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Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms

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SEXUAL HARASSMENT LAW IN
THE UNITED STATES AND SOUTH AFRICA:
FACILITATING THE TRANSITION FROM
LEGAL STANDARDS TO SOCIAL NORMS

DEBORAH ZALESNE*

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* Associate Professor, City University of New York School of Law. LL.M., Temple University School of Law, 1997; J.D., University of Denver College of Law, 1992; B.A., Williams College, 1988. I would like to dedicate this Article to the memory of Kyle Jewel, CUNY ’99, a committed South African human rights scholar and a good friend. Ideas for this Article developed from a talk I gave at the Women’s Legal Centre in Cape Town, South Africa. Earlier versions of this Article were presented at the 2000 Annual Meeting of the Australia Law and Society Association, and a 2001 CUNY Law School faculty forum. I would like to thank Michelle O’Sullivan, Helene Combrink, and Penny Andrews for organizing my visit to South Africa and for arranging a sexual harassment workshop at the Women’s Legal Centre in Cape Town. I would also like to thank Jennifer Nielsen, Greta Bird, and the participants of the Australian Law and Society Conference for their thoughtful remarks about issues presented in the paper, as well as the CUNY Law School faculty for their insights at the CUNY faculty forum. Special thanks to Justice Albie Sachs of the South Africa Constitutional Court, and Professors Penelope Andrews, Arthur Best, Michael Jaffe, Jeffrey Kirchmeier, Nancy Knauer, and Jenny Rivera for comments on an earlier draft. Finally, I would like to thank Laurie Tiberi, Sophia Cucos, Maria Osorio, and Melissa Briggs for their invaluable research assistance. Parts of this Article were taken from a paper I delivered at a symposium entitled “Redefining Violence Against Women” in October 1998 for the Temple Political and Civil Rights Law Review. See Deborah Zalesne, Sexual Harassment Law: Has It Gone Too Far or Has the Media?, 8 TEMP. POL. & CIV. RTS. L. REV. 351 (1999).
Sexual harassment in all societies and in all social classes hampers the integration of women into the labor market. Sexual harassment, commonly understood as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power," is a form of violence against women. Like rape, it generally occurs not out of sexual arousal, but rather from a desire to assert power over the victim or to "punish" or "control" the victim. In addition to threatening a woman's right to physical integrity, it also threatens a woman's liberty, autonomy, and equality by limiting the number of workers able to secure gainful employment and by limiting the rights and opportunities of women in the


2 See Lisa Vetten, Why Do Men Rape?, at http://www.cosatu.org.za/shop/shop0901/shop0901-08.html (last modified June 27, 2000) (noting that rapists often use rape "to punish women who do not behave in ways [they] consider acceptable in women . . . . [They] also rape to express their anger and frustration"); see also infra notes 37–38 and accompanying text.
workplace. Often times, these inequities are so subtle they seem "too small to bother with," but taken together, "they constitute a serious barrier to productivity, advancement, and inclusion."3

Most countries have a long history of tolerance toward sexual harassment,4 and the laws of various countries have only recently been interpreted to prohibit sexual harassment. In the 1970s, the United States was the first country to coin the term "sexual harassment" and to recognize it as a form of discrimination against women. By 1992, only six more countries prohibited sexual harassment outright through legislation;5 but today, at

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4See, e.g., Beverly H. Earle & Gerald A. Madek, An International Perspective on Sexual Harassment Law, 12 Law & Inq. 43, 46 (1993) (explaining that "[l]ess than twenty years ago no court either in the United States or abroad considered sexual harassment actionable, let alone a form of discrimination"); Michael Hanlon, Canada Near Top in Reporting Workplace Violence, Toronto Star, July 20, 1998, at A1 ("Women in some countries may consider only rape to be sexual harassment."); Minn. Advocates for Human Rights, Sex Discrimination and Sexual Harassment in the Workplace in Bulgaria 25 (1999) (explaining that "[t]here is no social condemnation of sex discrimination or sexual harassment in Bulgaria. Sex discrimination and sexual harassment are tolerated in the Bulgarian workplace and not taken seriously by the Government or labor unions"); U.N.: Despite Government Declaration of Equal Rights, Thai Women Continue in Traditional Roles, Committee Told, M2 Presswire, Feb. 1, 1999, available at 1999 WL 7551879 (noting that in Thailand, "the issue of sexual harassment in the workplace has yet to receive significant public attention"); Jenalia Moreno, Cuidado! Mujeres Trabajando! Scaling Mount Machismo: Number of Women Who Reach the Executive Suite on the Rise in Latin America, Houston Chron., Feb. 13, 2000, at 1 (observing that despite the fact that many Latin American countries, including Mexico and Brazil, have laws prohibiting sexual harassment in the workplace, it is still tolerated: "If you went to court to complain of sexual harassment, the judge would fall down laughing.") (quoting Carmen Arceola de Mestre, General Director of Grupo Azucarero Mexico, one of Mexico's largest sugar companies); Sonni Efron, Japanese Governor Resigns in Scandal; Charges of Assaulting Female Worker Are First Big Test of Nation's New Sexual Harassment Law, Indianapolis Star, Dec. 22, 1999, at A1 (noting that sexual harassment in Japan was until recently "brushed off with a wink and a nod"); John Varoli, Sexual Harassment, Russian Style, Moscow Times, Mar. 11, 1999, at 0102 ("[I]t's hardly news to say that sexual harassment is a problem in Russia. In fact, it is . . . often accepted as the natural course of relations between men and women. . . . [Sexual harassment] is fostered by an atmosphere of tacit tolerance in Russia toward the problem . . . ."); Renee G. Scherlen & Ruth Ann Strickland, The NAFTA(t)ization of Sexual Harassment: The Experience of Canada, Mexico, and the United States, 3 NAFTA L. & Bus. Rev. Am. 96, 109 (1997) ("The tradition of machismo has led many—both male and female—to consider sexual harassment as a foreign concept that does not make sense in the cultural context of Mexico. All of this contribute[s] to the widespread practice of sexual harassment.").

5See Sex Harassment a Global Plague: U.N. Study Cites Scope of Problem, Seattle Post Intelligencer, Dec. 1, 1992, at B5 (reporting that out of twenty-three countries surveyed by the United Nations, only Australia, Canada, France, New Zealand, Spain, Sweden, and the United States had statutes specifically referring to sexual harassment). Interestingly, the United Nations survey included the United States as a country with sexual harassment legislation, though even though Title VII of the Civil Rights Act of 1964 never explicitly mentions sexual harassment. In fact, the term was first used in case law that interpreted the language in Title VII to proscribe discrimination on the basis of sex. See, e.g., Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).
least forty countries have legislation specifically prohibiting sexual harassment.\textsuperscript{6}

In 1998, South Africa joined those countries that formally prohibit sexual harassment as a form of gender discrimination through its enactment of the South Africa Employment Equity Act ("EEA").\textsuperscript{7} Although this statute deals primarily with affirmative action, it is also groundbreaking national legislation in the area of sexual harassment. It can be considered an international model because of its comprehensive approach to and its ambitious treatment of sexual harassment, specifically defining the type of conduct that is prohibited,\textsuperscript{8} and providing detailed procedures to address the problem and prevent its recurrence.\textsuperscript{9} The legislation recognizes the severity and danger of sexual harassment and prescribes serious civil sanctions for the harasser.

Legal reform, however, has its limits. It is not yet clear to what extent sexual harassment has actually diminished in South Africa since the implementation of the EEA. South Africa is a strongly patriarchal society with a long history of sexual violence,\textsuperscript{10} and an extremely high incidence of reported rape.\textsuperscript{11} Comparatively, sexual harassment is not a top priority in South Africa and many men and women alike see it as a relatively unimportant issue. Practically speaking, it is still very difficult for employees in subordinate positions to insist upon their rights, and if they do, their claims are likely to be met with resistance by employers and receive varied responses through the legal system. In fact, since the enactment of the EEA over two years ago, very few cases have been brought, and the problem of sexual harassment is still treated as of minor importance.\textsuperscript{12}

The South African experience is not surprising considering the entrenched, state-sponsored discrimination inherited from the apartheid


\textsuperscript{7} Employment Equity Act 55 of 1998.


\textsuperscript{9} Code of Good Practice, supra note 8, § 7.


\textsuperscript{11} See infra notes 380–381 and accompanying text.

\textsuperscript{12} See infra notes 368–373 and accompanying text.
system and the sexism inherent in the tribal system of customary law.\textsuperscript{13} As Judge Albie Sachs of the South Africa Constitutional Court said, "It is a sad fact that one of the few profoundly non-racial institutions in South Africa is patriarchy."\textsuperscript{14} Sexism is inherent across racial lines in all South African communities, so much so that:

[II]t is frequently given a cultural halo and identified with the customs and personality of different communities. Thus, to challenge patriarchy, to dispute the idea that men should be the dominant figures in the family and society, is to be seen not as fighting against male privilege but as attempting to destroy African tradition or subvert Afrikaner ideals . . . .\textsuperscript{15}

Existing disregard for the progressive sexual harassment law in South Africa echoes the resistance many Americans have shown to the recent developments to sexual harassment laws in the United States. Five recent United States Supreme Court cases involving sexual harassment\textsuperscript{16} and extensive media coverage of them have heightened awareness of the issue of sexual harassment,\textsuperscript{17} and large jury awards, although rare and exceptional, have scared companies into improving their policies and practices.\textsuperscript{18} Yet many highly publicized sexual harassment cases, from Anita Hill's claim against Clarence Thomas in 1992,\textsuperscript{19} to Paula Jones' more recent suit against Bill Clinton,\textsuperscript{20} have made the sexual harassment laws the subject of ridicule in the United States.\textsuperscript{21} The media has been diligent in its accounts of male victimization from false claims of sexual harassment,\textsuperscript{22} affirming the sexist stereotypes that women are unreason-

\textsuperscript{13} For a background description of the laws of apartheid's caste system and the patriarchal traditions of customary law and how both those legal regimes "relegated black women to the lowest form of citizenship in South Africa prior to 1993," see generally Adrien Katherine Wing & Eunice R. de Carvalho, \textit{Black South African Women: Toward Equal Rights}, 8 HARV. HUM. RTS. J. 57, 60–75 (1995).

