retain a separate sense of identity. The two entities are approximately the same size as measured by various indicators. They are both increasingly multicultural and multiracial. Europe as a unit can be compared to the United States, and individual nations, which still control most of their own laws, can serve as analogues to the American states in this type of laboratory approach.

Among the nations of Europe, laws exist that have no American counterparts. For example, sexual harassment, so labeled, is not a crime in the United States as it is in two European countries.³³⁹

³³⁶ For an expression of this view, see Goldstein, *supra* note 75, at 19 (stating that the EC recommendation is disappointing); see also *supra* note 194.

³³⁷ See *Muller v. Oregon*, 208 U.S. 412, 419 & n.1 (1908) (citing the first “Brandeis brief,” which included comparisons to Europe in its support of workplace regulation). Brandeis pioneered the approach to law that is implicit in this Article, that of deciding questions and making policy inductively, based on attention to facts about communal life, rather than deductively. See PHILIPPA STRUM, LOUIS D. BRANDEIS, *JUSTICE FOR THE PEOPLE* 124-25 (1984).

³³⁸ See STRUM, *supra* note 337, at 80.

³³⁹ See *supra* note 62. Quid pro quo sexual harassment of an employee has occasionally been punished under American criminal law. See *Lovely v. Cunningham*, 796 F.2d 1 (1st Cir. 1986) (involving homosexual coercion of vulnerable employee); cf. James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 685 n.82 (1984) (citing a criminal law case involving extortion of sex).

Additionally, no national law requires American employers to state their policy against sexual harassment in employment contracts, a requirement now imposed on Belgian employers.³⁴⁰ Other provisions of the labor laws of European nations give harassed workers more rights than they have in most American states.³⁴¹ Europe, in sum, has moved ahead of the United States in various ways.³⁴² In the simplest kind of comparative inquiry, a borrower browses the law books of another nation for ideas. Such a detour into European law by an American comparativist would produce results.

American criminal law could change to provide for the reliable prosecution of quid pro quo harassers. With more difficulty, the United States could quicken its retreat from the principle of employment at will so that, for instance, harassing a worker would become one of the very few grounds for termination of employment. Good reasons exist to be pessimistic about the benefit of these approaches in the United States, but reformers who study them could devise useful modifications. As the bromide goes, two heads are better than one; for a problem like sexual harassment, which calls for a pluralistic solution, several approaches are better than one.

Eventually, the racial and ethnic variety among citizens and residents of Europe may lead to insights into the important relationship between questions of race and sexual harassment. Although the almost-concurrent civil rights and women's movements raised this issue in America, Europeans live more closely with it. A nearby war, an influx of refugees from the east and south, and the rise of open hostility toward foreigners and racial minorities (especially in Germany and France) forced white Europeans in the 1990s to think about race and ethnicity. During the same period, white Americans appeared less interested in this subject.³⁴³ White

³⁴⁰ See RUBENSTEIN & DE VRIES, *supra* note 23, at 24-25 (setting forth Belgian law, promulgated in 1992).

³⁴¹ See *supra* note 99 (comparing European and American experience with unjust-dismissal law as a remedy for sexual harassment).

³⁴² In the words of one comparative lawyer, "the forward movement" in sexual harassment "is to place greater emphasis and obligations on preventing it. But in the U.S., the approach is to punish it after it occurs." Anita Diamant, *Sexual Harassment on Job Widespread, 24-Nation Study Says*, BOSTON GLOBE, Dec. 1, 1992, at 1, 10 (quoting Constance Thomas, U.N. lawyer).