\textsuperscript{14} \textsc{Albie Sachs}, \textit{Protecting Human Rights in a New South Africa} 53 (1990) (discussing the constitutional rights of women in a post-apartheid South Africa).

\textsuperscript{15} \textit{Id.}


\textsuperscript{17} \textit{See generally} Deborah Zalesne, \textit{Sexual Harassment Law: Has It Gone Too Far or Has the Media?}, 7 TEMP. POL. & CIV. RTS. L. REV. 351, 352 (1999).

\textsuperscript{18} \textit{See infra} note 168 (listing cases with high punitive damage awards).

\textsuperscript{19} S. EXEC. DOC. No. 15 (1991).


\textsuperscript{21} Zalesne, \textit{supra} note 17, at 359.

\textsuperscript{22} \textit{See, e.g.}, MacKenzie v. Miller Brewing Co., 94-CV-010871 (Cir. Ct., Milwaukee Co., Wis. 1994) (awarding $26 million for wrongful termination to an employee who was fired for telling a female co-worker about a raucy \textit{Seinfeld} episode); Graydon Snyder v. Chicago Theological Seminary, 94 L 1423 (Cir. Ct., Cook Co., Ill. 1994) (awarding damages to a theology professor who was wrongly ordered to into counseling after a classroom
able and provocative, and creating a safe harbor for the belief that women attempt to exploit men through a code of political correctness.\textsuperscript{23} Accordingly, the legal advances of the last few years in the United States have been met with a counterattack by those who believe that the laws have gone too far in favor of the accuser.\textsuperscript{24}

As the development of the sexual harassment law in both the United States and South Africa illustrates, the law's effect on social reform is unclear. Although legal reform in both countries has certainly had some impact on shaping social attitudes,\textsuperscript{25} the progress has been complex and has seen various degrees of resistance. In the United States, rather than advancing our collective thinking, the sexual harassment laws, which some view as progressive, have led to backlash. Hostility toward the law is generally fed by the media\textsuperscript{26} and by those who likely fear that women are making progress that will threaten their economic and social well being. In contrast, South Africa is not yet experiencing any backlash from the media, as there are a number of female journalists raising the question of gender equality. Rather, there is a feeling that the urgency of dealing with sexual violence is so powerful that it is distracting to deal with the more nuanced issues of nonphysical, problematic gender dynamics in the workplace. In South Africa, at this early stage, the extent of these effects remains unclear, but evidence indicates that sexual harassment law is receiving low priority status and, as in the United States, social transformation is lagging far behind legal reform.

This Article explores the use of sexual harassment law as a force for imposing external morality. Typical sexual harassment regulatory schemes have had limited success in altering workplace behavior for a combination of reasons. In most cultures the laws prohibiting sexual harassment do not generally reflect existing social norms. In such a context, for a law to be an effective impetus for social change, it must call for and explain the need for the elimination of the "immoral" behavior, as well as provide for meaningful sanctions. Typical sexual harassment schemes, however, call for corporate self-regulation. The idea is that companies will be responsible in maintaining a workplace free of sexual harassment if doing so will be to their economic benefit. Failing to address a hostile work environment can impact a company's bottom line in two ways: the company can either be penalized directly through legal damages, or indirectly through social disapproval and a negative reputation. Under the current self-regulatory schemes, however, companies often work to prevent legal intervention, without addressing the inherent sexism that underlies claims of sexual harassment. In this way, economic costs have not

\textsuperscript{23} Zalesne, supra note 17, at 358.
\textsuperscript{24} Zalesne, supra note 17, at 352.
\textsuperscript{25} See infra text accompanying notes 223–225.
\textsuperscript{26} See generally Zalesne, supra note 17.
been sufficient in making companies responsive to normative demands. Law is only useful as an impetus for social change if it has cultural legitimacy. Sexual harassment law will only have the requisite legitimacy when those in power in the workplace understand the physical, psychological, economic, and moral harm of sexual harassment, and why it amounts to sexual discrimination.

The United States is a good model for the study of law and social change in the area of sexual harassment, since it is the first country to recognize sexual harassment as a form of discrimination against women, and therefore has the longest history to study. Over the past several decades, the United States has undergone significant legal transformation in the law of sexual harassment and has seen various trends in attitudes about those laws.

South Africa, in contrast, is a fascinating case study of law and social change in the area of sexual harassment because of the great disparity between its history with regard to race and gender discrimination and its current progressive legal system. Under apartheid, racism and sexism were inherent in the legal regime, and the country was “one of the world’s strictest in its public mores.”27 Sex was completely banned across racial lines, and homosexuality and pornography were forbidden.28 Now, in the new democratic era, the country has legally become one of the most tolerant in the world.29 Observers note that “the country has gone, seemingly overnight, from one of the world’s most oppressed and repressed to one of the world’s most open and permissive.”30 The effect of sexual harassment law on social behavior is more apparent in a country, such as South Africa, where there is a wide chasm between cultural and legal norms.

Using United States and South African sexual harassment laws as case studies, this Article examines the power of the law as a moral authority. In that light, the Article considers the development of the sexual harassment law over the years in the United States and the resulting backlash from that law, and then examines the likelihood that South Africa will experience a similar pattern of behavior in light of its unique social context. Using the United States and South African experiences as a guide, the Article then suggests ways in which nations that choose to legislate against sexual harassment might properly facilitate the transition from legal reform to actual change in social behavior.

Part I examines attempts by the United States and South Africa to legislate social behavior in the workplace through sexual harassment

27 Revolutionary Country; South Africa: Mandela Rule Bans Discrimination—But Will People’s Behavior Change?, BALT. SUN, Apr. 23, 1997, at 18A.
28 See infra notes 425–433 and accompanying text.
29 See infra notes 437–451 and accompanying text.
This Part starts with an examination of the extent of the problem of sexual harassment in South Africa, fully reviewing the Employment Equity Act and the extent to which it has achieved its stated purposes. This Part then goes on to look at experiences in the United States with respect to the development of sexual harassment laws, drawing on five recent Supreme Court cases that have modernized our sexual harassment laws, and analyzing the backlash that resulted from these recent cases.

Part II focuses on aspirations for social transformation in countries with evolving sexual harassment legislation. This Part begins with a discussion of the efficacy of legislative schemes that rely on the use of self-policing as a method of conforming social behavior, ultimately asserting that sexual harassment law will not have the power to effectuate true social change if the law lacks legitimacy. This Part then posits that sexual harassment laws will not be seen as legitimate until societies understand the real harm and immorality of sexual harassment. Part II then goes on to analyze the political, economic, and cultural limits to the full understanding and use of sexual harassment legislation, identifying a variety of factors that are crucial in facilitating or retarding the effectiveness of anti-harassment objectives. I examine each of these factors in light of the United States experience and the South African experience, and then attempt to show how these factors may work in societies that have different cultural or historical starting points. This Part concludes that sexism, racism, unequal access to the law, gender-specific cultural norms, and failure to make sexual harassment a priority, may continue to thwart the legal progress made by many countries in the area of sexual harassment in recent years.

Part III suggests ways in which a country can facilitate the transition from law to social reality. This Part denounces litigation as the sole, or even the best, method for dealing with sexual harassment because of the impediments discussed above. Since the most likely victims of sexual harassment are those with the least amount of power, reliance on the courts means relief for those with the best lawyers, at the exclusion of those who need and deserve representation most. The problem of sexual harassment is one involving ordinary people in ordinary settings, which makes it amenable to ordinary solutions, outside the context of law enforcement agencies, such as greater involvement of unions and other employee organizations. For many women, a shift away from litigation to active engagement of the working community might have greater empowerment value than going to court. Ultimately, a statute’s capacity for social reform will depend in large part on the eradication of misperceptions and stereotypes about the nature of sexual harassment and the harm it causes, and on integration into the legal and political discourse on both economic equality and violence against women.
I. ATTEMPTS AT LEGISLATING PERSONAL RELATIONSHIPS IN THE
WORKPLACE: SEXUAL HARASSMENT LEGISLATION IN SOUTH AFRICA AND
THE UNITED STATES

A. South African Sexual Harassment Law: Low Priority Status

1. The Root of the Problem

It is well documented that sexual harassment is a serious problem in
South Africa. Although underreporting makes it impossible to know
the true extent of sexual harassment, one survey, conducted in May of
1992, revealed that about seventy-six percent of working women in South
Africa claimed to have been subjected to some form of sexual harassment
at work. That survey indicated most of those women "would rather resign
than 'make a fuss.'" The survey revealed that 37.7% of respondents
knew of sexual harassment in their organizations, but only 6.5% of those
companies have a formal sexual harassment policy. Another survey
showed that although many respondents wish to remedy the gender im-
balance in management, over fifty percent of employers felt uneasy about
promoting women to management positions.

It is by now well accepted that the root of sexual harassment is gener-
ally not sexual attraction, but the desire to assert power over an indi-

31 See generally Polly Halfkenny, Legal and Workplace Solutions to Sexual Harass-
ment in South Africa (Part 2): The South African Experience, 17 INDUS. L.J. 213 (1996);
Polly Halfkenny, Legal and Workplace Solutions to Sexual Harassment in South Africa
(Part 1): Lessons from Other Countries, 16 INDUS. L.J. 1 (1995); Gumisi Mutume, South
Africa: Victims of Sexual Harassment Suffer in Silence, INT'L PRESS SERV. May 17, 1995
(on file with author); Managay Reddi, Sexual Harassment in the Workplace: Do We Need
New Legislation?, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 109 (Chris-
tina Murray ed., 1994); Lisa Dancaster, Sexual Harassment in the Workplace: Should South
Africa Adopt the American Approach?, 12 INDUS. L.J. 449 (1991); J. G. Mowatt, Sexual

32 See infra notes 332–335 and accompanying text.

33 INST. OF DIRS. ET AL., SEXUAL HARASSMENT IN THE WORKPLACE (1992) (survey
conducted by the Institute of Directors, the Institute of Personnel Management, the UNISA
Centre for Women's Studies, the Women's Bureau of South Africa, and the ANC Women's
League) [hereinafter SEXUAL HARASSMENT IN THE WORKPLACE], cited in Lisa Venus,
Adding Up the Costs of Sexual Harassment, at http://www.csrv.org.za/articles/artcost1.htm;
Averile Ryder, Devising a Sexual Harassment Policy, PEOPLE DYNAMICS, Jan. 1998, at 26
(citing research done in 1987 for an MBL thesis); see also UNISA UNIT FOR GENDER
RESEARCH IN LAW, WOMEN AND THE LAW IN SOUTH AFRICA: EMPOWERMENT THROUGH
ENLIGHTENMENT 169 (1998) (noting that "researchers argue that the percentage of women
in South Africa who have been subjected to some form of harassment during their em-
ployment may even be as high as 70").

34 CENTRE FOR SOCIO-LEGAL STUDIES, 7 SOUTH AFRICAN HUMAN RIGHTS YEARBOOK
351 (1998) [hereinafter HUMAN RIGHTS YEARBOOK] (citing sexual harassment in the work-
place, supra note 33).

35 SEXUAL HARASSMENT IN THE WORKPLACE, supra note 33.

vidual. The harassers exploit what they see to be a weakness in their victims so as to reassert their superiority and keep victims subordinated. There is a myriad of ways in which one person can come to have power over another, particularly in the workplace. Employers have inherent power over their employees because of employers’ ability to punish or reward their employees, and because of economic and social inequalities likely to be found between the two groups.

In addition to the natural power imbalances intrinsic to the employer/employee relationship, women, and racial and sexual minorities are often vulnerable to a different type of subordination based on a gendered and racialized imbalance of power in society. “Power is socially constructed,” and in most societies, masculinity and whiteness have come to be associated with power and success, while traits associated with “other” have come to be devalued in the workplace. Therefore, women and racial, ethnic, and sexual minorities can be targets for sexual harassment.

In South Africa, women are particularly vulnerable to sexual harassment because of their low status in the working hierarchy. Women have always been vastly underrepresented in management, occupying the lowest status jobs. Professions traditionally filled by women are under-

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37 See, e.g., MACKINNON, supra note 1 (identifying sexual harassment as an act of power); Amelia A. Craig, Musing About Sexual Orientation Discrimination Based on Sex and Sexual Orientation as “Gender Role” Discrimination, 5 S. CAL. REV. L. & WOMEN’S STUD. 105, 110 (1995) ("[C]ourts . . . recognize that the objective of such harassment is maintenance and abuse of power and dominance, rather than a real desire for sex."). It is also well-accepted today that rape, sexual harassment in its most extreme form, is a crime of violence rather than sexual attraction. See, e.g., Peggy Miller & Nancy Biele, Twenty Years Later: The Unfinished Revolution, in TRANSFORMING A RAPE CULTURE 47, 49 (Emilie Buchwald et al. eds., 1993) ("Rape in all its forms . . . is an act of violence, a violation of the victim’s spirit and body, and a perversion of power . . . ."); SUSAN BROWN Miller, AGAINST OUR WILLS: MEN, WOMEN AND RAPE (1975) (characterizing rape as a widespread and violent effort to assert power and possession over women’s bodies). Sexual harassment is generally viewed as a mild form of rape, so undoubtedly the motivations of the two crimes are similar. See Nan Stein, No Laughing Matter: Sexual Harassment In K-12 Schools, in TRANSFORMING A RAPE CULTURE, supra, at 310, 317-18 (comparing child’s motivation in bullying to motivation behind sexual harassment).

38 Craig, supra note 37, at 106, 112 (explaining both that many men see qualities typically regarded as “feminine” as denoting weakness and that motivation behind sexual harassment is desire of heterosexual men to maintain power and dominance).


41 See generally Zalesne, supra note 39, at 414.

42 Levin, supra note 36, at 366 ("although 35.6 per cent of the workforce in the companies [surveyed] were women, only 13.1 per cent of management were women"); Catherine O’Regan, Equality at Work and the Limits of the Law: Symmetry and Individualism in Anti-Discrimination Legislation, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER, supra note 31, at 65 ("Women constitute less than ten percent of the top three income brackets."). This is especially true of black women. See Felicity Kaganas & Christina
valued and poorly paid.\textsuperscript{43} Almost twenty percent of all employed women are in domestic service, and fifteen percent are in clerical jobs;\textsuperscript{44} more than half of the employees in the lowest two income brackets are women, even though women make up only one third of all employees.\textsuperscript{45}

Yet, even women who have been able to achieve greater than usual power in the workplace face a type of discrimination at work that makes them equally vulnerable to sexual harassment. In South Africa, as in most countries, gender bias still exists in the workplace in the form of stereotyping, as many men still view women in their traditional, passive, subordinate, and domesticated role.\textsuperscript{46} Accordingly, working women who do not conform to approved images of womanhood and motherhood face discrimination:

While those women who remain within their traditional stereotypes of good wives and mothers are treated with protective paternalism, women who venture outside those boundaries and attempt to assert themselves apart from their husbands, for instance as career women, are punished by lack of recognition of status or financial hardship.\textsuperscript{47}

The discrimination faced by women who fail to conform to gender-based stereotypes and norms often takes the form of sexual harassment. In these scenarios, typically the harasser "targets and penalizes individuals for diverging from prescribed notions of appropriate female appearance and demeanor."\textsuperscript{48} Ironically, women are often penalized both for possessing stereotypically female traits, since femininity is generally associated with weakness and incompetence in the workplace, as well as for portraying stereotypically masculine characteristics, such as physical strength or assertiveness, because many men feel threatened when women exhibit the

\footnotesize{Murray, Law and Women's Rights in South Africa: An Overview, in Gender and the New South African Legal Order, supra note 31, at 29 ("Of the 3770 women reflected in the 1991 Manpower Survey as being in managerial positions, only four were Africans." (citing Cent. Stat. Serv., Manpower Survey: Occupational Information (1991))).}

\textsuperscript{43} Liesl Gerntholtz, South Africa: Gender Bias in Law, Sowetan (Johannesburg), Mar. 16, 1999, available at 1999 WL 10803547.

\textsuperscript{44} C. O'Regan & B. Thompson, The Unionisation of Women Workers in Different Industrial Sectors in South Africa 8 (1993) (on file with author).

\textsuperscript{45} O'Regan, supra note 42, at 65 (citing Nat’l Manpower Comm'n, Annual Report 53 (1991)).

\textsuperscript{46} See infra notes 375–378 and accompanying text.

\textsuperscript{47} Michelle O'Sullivan, Stereotyping and Male Identification: "Keeping Women in Their Place," in Gender and the New South African Legal Order, supra note 31, at 190.

\textsuperscript{48} Hilary S. Axam & Deborah Zalesne, Simulated Sodomy and Other Forms of Heterosexual "Horseplay": Same Sex Sexual Harassment, Workplace Gender Hierarchies and the Myth of the Gender Monolith Before and After Oncale, 11 Yale J.L. & Feminism 155, 169 (1999).}
valued characteristics which are often deemed necessary for success in many jobs.\textsuperscript{49}

But sexual harassment does not affect all women equally. South African women are divided by, among other things, race,\textsuperscript{50} class, culture, urban and rural situation, education, and language.\textsuperscript{51} Black women, including African, Coloured, and Indian women, are the most likely victims of sexual harassment because of their historical position on the lowest rung of the working ladder.\textsuperscript{52} Black women experience subordination not only as women and blacks, but also typically as members of the working class.\textsuperscript{53} Working class black women face different stereotypes from middle class career women. It is a truism that working class women

\textsuperscript{49} See generally id. at 165–70. This pattern of harassers choosing targets who possess traditionally devalued feminine traits or who fail to conform to prescribed gender roles, is present with overwhelming consistency in sexual harassment cases in the United States. Id. In South Africa there are many fewer sexual harassment cases from which to derive such a pattern. However, given the widespread prevalence of such cases in the United States, and the strong expectations in South Africa that women should conform to their traditional role of mothers and nurturers, it is not a big leap to assume that sexual harassment in South Africa stems from a similar discomfort of women in the male-dominated workplace. See, e.g., Reddy v. Univ. of Natal, 19 I.L.J. 49 (LAC) (1998) (where complainant was employed as a security guard on the night shift at a university; a job traditionally held by men).