³⁴³ See Mike Barnicle, *Fear, Anger and a Racial Gulf*, BOSTON GLOBE, Apr. 7, 1992, at 21 (analyzing the division between the races and the hesitation to address the problem); Ben Holman, *Media's Surprising Problem*, DALLAS MORNING NEWS, Mar. 28, 1993, at 1J (discussing the media's treatment of racial issues); James Yuenger, *Politics*

American feminists have long been accused of ignoring race—of dividing women unconsciously into “women who bear the traits of race and ethnicity” and “women” unmodified (themselves)—in their fight against discrimination.³⁴⁴ Although many writers have responded eloquently to this charge,³⁴⁵ the two struggles do remain somewhat separate in American scholarship and activism. I offer no bridge of this gap, only the observation that white observers in Europe seem to view sexual harassment and sex discrimination as closely related to issues of race and ethnicity.³⁴⁶ How they do it may become intelligible to American comparativist-feminists who can approach the European Community as a laboratory.³⁴⁷

c. *Cultural Intangibles: “European Sophistication” and “American Puritanism”*

Different approaches to sexual harassment law in different countries reflect cultural notions that are widely held yet inadequately examined. Studying and improving the law would mean studying and improving these understandings. The stereotype encountered most often in the comparative study of sexual

of *Division: A Bitter Harvest*, CHI. TRIB., May 11, 1992, at 1C (reviewing political attitudes toward racial issues).

³⁴⁴ See Harris, *supra* note 23, at 592; see also BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 141-43 (1981).

³⁴⁵ See, e.g., LETTY C. POGREBIN, *DEBORAH, GOLDA AND ME: BEING FEMALE AND JEWISH IN AMERICA* 275-311 (1991) (describing asymmetry between the feminism of white Jews and that of African-Americans); Coombs, *supra* note 207, at 294 n.58 (apologizing for white feminists' appropriation of the Anita Hill experience); Robin West, *Relativism, Objectivity, and Law*, 99 YALE L.J. 1473, 1490 (1990) (book review) (emphasizing the common ground of all persons who are disadvantaged by the legal concept of objectivity).

³⁴⁶ My observation is grounded only in an impression gathered from living near, and also interviewing, white Europeans for one year. For an EC allusion to race and sexual harassment, see RUBENSTEIN & DE VRIES, *supra* note 23, at 11-13 (describing an empirical study of “racially explicit sexual harassment”).

³⁴⁷ One possible explanation of this phenomenon is that activists among Europeans comprise a little elite of the left, whereas the more pluralistic women's movement in America includes feminists who are indifferent to racial equality, the gap between rich and poor, and other topics of a liberal or radical political agenda. If this explanation is correct, it may indicate ideological tension between the two causes of racial justice and feminism in America; perhaps American advances in sexual harassment law could not have occurred without the efforts of feminists with regressive views on race. For a more optimistic assessment of this division, see Emma C. Jordan, *Race, Gender, and Social Class in the Thomas Sexual Harassment Hearings: The Hidden Fault Lines in Political Discourse*, 15 HARV. WOMEN'S L.J. 1, 23-24 (1992).

harassment law pertains to sex as it is perceived in Europe and the United States. According to this stereotype, Europeans are sophisticated and Americans are puritanical.³⁴⁸

Much needs to be said about this stereotype, as its prevalence in America has had policy consequences. Perhaps the most important point is that little or no evidence exists to support it, and no serious effort has been made to isolate the grain of truth that popular stereotypes are said to contain. Nonetheless, the notion retains a vague kind of power, used to good advantage against American feminists.

Critics have written that despite its rhetorical appeal to liberation, American feminism seeks to impose a censorious, joyless revision of sex on a diverse populace.³⁴⁹ Feminist efforts against pornography, rape (especially acquaintance rape), demonstrations of misogyny in the military, and sexual harassment have been described as expressions of this puritanical crusade.³⁵⁰ Puritanical

³⁴⁸ For expressions of the stereotype in American culture, consider the literary corpus of Henry James and F. Scott Fitzgerald; the musicals *Gigi*, *Cabaret* and *Do I Hear a Waltz?*, which rely on racy images of Paris, Berlin, and Venice; Olivia de Havilland's Academy Award-nominated portrayal of American virtue overwhelmed by Charles Boyer in *Hold Back the Dawn*; the fading but still-used slang phrases where "French" is an adjective signifying sex; the terms "art films" and "Latin [i.e. Spanish or Italian] lovers"; Nazi images and French maid's uniforms in pornography; Scandinavian "freedom"; and Romance-language synonyms for the techno-American "womanizer"—Lothario, Casanova, Romeo, Don Juan, and gigolo.