\textsuperscript{50} Black South African women constitute about thirty-six percent of the South African population, Coloured women make up about five percent of the South African population, and Indian women make up less than two percent. Adrien Katherine Wing, A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women, 60 ALB. L. REV. 943, 954 n.46 (1997).


\textsuperscript{52} Kaganas & Murray, supra note 42, at 29; Audrey Haroz, South Africa’s 1996 Choice on Termination of Pregnancy Act: Expanding Choice and International Human Rights to Black South African Women, 30 VAND. J. TRANSNAT’L L. 863, 869 (1997). The status of African women in South Africa reflects a history of limited educational and occupational opportunities:

Prior to the 20th century, African women in South Africa worked primarily as domestics or teachers. When missionaries opened hospitals for Africans in the mid-19th century, they employed African women as domestics and nurse’s aides. By 1910, only one African woman had completed full nurse’s training compared to 3,446 African women with teacher’s qualifications; shortly thereafter, however, nursing became one of the most popular and prestigious professions open to African women in South Africa. By as late as 1960, economic prospects for the nation’s African women had changed little. Out of a population of 7.5 million African women, only 800,000 were classified as economically active. Half that number were working as domestic servants; 200,000 as workers on White farms; 25,000 as professionals (including 12,000 nurses and 11,000 teachers); and the remainder were employed as factory workers or clerks.


\textsuperscript{53} See O’Regan, supra note 42, at 65; Romany, supra note 10, at 861 ("Black women in South Africa have suffered multiple oppressions and have been marginalized by virtue of being both black and female. . . . Their subordination in society is magnified by the sexism that intersects with official racism and economic deprivations.").
have always worked. Accordingly, "while there is a strong disapproval of middle-class wives engaging in careers in the public sphere, there is a presumption that lower-class and working-class women should be employed." The presumption, though, is that they should be employed in the lowest paying occupations, which historically has been the case. Eighty percent of working black women are employed in agriculture and domestic work, which are among the lowest paying jobs.

[M]ost black women work without trade union rights and legislative protection. Many work the land or in the textile and canning industries where working conditions are not that much different from those of farm laborers. South Africa has few black female professionals. In the mid-1970s there were no black "women lawyers, judges, magistrates, engineers, architects, veterinarians, chemists, or pharmacists." Pigeonholing black women in these roles leaves them with the least amount of power in the workplace.

As affirmative action programs begin encouraging more women, and particularly black women, into jobs traditionally reserved to white men, however, sexual harassment will undoubtedly continue. In fact, the rate of sexual harassment may increase, as some men, who desire to maintain the socially constructed perception of male strength, seek to reinforce their own sense of identity and position of privilege in the gender hierarchy.

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54 See, e.g., Isik U. Zeytinoglu & Jacinta K. Muteshi, A Critical Review of Flexible Labour: Gender, Race and Class Dimensions of Economic Restructuring, 27 RESOURCES FOR FEMINIST RES. 97, 110 (2000) (noting that within advanced industrialized economies, because of financial necessity "minority women and working class women have had consistent economic participation over their lifetimes, have been expected to work outside the home and have been more systematically positioned as wage earners in full-time domestic work, field work and industrial work"); Patricia Cooper, A Masculinist Vision of Useful Labor: Popular Ideologies About Women and Work in the United States, 1820 to 1939, 84 KY. L.J. 827, 831 (1995) (noting that in the United States, "many immigrant women and poor women of all colors” have been expected to work for pay).

55 O’Sullivan, supra note 47, at 196.

56 As stated by Nelson Mandela, “black women, in thousands, occupy the lowest ranks in employment . . . . [B]lack women are underpaid and are most brutally exploited as farm labourers and domestic workers.” Romany, supra note 10, at 857.

57 Black women make up eighty-six percent of South Africa’s domestic workers. Id. at 865.

58 Id. (citation omitted).

59 Reddi, supra note 31, at 119 (“The expected increase in the frequency of sexual harassment is on account of the fact that male supervisors and co-workers would probably fight back with the last weapon available to them: sexual coercion.”).
2. Fixing the Problem: Legal Reform


During most of the apartheid regime, "sexual harassment was neither recognized nor defined as a social or legal problem."\(^6\) Prior to 1998 there was no legislation specifically addressing the problem of sexual harassment in South Africa. There were, however, several possible avenues for combating sexual harassment through more general laws. Most broadly, the South Africa Constitution protects the right to equality and non-discrimination,\(^6\) the right to "security of the person,"\(^6\) and the right to "dignity."\(^6\) Although no sexual harassment case has ever been won as a straight Constitutional claim, sexual harassment has been characterized as a violation of "that right to integrity of body and personality which belongs to every person,"\(^6\) and has been said to infringe "the right to human dignity."\(^6\) Additionally, a victim of sexual harassment in the workplace could seek civil redress in delict (the South African equivalent of tort law) or under the labor laws, or could seek redress through the criminal law. But like many countries that do not explicitly prohibit sexual harassment through statute, the available sources of relief under former South African law did not adequately protect women who were subjected to sexual harassment.\(^6\)

Prior to the enactment of the Employment Equity Act in 1998, the few South African cases dealing with sex discrimination by means of sexual harassment were generally brought under the Labour Relations

\(^6\) Wing & de Carvalho, supra note 13, at 69.
\(^6\) Id.
\(^6\) For example, in Bulgaria there are no laws specifically addressing the problem of sexual harassment in the workplace. Minn. Advocates for Human Rights, supra note 4, at 25. However, Bulgaria's new Constitution provides certain protections for women and seeks "loyalty to the universal human values of liberty, peace, humanism, equality, justice and tolerance." Bulg. Const. pmb. Although Bulgaria's Labour Code does not include specific language protecting women from sexual harassment, it explicitly prohibits discrimination in the workplace. Bulg. Labour Code, art. 1, § 3 (1992). Also, several articles of the Bulgarian Criminal Code could be used by women against their supervisors who sexually harass them. Bulg. Crim. Code, art. VIII, § 153 (amended 1982, 1986) (punishing a person who compels a woman into sexual intercourse by "taking advantage of [the woman's] material or official dependency upon him"). To date, however, none of these provisions has been applied to sexual harassment claims. Minn. Advocates for Human Rights, supra note 4, at 27–28. Similar circumstances exist in many Asian countries such as Pakistan, India, and Nepal. See Janet Sigal & Heidi Jacobsen, A Cross-Cultural Exploration of Factors Affecting Reactions to Sexual Harassment Attitudes and Policies, 5 Psychol. Pub. Pol'y & L. 760, 770 (1999); Breaking the Taboo, supra note 6.
Act. A majority of those claims, however, involved claims of unfair dismissal by the "aggrieved" harasser, rather than claims by the sexual harassment victim. The first case of sexual harassment in South Africa was not heard until February 1989. In J v. M, the court addressed the validity of the dismissal of a senior engineering manager found to have sexually harassed female coworkers. The harasser was asked to resign after he was found to have repeatedly touched various female employees in a sexual manner without their consent. The harasser resigned, but later withdrew his resignation. The court found the dismissal was fair, despite the fact that the original complaining party withdrew her complaint and several female employees signed a petition in support of his reinstatement. Again in Mampuru v. Putco, an employee was dismissed on charges of sexual harassment. As in J v. M, the court found the dismissal fair as the harasser had an "intimidating attitude" towards female employees, thus frightening them into not complaining for fear that they would be dismissed. Other judges were not so sympathetic toward claims of harassment, and reinstated employees suing for unfair dismissal, despite findings of "misconduct" and "abhorrent" behavior.

Although the Industrial Court recognized in several cases that dismissal based on behavior constituting sexual harassment was proper, courts overall still seemed resistant to the idea, and it remained unclear whether sexual harassment would be deemed "sex discrimination" under

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70 Id.

71 Id.

72 Case No. IC 11/2/2136 (Sept., 1989).

73 Id.


the Labour Relations Act. It was not until 1994, five years after J v. M and Mampuru v. Putco, that the first case was brought by a victim of sexual harassment. However, in Lynne Martin-Hancock v. Computer Horizons\textsuperscript{77} and several similar cases that followed, the rulings were limited to the fairness of the dismissal of the female employee, and failed to address whether sexual harassment had in fact occurred.\textsuperscript{78}

Although the Labour Relations Act offered recourse in some situations, it had several important limitations. Remedies under the Labour Relations Act were limited to instructing an employer to cease the unfair labor practice, and did not allow the plaintiff to recover damages for humiliation or lost opportunities.\textsuperscript{79} Even if the Industrial Court had allowed such a claim, this cause of action was not necessarily available to people applying for employment, and may not have been available against an employer who was not aware of the harassment.\textsuperscript{80} Furthermore the Labour Relations Act did not cover all categories of workers. Domestic workers were excluded from its purview.\textsuperscript{81} Therefore, the labor law was not the best route for a plaintiff to seek compensation for damages suffered.

A woman subjected to sexual harassment in the workplace also had the option of suing in delict for damages suffered as a result of the harassment.

\textsuperscript{77} Case No. NH 11/2/14268 (Oct. 1994).