England, historically separate from the rest of the continent, can fall on either side of this divide. Compare E.M. FORSTER, *A ROOM WITH A VIEW* (1908) (telling the story of an innocent English heroine awakened by love and sensuality in Florence) with ROBERTSON DAVIES, *A MIXTURE OF FRAILTIES* (1957) (portraying the story of an innocent Canadian heroine seduced by a dissolute English artist in London).

³⁴⁹ See, e.g., Pete Hamill, *Woman on the Verge of a Legal Breakdown: Feminist Catharine MacKinnon*, *PLAYBOY*, Jan. 1993, at 138 (comparing MacKinnon to Lenin and Andrea Dworkin to Trotsky); R. Emmett Tyrrell, Jr., *The Worst Book of the Year*, *AM. SPECTATOR*, Feb. 1994, at 20, 22 (calling Catharine MacKinnon "a bully"). On November 1, 1993, I ran a NEXIS search in the Omni library of Rush Limbaugh's neologism "feminazi," which retrieved 79 documents.

Even some feminists identify a tendency within feminism to reject or fear sexual pleasure. See, e.g., NAOMI WOLF, *FIRE WITH FIRE* 133-232 (1993) (contrasting her own "power feminism" with "victim feminism").

³⁵⁰ See KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* 66-75 (1993) (arguing that much of the current date rape discourse draws on Victorian notions of women and their sexuality); Camille Paglia, *The Return of Carry Nation: Feminists Catharine MacKinnon and Andrea Dworkin*, *PLAYBOY*, Oct. 1992, at 36 (attacking the anti-pornography effort); Charley Reese, *Tailhook Outrage a Victorian Reaction in the Age of Caligula*, *ORLANDO SENTINEL TRIB.*, May 4, 1993, at A6 (arguing that the Tailhook incident accusers hypocritically appeal to standards of the nineteenth century in bringing harassment claims against their fellow aviators).

compared to where? A mythical Europe—different from, yet similar to, America—becomes necessary.³⁵¹ Even the linguistic reference to the Puritans evokes an image of a New Jerusalem on the American continent—a rejection of Europe. Without the contrast of “European sophistication,” “American puritanism” would lose much of its meaning. The contrast wounds liberal reformers in a vulnerable place. Policymaking elites appear to prize their belief in their own worldliness, and they acquiesce in the idea of “European sophistication.”³⁵² Yet this distinction between Europeans and Americans rests on sparse evidence. One need not endorse every goal on the feminist list mentioned above—I do not—to be dubious of the charge of puritanism that opponents of feminism raise, and to observe that a fanciful notion of “European sophistication” buttresses this construct.

Those who will carry out future research in comparative sexual harassment law will hear of “European sophistication” versus “American puritanism” as an explanation for the different, and apparently weaker, European response to this problem. I believe that the distinction is overdrawn and that this exaggeration retards feminist progress in America, but it will fall to other writers to extract whatever truth lies in the contrast. As detailed previously, my own explanation of the difference in approaches to sexual harassment also relies on notions of culture—the European decision to limit access to courts, and a related skepticism about fault.³⁵³ The very question “What is sexual harassment?” is itself culturally laden.³⁵⁴ Attention to Europe will reveal a hidden foundation that

³⁵¹ Camille Paglia has frequently invoked American puritanism and European sophistication in her attacks on mainstream American feminism. See Joan Connell, *Clarence Thomas Hearings Widen Chasm Between Men, Women*, HOUSTON CHRON., Oct. 20, 1991, at A25 (quoting Paglia on American feminists). In an interview, Paglia alluded to the many European people and things she admires—Oscar Wilde, the Marquis de Sade, “The Birth of Venus,” Ingmar Bergman—while comparing American feminism to the Kremlin, and charging it with warping women’s “instincts to beauty and pleasure.” See Michael Kilian, *Hurricane Camille: A Torrent from the Feminist Whom Feminists Love to Hate*, CHI. TRIB., Dec. 6, 1992, § 6, at 4.