\textsuperscript{78} See, e.g., Martin-Hancock, Case No. NH 11/2/14268 (finding constructive dismissal of a woman who claimed to be sexually harassed for two years); G v. K, 1988 (9) I.L.J. 314 (IC) (finding wrongful dismissal and reinstating female employee after her employer fired her for ending their consensual affair); Anthony v. 007 Casino, \textit{cited in Smythe, supra} note 67, at 18 (finding wrongful dismissal and awarding six months' salary as compensation where a woman was fired for refusing to succumb to sexual favors in exchange for a salary increase); Du Preez v. Car Connection, \textit{cited in Smythe, supra} note 67, at 18 (finding wrongful constructive dismissal where a female employee resigned after her employer attempted to touch her breasts, made comments of a sexual nature and repeatedly used foul language over a fairly lengthy period); Pretorius v. Britz, 1997 (5) BLLR 649 (CCMA) (finding wrongful constructive dismissal and awarding nine months' salary as compensation where a female employee resigned after, over a period of eighteen months, an employer made a number of sexual advances towards her, including giving her unsolicited gifts of a sexual nature such as pink G-string panties, attempting to kiss her, and asking her not to wear a brassiere); Coetzer v. J. J. Joubert, \textit{cited in Smythe, supra} note 67, at 18 (finding constructive dismissal and awarding eight months' salary where an employee resigned after her employer made sexual advances which were refused and then required her to work odd and long hours, engaged in unwanted touching on thighs and buttocks, and came into her bedroom and slept on top of her); Intertech Sys. Ltd. V. Sowter, 1997 (18) I.L.J. 689 (LAC) (finding wrongful constructive dismissal and awarding twelve months' salary where an employee resigned after severe and prolonged emotional, physical and sexual abuse by a co-worker both inside and outside the workplace).

\textsuperscript{79} J. G. Mowatt, \textit{supra} note 31, at 637. This also meant that the court could find that sexual harassment is an unfair labour practice without ruling that it amounts to sexual discrimination. Dancaster, \textit{supra} note 31, at 465.

\textsuperscript{80} Carla Sutherland, \textit{Paying for Stolen Kisses? Sexual Harassment and the Law in South Africa}, Seminar at the Centre for the Study of Violence and Reconciliation (Mar. 24, 1992), at \url{http://www.wits.ac.za/csclr/papers/papsuth.htm}.

\textsuperscript{81} Id.
assment.\(^2\) Again, there were several limitations on such a suit. Most significantly, the victim would be unable to recover damages for lost employment, or for loss of other tangible assets.\(^3\) Damages could only be recovered under the delictual head of *injuria* for the wrongful and intentional impairment of the victim's physical integrity (*corpus*), dignity (*dignitas*), or reputation (*fama*).\(^4\) Moreover, suing in delict could be quite expensive for a plaintiff who would have to hire a lawyer and might have to pay the defendant's legal fees if she lost her case. There are no reported cases involving a sexual harassment case in delict. Sexual harassment could also probably give rise to civil damages for assault, although there is no reported case using that remedy in South Africa.\(^5\)

Finally, sexual harassment may also fall into one of the categories of crimes against the person, such as rape, assault, indecent assault, or *crimen injuria*, allowing for criminal prosecution.\(^6\) In the past decade, increasing numbers of women brought charges of criminal assault as companies refused to act in matters of sexual harassment.\(^7\) A victim filing criminal charges, however, would not be able to recover any monetary damages, nor would she be able to bring charges against an employer for sexual harassment perpetrated by a co-worker, since the criminal law requires only direct suits against the person alleged to have committed the crime. Additionally, in criminal cases against the harasser, there is a heavier burden of proof than in civil cases.\(^8\) Since neither the labor, delict, nor criminal laws were written to specifically address the unique problem of sexual harassment, the options for employees subjected to sexual harassment were all lacking in significant ways.

### b. Employment Equity Act: South Africa Takes a Progressive Stand on Sexual Harassment

On October 19, 1998, recognizing that South African businesses had "largely failed to achieve employment equity in the absence of legisla-

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\(^3\) See Dancaster, *supra* note 31, at 465.

\(^4\) Dancaster, *supra* note 31, at 464 (citing J.C. Van der Walt, *Delict: Principles and Cases* 18 (1979)).

\(^5\) See J.C. Van der Walt, 10(2) LAW OF SOUTH AFRICA (GENDER AND LABOUR LAW) 244 n.4 (1979).

\(^6\) See id. at 244. In *J v. M*, 10 I.L.J. 755 (IC) (1989), for example, the physical contact, where the harasser repeatedly and without consent touched female employees under his control in a sexual way, might have been grounds for a criminal charge of indecent assault. See Dancaster, *supra* note 31, at 465.

\(^7\) See Van der Walt, *supra* note 85, at 244 n.4.

\(^8\) *Sexual Harassment Education Project, Dealing with Sexual Harassment* (Mar. 1998) ("The disadvantage to laying a criminal charge [regarding sexual harassment] is the high burden of proof required; guilt needs to be proved beyond a reasonable doubt. This is very often difficult considering that there are generally no witnesses to incidents of sexual harassment; cases often consist of one person's word against another's.") at http://www.sn.apc.org/sadc_pvaw/papers/skakel.htm.
tion,” the South African democratic government enacted the 1998 Employment Equity Act. This legislation seeks to put an end to years of inequalities in the labor market resulting from apartheid policies, societal prejudices, and stereotypes, by promoting the use of affirmative action and prohibiting unequal treatment of employees in the workplace.

The EEA, put into force in August of 1999, prohibits discrimination in the workplace, either directly or indirectly, on the grounds of “race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.” It specifies that “harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).”

Positive aspects of the EEA include the fact that it identifies sexual harassment in the workplace as a serious problem that needs to be dealt with, and the fact that it places the burden of proving that the discrimination was fair on the employer. Placing the burden of proof on the employer is significant because of the difficulty of proving sexual harassment when there are few or no witnesses. The EEA also provides the Labour Court with the power to award appropriate damages, including compensation for harm suffered. The law is written to apply not only to

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91 Id. pmbl. The preamble recognizes that “disparities in employment, occupation and income within the national labour market” resulted from “apartheid and other discriminatory laws and practices . . .” Id. The drafters noted that such disparities “create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws . . .” Id. The EEA sets out as its goal to:

promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation of employment equity to redress the effects of discrimination; achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of the International Labour Organisation . . .

Id.

92 Id. § 6(1).

93 Id. § 6(3). The EEA applies only to “designated employers,” which is defined as “an employer who employs 50 or more employees; an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business . . .; a municipality . . .; an organ of the state . . .; and an employer bound by a collective agreement . . .” Id. § 1.

94 Id. § 11 (“Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair”).

95 If the Labour Court decides that an employee has been unfairly discriminated against, it has the power to order, among other things, that the employer pay compensation and damages to the employee, or that the employer take steps to prevent the same type of discrimination from occurring again. Id. § 50(2).
current employees, but also to former employees and applicants for employment, as well as to temporary employees, where their employment is of indefinite duration or for a period of three months or longer. Additionally, the EEA provides for vicarious liability on the part of employers if the employer is informed about the problem and the employer fails to take the necessary steps to eliminate the undesirable conduct. The provisions on employer liability, however, are more employer-friendly than the law in the United States, where an employer is always vicariously liable for sexual harassment committed by a superior if there is tangible harm to the plaintiff, even if the employer was unaware of the problem.

While the EEA briefly describes the procedure for referral of a dispute about sexual harassment, it leaves many questions unanswered. The "Code of Good Practice on the Handling of Sexual Harassment Cases" (the "Code"), approved on May 4, 1998 by the NEDLAC Market Chamber under the provisions of the Labour Relations Act, answers many of those questions. The Code, a guideline for handling sexual harassment cases, sets out an ambitious objective to "eliminate sexual harassment in the workplace" by encouraging and promoting "the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, their privacy, and their right to equity in the workplace." But despite the Code's ambitious goals, it remains to be seen what type of effect the Code will actually have on the outcome of sexual harassment cases. As a detailed government-sponsored guideline, it seems likely that courts will refer to the Code in the disposition of sexual harassment cases, but no reported cases have yet done so.

Perhaps the greatest achievement of the Code is its detailed definition of sexual harassment:

96 Id. § 51(5).
97 Id. § 57(1). The Code elaborates, explaining that the perpetrators and victims of sexual harassment may include "owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors, or others having dealings with a business."
98 CODE OF GOOD PRACTICE, supra note 8, § 2(1).
99 CODE OF GOOD PRACTICE, supra note 8, § 2(1).
101 The Code is the product of eight months of negotiations in NEDLAC which commenced in September of 1997: "[t]he drafters studied a variety of international precedents, and began negotiations on a draft which was partly inspired by the European Community's Code of Practice on Measures to Combat Sexual Harassment (November of 1991)."
102 CODE OF GOOD PRACTICE, supra note 8, § 1(1).
103 Id. § 1(3).
(1) Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes sexual harassment if:

(a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or

(b) The recipient has made it clear that the behaviour is considered offensive; and/or

(c) The perpetrator should have known that the behaviour is regarded as unacceptable.\textsuperscript{104}

The Code also elaborates on the forms sexual harassment can take:

(1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:

(a) Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.

(b) Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.

(c) Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.

(d) Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.\textsuperscript{105}

\textsuperscript{104} Id. § 3.
\textsuperscript{105} Id. § 4(1).
Sexual favoritism is also prohibited, and occurs where "a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases."\(^{106}\) The forms of harassment listed are not meant to be exclusive, but rather are exemplary of what conduct might constitute sexual harassment.\(^{107}\) The Code also provides procedures to deal with the problem and prevent its recurrence, suggesting that employers designate someone outside of management as available to give advice and assistance, and outlining informal and formal procedures that can be taken to resolve conflict.\(^{108}\)

The Code's definition of sexual harassment is legally and politically important because it provides comprehensive legal protection to women against a broad range of abusive tactics. The EEA responds to women's experiences by penalizing physical and emotional harassment, as well as verbal and written harassment, assuring that harm from all types of unwanted behavior of a sexual nature may be addressed through legal interventions.

The Code presents what seems to be a subjective standard for making the determination of what conduct constitutes sexual harassment: "sexual attention becomes sexual harassment if . . . the recipient has made it clear that the behavior is considered offensive . . . ."\(^{109}\) This standard differs from the standard in the United States, under which actionable harassment must be hostile and abusive in both the subjective and objective senses. The victim must perceive the environment to be abusive and the situation must be such that a reasonable person would find the conduct hostile or abusive.\(^{110}\)

Despite its recognition of the importance of the problem of sexual harassment, the Code falls short in its failure to give employers an affirmative duty to act in a preventative manner against potential sexual harassment. Although employers are "required to take appropriate action . . . when instances of sexual harassment which occur within the workplace are brought to their attention,"\(^{111}\) the Code indicates only that they "should create and maintain a working environment in which the dignity of employees is respected,"\(^{112}\) they "should attempt" to ensure the workplace is free of sexual harassment,\(^{113}\) and they "should" implement a sex-

\(^{106}\) Id. § 4(2).

\(^{107}\) Id. § 4(1) (noting that the forms sexual harassment can take are "not limited to the examples listed").

\(^{108}\) Id. § 7.

\(^{109}\) Id. § 3(2)(b).


\(^{111}\) CODE OF GOOD PRACTICE, supra note 8, § (1)(d).

\(^{112}\) Id. § 5(1) (emphasis added).

\(^{113}\) Id. § 5(1)(c) (emphasis added) ("Employers/management should attempt to ensure that persons such as customers, suppliers, job applicants and others who have dealings
ual harassment policy and "take disciplinary action against employees who do not comply with the policy." While the Code is explicit and detailed about what the sexual harassment policy should include and about what procedures should be followed once a complaint is filed, these are only guidelines which employers are not bound to follow. This managerial prerogative is problematic because management structures are typically dominated by men who are less likely to identify sexual behaviour in the workplace as sexual harassment and less likely to perceive sexual harassment as a serious issue.

There is, however, strong incentive for employers to prevent harassment from occurring. While the Code does not impose penalties on an employer for failing to issue a policy, a failure to do so could provide the court with a basis on which to hold employers liable in cases where the employee files a complaint against the employer for failing to "take the necessary steps to eliminate the alleged conduct ... ." Additionally, the EEA itself requires that all designated employers prepare and implement an "employment equity plan which will achieve reasonable progress toward employment equity in that employer's workforce." This plan must state, among other things, "the objectives to be achieved for each year of the plan." A court might interpret the EEA in such a way that an employer's failure to institute a policy in accordance with the Code amounts to a failure to accommodate women as required under the plan.

There are also non-legal incentives for compliance. In addition to legal costs, sexual harassment can also cost companies money by reducing

with the business, are not subjected to sexual harassment by the employer or its employees."

114 Id. §§ 6(1)–6(2).
115 Policy statements should explain that "allegations of sexual harassment will be dealt with seriously, expeditiously, sensitively and confidentially" and should state that "employees will be protected against victimization, retaliation from lodging grievances and from false accusations." Id. § 6(3).
116 Id. § 7; see supra text accompanying note 109.
117 See supra text accompanying notes 42–45.
118 See generally Deborah Zalesne, The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who Is the Reasonable Person?, 38 B.C. L. Rev. 861 (1997). This article on sexual harassment in rental housing argues that "because women have not historically held power positions, men and women often have different perspectives regarding what conduct constitutes sexual harassment," and "actions deemed harassment by women were often perceived as harmless by men." Id. at 871 (citing Robert Rosenthal, Comment, Landlord Sexual Harassment: A Federal Remedy, 65 Temp. L. Rev. 589, 593 (1992)). Statistics from a joint survey by Redbook magazine and the Harvard Business Review indicate that many more men than women think that incidents of sexual harassment in the workplace are exaggerated and that various examples of sexual remarks at work are simply social comments. Id. (citing Eliza G.C. Collins & Timothy B. Bodgett, Sexual Harassment . . . Some See It . . . Some Won't, Harvard Bus. Rev., Mar.–Apr. 1981, at 76–77).
119 § 60(2) of Employment Equity Act 55 of 1998. This theory has yet to be tested.
120 Id. § 20(1).
121 Id. § 20(2).
productivity, morale, and motivation.122 As noted in a South African business magazine, "the penalty for not adhering to the 'Code of Good Practice for the Handling of Sexual Harassment Cases' is bad publicity, low morale and loss of employee loyalty which could follow a case of serious sexual harassment within a company."123 A pamphlet produced by the Women's Bureau of South Africa suggests that sexual harassment can have serious financial implications for companies, including:

An intimidating or hostile environment, lower productivity, poor performance and poor quality, low staff morale, absenteeism, accidents caused by stress and distraction, resignations of valuable staff, staff losing respect for people in power positions who "turn a blind eye," poor image of the company in the eyes of members of both the staff and the public, and litigation and costly legal battles.124

Promoting equality and diversity and treating workers with dignity and respect can have a positive impact on a company's image, and "with the growing importance of women as clients, it is necessary to create a gender sensitive image."125

Employment equity has been further advanced in South Africa by the recent enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act (the "Equality Act").126 The Equality Act is a law of general application dealing with equality and discrimination in the broader society, specifically prohibiting unfair discrimination against any person (by the state or by any person) on any of the prohibited grounds.127 The Equality Act has been said to complement and in certain respects

122 Ryder, supra note 33, at 27.

Sexual harassment can have a direct impact on productivity and profitability. The stress resulting from sexual harassment can make employees ill, resulting in time off work and reduced efficiency, and increasing costs for the employer in the form of sick pay and medical insurance. While they are at work, victims of sexual harassment are likely to be less productive and less motivated, thereby affecting both the quantity and quality of their work.

Breaking the Taboo, supra note 6.

123 Labour Finds an Ally in Business on the Issue of Sexual Harassment, BUS. VOICE, May 1998, at 25, 26; see also WOMEN'S BUREAU OF S. AFR., SEXUAL HARASSMENT IN THE WORKPLACE 1 (1992) ("[C]ase histories and research, both internationally and in South Africa, have proven that sexual harassment can cost companies money, by reducing productivity, morale and motivation. Companies may lose valuable staff or incur legal costs.").

124 WOMEN'S BUREAU OF S. AFR., supra note 123, at 6.

125 Breaking the Taboo, supra note 6.


127 Additionally, any other ground is prohibited if it causes systematic disadvantage, undermines human dignity, or seriously affects equal enjoyment of rights and freedoms. Id. § 1. Measures designed to "protect or advance persons or categories of persons disadvantaged by unfair discrimination" do not constitute unfair discrimination. Id. § 14(1).
reinforce the Employment Equity Act. It reinforces the Employment Equity Act by establishing an affirmative duty on the part of the state to promote and achieve equality by developing awareness of fundamental rights, enacting further legislation, and providing assistance, advice, and training on issues of equality. It complements the Employment Equity Act in several ways: first, it provides protection to employees that are excluded from the Employment Equity Act, such as members of the defense force; and second, it imposes responsibility and liability on some employers that are not “designated employers” under the Employment Equity Act.

Overall, the Employment Equity Act and the accompanying Code, together with the Equality Act, provide a solid basis for prosecuting sexual harassment. However, the law will only be effective if those whom it was meant to protect know about their rights and choose to assert them, if employers are convinced to implement policies and take action against employees who do not comply, and if lawyers and judges interpret the laws in accordance with the intent of the drafters.

c. Sexual Harassment Continues: The Extent of the Problem Since Implementation of the Employment Equity Act

Despite the enthusiasm that accompanied the enactment of the Employment Equity Act, its effectiveness is still largely untested. Although some believe that because of the new legislation sexually harassed women no longer fear speaking out, evidence indicates otherwise. In fact, since its enactment over two years ago, only a few cases have been brought under the Employment Equity Act, with unclear results.

Reactions to the statute have been unabashedly contrary to the intent of the law. The statute has encountered ongoing resistance and skepticism from law enforcement, courts, prosecutors, the business community, and the general public. There is still “entrenched hostility towards employment equity by employers and conservative trade unions in some

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128 COSATU SUBMISSION ON EMPLOYMENT EQUITY ACT, supra note 89.
130 COSATU SUBMISSION ON EMPLOYMENT EQUITY ACT, supra note 89.
131 Id.
133 In the December 2000 case of Ngantwini v. Daimler Chrysler, 2000 (9) BALR 1061, 1066 (CGMA), for example, despite the recent promulgation of the Employment Equity Act, the court made no mention of that Act, instead applying the Labour Relations Act to determine that the dismissal of an employee based on accusation of sexual harassment was appropriate. Because the incident involved unwanted physical contact, the court determined the conduct amounted to assault and found no need to address whether sexual harassment had also occurred.
sectors.”¹³⁴ Many employers “do not involve unions and workers in the
assessment of the workplace as required by the EEA,”¹³⁵ and continue to
resist attempts to place matters of employment equity on the table for
discussion at all.¹³⁶ This hostility comes as little surprise considering the
fact that the statute directly challenges inherited privileges and disrupts
the current balance of power.