³⁵² This acquiescence can be inferred from the lack of a response to the charge. Elites, of course, may simply believe that reference to “European sophistication” as a basis for attacking feminist projects is too silly and trivial to warrant a response. As I have argued, however, once “European sophistication” is conceded, it becomes harder for feminists to maintain that their ideal world includes a place for sexual excitement and novelty.

³⁵³ See *supra* part II.

³⁵⁴ See Lloyd R. Cohen, *Sexual Harassment and the Law*, SOCIETY, May-June 1991, at 8, 9-11.

legal doctrine can obscure.

d. *Ameliorating an Impasse*

In arguing that attention to comparative sexual harassment law can expose a somewhat unfair tactic used by critics of feminism, I do not want to neglect an apparently paradoxical point: this attention can also improve relations between American feminists and their critics. Cultural comparison, in the setting of comparative law, would move American law forward, out of a partial impasse. The two camps tend to label each other as harassers-and-their-apologists and prudes-and-feminist-censors, and, therefore, little dialogue can take place. Looking at Europe may offer a way out. The former camp (those who appear to condone harassment) can see that Europe, less inclined to regulate sex through law than the United States, has nonetheless taken a stance against sexual harassment that has effected real change. The latter camp (those who would escalate measures used currently to remedy this problem) can examine the apparent tolerance of some degree of sexual harassment in Europe. As I have argued, this apparent tolerance is more than capitulation, or failure to see the feminist light, although it shows a weaker commitment to principles than American feminists would accept. Without necessarily condoning any European laxity, American feminists can revisit their demands to see which matter the most, and which might sensibly be dropped. Advocates and opponents of a stronger stance against sexual harassment in America live in a pluralistic society with no consensus about what constitutes harassment or how it ought to be remedied. Europe offers lessons to both groups.

2. A Word of Warning

The mutual influence of comparative law poses several dangers. Perhaps foremost among them is the fear that emulation causes borrowers to lose more than they gain.³⁵⁵ European reformers have been haunted by negative images of the United States as they seek to make sexual harassment preventable and punishable; they have alluded to their dread of "American excesses."³⁵⁶ Reform,

³⁵⁵ See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991) (offering a history of the conservative or reactionary contention that reform either cannot work or will make problems worse).

³⁵⁶ Riding, *supra* note 9, at 1.

should it go too far, would import a foreign culture: censorious, litigious, fearful of sexuality, repressed, and full of costly legal minefields. Their American counterparts, were they to look to Europe at all, would likely see it as a place that has yet to grasp and acknowledge the reality of sexual harassment, a place where injured persons lack redress in the courts and where the law scarcely impinges on male privilege.

At a more general level, a connection between comparative law and legal feminism such as the one proposed here has few precedents, and the precedents suggest that looking at Europe tends to temper rather than advance feminist progress.³⁵⁷ As this Article has shown, attention to Europe generally leads a comparativist away from the American idea that private law suitably expresses and reifies individual rights. The temptation for Americans is to stop there: to take away rather than add. And how much can a comparative method demand? Comparative law in the United States (in contrast to some European nations, especially Germany) has always been a marginal force for change, even when a foreign law under study fits American needs closely and would be simple to emulate. The difficult comparativism that I have advocated here may be too much to expect from Americans, who quite accurately see themselves as world leaders in the fight against sexual harassment.