Women report that sexual harassment is still not taken seriously in
the workplace.¹³⁷ A 1999 study of the private sector by the Commission
for Gender Equality shows that “despite new legislation, SA business has
done little or nothing to change the poor status of women in their organi-
sations.”¹³⁸ The study revealed that of the companies interviewed, forty-
one percent did not have a sexual harassment policy. Of those companies,
twenty-four percent said they did not feel obligated to provide a policy
“because staff had not asked for one,” and nineteen percent indicated that
having a sexual harassment policy was “unimportant.”¹³⁹ Nerishni Shun-
mugam, a representative of the company that conducted the survey, sug-
gests that the results show a “general disrespect for women” and reflect
“the society we live in as a whole.”¹⁴⁰

The minimal effect of the Employment Equity Act on occurrences of
sexual harassment is consistent with national trends in behavior following
the implementation of various other “women friendly” labor practices
in South Africa. Certainly, the integration of women in business over the
past few decades has had some effect on the economic status of South
African women.¹⁴¹ There is still, however, high turnover of women in
managerial positions. Some women have attributed this phenomenon to a
lack of training and promotion.¹⁴² One South African female executive
explained, “the atmosphere that management thinks is tolerant and wel-
coming to all employees is actually corrosive to women.”¹⁴³ She contin-
ued:

The problem of improving the workplace environment to suit
working parents, which are still mainly women, is not discussed
since both management and women (especially women who do
not want to be perceived as different from men) pretend every-

¹³⁴ COSATU SUBMISSION ON THE EMPLOYMENT EQUITY ACT, supra note 89.
¹³⁵ Id.
¹³⁶ Id.
¹³⁷ See, e.g., Govender, supra note 132.
¹³⁸ Celean Jacobson, Women Still on a Road to Nowhere, BUS. TIMES (S. Afr.), May 16,
1999, at 1.
¹³⁹ Id.
¹⁴⁰ Id.
¹⁴¹ Breaking the Glass Ceiling, MAIL & GUARDIAN, Aug. 11, 2000, available at
¹⁴² Id.
¹⁴³ Id.
thing is just fine. Women, therefore, feel there is a misunderstanding on how to manage and motivate them since they feel they cannot perform to their full potential if their special needs are not satisfied.\textsuperscript{144}

According to Felice Schwartz, president and founder of Catalyst, a research and advisory non-profit organization, most companies fall into one of three categories: they either make no effort to recruit, train or promote women; or they go for quantity, attempting to employ as many women as possible, irrespective of the position they occupy in the hierarchy of the company; or they go a step further and actually implement policies meant to address women's welfare in the company.\textsuperscript{145} However, regardless of which category the company falls into, Schwarts and other labor consultants believe that the status of women in most of these companies remains subservient to male dominance with respect to "decision-making and other processes that are central to the running of a successful organisation."\textsuperscript{146} This might be explained by firmly entrenched racist and cultural stereotypes, such as "black women cannot be depended upon as they are always having babies," and "men are heads of households and therefore should be in higher positions,"\textsuperscript{147} and might account for the low retention of women in managerial positions.

Women in law serve as an example. In the legal profession, women are better represented as students and as entry level employees than they are as practicing attorneys or as partners. Since the end of the 1960s, universities have significantly increased the percentage of females in their classes to between thirty-six and fifty percent. Women's representation in higher status positions, however, has not been as promising:

In 1998, the number of women practising at the Bar in South Africa showed a downward trend. The number of women advocates had increased (as with women attorneys) from two percent in the late 1960s to 12.7 percent in 1997, but the figure has now started to drop. Only two percent of silks\textsuperscript{148} in the country are women, with no women silks practising at certain Bars in the country.\textsuperscript{149}

Additionally, a 2000 survey of the top ten legal firms in South Africa revealed that although forty percent of their candidate attorneys were

\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Jacobson, supra note 138, at 1.
\textsuperscript{148} Silks are senior counsel.
women, only fourteen percent were partners.\textsuperscript{159} Thus, although there are new opportunities for women entering the legal profession, there are still hidden barriers to upward mobility. Women still face "cultural and sexist values" that lead to these obstacles, and it is still very difficult for women to break from their traditional roles.\textsuperscript{151}

Since the end of apartheid there has been wholesale legal transformation, but it could take generations for accompanying social transformation. Despite the new Constitution that grants equality to women, women are still subject to the sexist conventions and ideology of their primarily male employers, and in many cases, women are still expected to conform to traditional roles. It has become clear that the law should not be relied upon as the exclusive source for change. Political and social progress, as well as women's more active participation in economic development, are also necessary to combat sexual harassment. The ultimate success and utility of the Employment Equity Act will depend on the erosion of deep-rooted gender inequality and sexism in the legal system, as well as in the broader society.

B. United States Sexual Harassment Law: Decades of Struggle

1. Background: Development of the Law Since the 1970s

Title VII of the Civil Rights Act of 1964\textsuperscript{152} provides that "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to ... terms, conditions, or privileges of employment, because of such individual's ... sex ...."\textsuperscript{153} Title VII predated the recognition of sexual harassment as a pervasive problem in the workplace, and the courts' recognition of sexual harassment as a form of sex discrimination has evolved gradually over the past two decades. Initially, many courts rejected women's contentions that sexual harassment constituted a form of actionable sex discrimination.\textsuperscript{154} In the view of these courts, sexual harassment was an inevitable component of interactions between men and women that constituted a private, interpersonal matter beyond the purview of employment discrimination laws.\textsuperscript{155} In the late 1970s, however, courts began recognizing that the conduct at issue was intimately related to the target's status as a woman and thus recognized that conditioning employment-related

\textsuperscript{159} Id.
\textsuperscript{151} Id.
\textsuperscript{153} Id. § 2000e-2(a)(1).
\textsuperscript{154} See, e.g., Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163-64 (D. Ariz. 1975) (describing sexual harassment as "nothing more than a personal proclivity" on the part of the harasser rather than a condition of the plaintiff's employment), vacated by 562 F.2d 55 (9th Cir. 1977).
benefits on sexual favors (commonly known as “quid pro quo” harassment) constituted a form of discrimination “because of... sex.”  

Several years elapsed before the courts began to recognize that sexual harassment could constitute a form of sex-based discrimination even where the harasser did not demand sexual favors in exchange for tangible employment-related benefits. In the landmark case of Bundy v. Jackson, the Court of Appeals for the D.C. Circuit held that sexual harassment that creates a hostile environment alters the conditions under which an employee must work and constitutes actionable sex discrimination. In 1986, the Supreme Court adopted this reasoning in Meritor Savings Bank v. Vinson, holding that Title VII forbids not only quid pro quo harassment but also “hostile environment” harassment: harassment that, while not affecting economic benefits, subjects the plaintiff to a hostile or offensive working environment. In 1993, the Supreme Court clarified the parameters of a hostile environment sexual harassment claim in Harris v. Forklift Systems, Inc., holding that for actionable sexual harassment, the victim must “subjectively perceive the environment as abusive,” and an objective reasonable person must also find the environment hostile and abusive.

In the meantime, the business world was not so quick to respond to the problem of sexual harassment. Although as early as 1976 sexual harassment was reported as a serious problem experienced by up to ninety percent of working women, in the following decades, the business community continually failed to treat it as such, hesitant to involve itself with moral dilemmas. Accordingly, women were reluctant to bring suits because of the low success rate, high costs, and fear of retaliation. It was not until Congress amended Title VII in 1991 to permit victims of sexual harassment to recover damages, including punitive damages, and the ensuing Clarence Thomas confirmation hearings took place in

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158 Id. at 946.
159 Id.
161 Id. at 21–22.
162 Claire Safran, What Men Do to Women on the Job: A Shocking Look at Sexual Harassment, REDBOOK MAG., Nov. 1976, at 149 (reporting that nine out of ten women responding to their survey had experienced sexual harassment in the workplace).
163 For example, although eighty-six percent of respondents to a 1988 Working Woman survey indicated they believed mandatory training programs would help alleviate the problem, less than sixty percent of companies offered such programs. SEXUAL HARASSMENT: CONFRONTATIONS AND DECISIONS 79 (Edmund Wall ed., 2000) [hereinafter CONFRONTATIONS AND DECISIONS].
164 See infra note 340 and accompanying text.
1992, that sexual harassment began to become a practical problem for businesses. Companies began to fear public relations problems and expensive litigation and finally started to "make moral education part of their business."\(^{167}\) Even then, however, companies reacted slowly and it was not until several cases awarding high punitive damages became well-publicized\(^ {168}\) and solidified companies' fears that they finally began to recognize the problem and treat it as important.