Yet because sexual harassment is more than sexism, or a subset of employment discrimination, or a women's problem, or a species of tort, or a European-style condition of work, the breadth of the topic justifies and compels an expansive recruitment of all persons who are touched by this harm. Comparative law is only one of the devices that can widen our understanding of sexual harassment. Having mentioned the dangers of this device, I note that within the pluralistic array of influences that will continue to explain sexual harassment, comparative law will be just one of many approaches. Its risks accordingly will be reduced by diversification. As for its benefits, one of the best is the hope of taking sexual harassment beyond the converted, committed feminist reformers to those

³⁵⁷ The leading work bridging comparative law and feminist topics is MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987). Professor Glendon is led to join the numerous critics of *Roe v. Wade*; she would leave abortion rights to the legislature and is skeptical of American rights-discourse generally. See GLENDON, *supra* note 95, at 58-60.

Americans who do not yet appreciate the meaning of sexual harassment in their own lives.

CONCLUSION

To convince a reader that sexual harassment harms workers, takes subtle forms, ought to be prevented as well as remedied, causes economic loss as well as dignitary harm, and is imperfectly redressed in the courts, one need hardly write yet another law review article. Workplace sexual harassment is now a phenomenon whose evil nobody denies. The scholarly debates that I have summarized are mere quibbles within this overwhelming American consensus. Yet work and controversy remain. Where do we go from here to build a better law of workplace sexual harassment?

Exploring this question, I have defended a new process—comparing and borrowing, from the vantage point of an innovator—and I have shown how institutional competencies might develop to enforce, communicate, and nourish this better law. These competencies would rest on a base that is still unfamiliar to Americans. Sexual harassment, I have argued, ought to be perceived as a problem of the workplace. In the United States, this problem has traditionally been viewed as wrongful conduct between workers, or the subjugation and control of women by men. Both perceptions share a preoccupation with fault, and this preoccupation has given short shrift to a possible third concept, that of detrimental workplace conditions. I have offered a European-influenced version of such an approach. I have also argued—with greater insistence—in favor of a multifaceted approach to the problem of sexual harassment. No single paradigm ought to dominate. Used selectively in combination, with the help of comparative study, all three perspectives can help to explain and cure this compelling problem of the workplace.

From personal experience, I emphasize that this comparative study, especially when invoked to address a practical problem, is frustrating, risky, often distressing, and hard to do well. To the warnings that I have detailed in the last Part of the Article, I add another. The effort to create a law of sexual harassment informed by comparative study is uniquely complicated by the daunting nature of sexuality itself. Sex is a misunderstood subject, and this level of misunderstanding is unlikely to be changed in the near future. A universal ignorance about foreign cultures compounds this confusion. The endeavor I have described is fraught with

prejudice, misuse, and partial truths garbled in transmission. Despite the hobbling effect of fear and ignorance, however, the sexual harassment law of the world moves forward through comparative observation and learning.

The comparativism now taking place in sexual harassment law offers practical and theoretical insights to be applied to the solution of problems. This process—pluralistic rather than unidirectional—is suited to a newer world political order with humbler superpowers, blurred dichotomies, more nations, and freer exchange. As a strand of both comparative law and legal feminism, comparative sexual harassment law contributes a concrete problem and specific work to do.³⁵⁸ In the building of comparative sexual harassment law, both comparative law and feminism have developed a new method of operation, and the method has achieved real change. A problem has been named, condemned, and fought. Regardless of what may await, this new device has revealed the first hints of its great strength.

³⁵⁸ In both comparative law and feminism, elder statesmen and stateswomen have issued a call for new specifics. *See* Herbert Bernstein, Book Review, 40 AM. J. COMP. L. 261, 261 (1992) (urging fellow comparativists to produce "hard-nosed comparative work on clearly defined specific institutions or subject-matter areas"); *see also* BETTY FRIEDAN, *THE SECOND STAGE* 343 (1981).