2. Recent Developments

Before 1998, *Meritor* and *Harris* were the only two cases in which the Supreme Court had occasion to rule on an issue regarding sexual harassment. In the 1997-98 term, however, the United States Supreme Court decided an unprecedented number of sexual harassment cases, bringing the term "sexual harassment" into American vernacular, and demonstrating the Court's commitment to addressing issues of gender discrimination in the workplace.

a. Same-Sex Sexual Harassment

In *Oncale v. Sundowner*,\(^ {169}\) the Supreme Court revisited the issue of what conduct constitutes sexual harassment, but this time in the context of a man suing another man. In 1991, Joseph Oncale, a self-identified heterosexual oilrig worker, was sexually harassed by his heterosexual co-workers and supervisor on an oilrig off the coast of Louisiana. He claimed that he was sexually assaulted, battered, touched, and threatened with rape by his direct supervisor and others, including one instance where three male co-workers held him down in a shower and shoved a bar of soap between his buttocks.\(^ {170}\) He sued under Title VII, claiming he was subjected to a hostile work environment, but the lower courts denied his claim since both he and his harassers were male.\(^ {171}\) The Supreme Court reinstated Oncale's claim stating that "nothing in Title VII neces-

\(^{167}\) *Confrontations and Decisions*, *supra* note 164, at 83.  
\(^{168}\) See, e.g., *Fuller v. City of Oakland*, 47 F.3d 1523 (9th Cir. 1995) (awarding $3.1 million to a female police officer for being subjected to a hostile work environment); *Scribner v. Waffle House*, 976 F.Supp. 439 (N.D. Tex. 1997) (awarding $6.3 million in punitive damages to sexual harassment victim), *vacated by 62 F.Supp.2d 1186* (N.D. Tex. 1999); *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510 (Cal. Ct. App. 1998) (awarding $6.9 million, later reduced to $3.5 million, to female employee of law firm where the firm exhibited conscious disregard for the rights and safety of others by failing to take reasonable steps to prevent sexual harassment); *Coates v. Wal-Mart Stores*, 976 F.2d 999 (N.M. 1999) (awarding $1.76 million to sexual harassment plaintiffs where employer knew of the harassment yet failed to protect the plaintiffs and failed to reprimand the employee).  
\(^{170}\) Id. at 79.  
sarily bars a claim of discrimination "because of sex" merely because the plaintiff and the defendant . . . are of the same sex."172

The Oncale opinion was widely viewed as greatly expanding the scope of protection of Title VII.173 The Court's ruling, however, did not address whether Oncale was in fact sexually harassed in that case, leaving it to the lower courts to work out what proof is required to establish that same-sex harassment is "because of sex." Oncale's case was remanded and Oncale was left to convince a jury that his co-workers and supervisor discriminated against him because of his sex. The parties ultimately settled the case,174 so it remains unclear whether the Supreme Court's ruling would have helped Oncale. In fact, while the Oncale decision allows the possibility of a case of same-sex sexual harassment, there is no indication that the Court would recognize the right of such a plaintiff based on the gender stereotyping that is typical of same-sex sexual harassment. Accordingly, even if Oncale's co-workers did everything he said they did, he still might have lost his case on remand.

The media, while correctly reporting the technical holding of the Oncale case, left the public believing Oncale had already won his suit, or that he would have been likely to prevail on remand. Many news reports did not recognize the wide leeway lower courts now have to define what it means to discriminate "because of sex" in a way which excludes protection for gay or effeminate men, nor did the media recognize the possibility that the Court's ruling may actually make it easier to eliminate most same-sex sexual harassment cases.

b. Employer Liability

In two other cases decided during the 1997-98 term, the Supreme Court resolved a split in the circuit courts over the correct standard for holding employers liable for the sexual harassment of an employee by a supervisor. In Faragher v. City of Boca Raton,175 the Court addressed the issue in the context of a hostile environment claim. The case involved a lifeguard who was subjected to repeated and uninvited offensive touching, sexual comments and gestures, and threatening sexual requests by her two male supervisors.176 Her employer, the City of Boca Raton, asserted that it could not be held responsible for hostile environment harassment that occurred at a remote location and which, although reported

172 Oncale, 523 U.S at 79.
173 See, e.g., Same-Gender Harassment Is Also Banned, 219 N.Y.L.J. 1, 1 (1998) (referring to the Oncale decision as a "case of enormous importance for American workplaces") [hereinafter Same-Gender Harassment].
176 Id. at 782.
to an intermediate supervisor, was never reported to higher-ups in the city.\textsuperscript{177} In \textit{Burlington Industries v. Ellerth},\textsuperscript{178} the Court addressed the question of employer liability based on a claim of quid pro quo sexual harassment. \textit{Ellerth} involved a claim that the plaintiff’s supervisor repeatedly implied that her job would be in jeopardy unless she succumbed to his advances.\textsuperscript{179} Her employer, Burlington Industries, argued it should not be held liable because she suffered no job consequences (she actually got promoted before she quit), and because she failed to utilize the company’s sexual harassment complaint procedure.\textsuperscript{179}

In considering these two cases, the Court determined first that the distinction between hostile environment and quid pro quo harassment did not control the issue of employer liability.\textsuperscript{181} The Court then held that under either type of claim, employers are potentially liable for their supervisors’ misconduct, whether or not the company was aware of the misconduct.\textsuperscript{182} Specifically, an employer will be held strictly vicariously liable to a victimized employee who has an actionable claim of sexual harassment created by a supervisor who has authority over the employee, when the exercise of supervisory authority results in tangible harm to the plaintiff.\textsuperscript{183} When the plaintiff cannot prove tangible detriment, the employer can raise the affirmative defense that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and that the complaining employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.\textsuperscript{184}

These cases were decided during the height of the sexual harassment backlash, when common perception was at its strongest that sexual harassment law was out of hand. At a time when people were already convinced that too many frivolous suits were being brought, the feeling was that these decisions would lead to more lawsuits and greater expense to employers, and ultimately “further complicate a workplace already confused about male-female relations.”\textsuperscript{185} Critics feared that these two rulings would cause employers to adopt overbroad, policies under which

\begin{itemize}
  \item \textsuperscript{177} Id. at 785.
  \item \textsuperscript{178} 524 U.S. 742 (1998).
  \item \textsuperscript{179} Id. at 747-48.
  \item \textsuperscript{180} Id. at 749.
  \item \textsuperscript{181} Id. at 753.
  \item \textsuperscript{182} Id.
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Id. at 765.
\end{itemize}
"offending employees [could be] disciplined or discharged for relatively trivial offences."\footnote{186} 

The Court’s decisions, however, have also been viewed by many as evenhanded. Employers are relieved that effective sexual harassment policies can shield them from liability while employees are pleased that the burden of proof for any affirmative defense is on the employer.\footnote{187} Justice Souter, writing for the majority in \textit{Faragher}, explained that, although Title VII seeks to remedy injuries suffered because of unlawful discrimination, its primary objective “is not to provide redress, but to avoid harm.”\footnote{188} That, in fact, is exactly the aim of these two decisions. While these new rulings might have caused some initial confusion, the cases provide incentives for preventing harassment and dealing promptly with problems. The likely result is that more workplaces will adopt sexual harassment policies, thereby discouraging sexual harassment in the first place. Ultimately, more victims should feel safe reporting sexual harassment to their supervisors, and more cases will be resolved without resort to litigation.

\textbf{c. School Liability}

In a fourth sexual harassment case decided by the Supreme Court in the 1997-98 term, the Court took a different turn on the issue of employer liability. Victims of sexual harassment experienced the biggest setback in \textit{Gebser v. Lago Vista Independent School District},\footnote{189} where the Court held that a plaintiff is not entitled to damages for teacher-student sexual harassment unless a school district official with authority to institute corrective measures has actual notice of, and is deliberately indifferent to, the teacher’s misconduct. In that case, Alida Star Gebser, a junior high school student, was subjected to a campaign of sexual innuendo and provocation by her teacher. She ultimately had an affair with the teacher that lasted for a year, and ended in prosecution for statutory rape. Gebser never reported the incidents to anyone, including her parents, because “she was uncertain how to react and she wanted to continue having him

\footnote{186 Men, Women, Work and Law, supra note 185, at 21 ("The law already forced employers to engage in massive censorship of employee speech. The new cases put even more pressure on them to do this." (quoting Kingsley Browne, a law professor at Wayne State University)); see McGinnis, supra note 185 ("In order to avoid lawsuits, companies thus will react by creating inflexible, overbroad codes that are likely to chill much social behavior that does not constitute harassment.").}


\footnote{188 Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998).}

\footnote{189 524 U.S. 274 (1998).}
as a teacher." The couple was eventually discovered having sex and the teacher was fired and arrested.

Gebser sued under Title IX of the Education Amendments of 1972, which bars sex discrimination at educational institutions receiving federal funds. Although Title VII and IX had been analogized in the past to determine liability for sexual harassment, the Court departed from the clear law under Title VII in a 5-4 decision, holding that the school was not liable for sexual harassment because no one with authority to take corrective action had actual notice of the harassment. The result of the Court's ruling is that school employees are now better protected from sexual harassment than are students at the same school. In fact, practically speaking, in some instances where even the principal of the school does not have authority to take corrective action, a harassed student may be required to report any instances of sexual harassment to the school board in order to take advantage of the protections of Title IX.

This ruling actually encourages schools to turn their backs on sexual harassment altogether as a means of avoiding liability. "What this does is reward school districts who refuse to have meaningful anti-harassment policies for students," says employment law scholar Charles Craver. Gebser has taken away the incentive to have an anti-harassment policy, putting the responsibility on a thirteen-year-old for reporting an incident, rather than putting the responsibility on the school or the teacher.

In 1999, the Supreme Court decided another school sexual harassment case. Davis v. Monroe County Board of Education was a sex discrimination lawsuit brought by the mother of LaShondara Davis who was sexually harassed by G.F., a 5th grade classmate. Sitting behind her in the classroom, in physical education class, and in the hallways, G.F. would try to touch her breasts and vaginal area saying, "I want to get in bed with you" and "I want to feel your boobs." He rubbed his body against hers in the hallways, put a doorstop in his pants, and pretended to have sex with her during physical education class. LaShondra complained about each incident, but neither her teachers nor the elementary school's principal did anything about it. Davis tried to get away from him by asking for her seat assignment to be changed, but it was three months before the teacher let her move. Even then, G.F., who was never disciplined by the school, continued to sexually harass her in the

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190 Id. at 278.
192 Gebser, 524 U.S. at 292.
195 Id. at 633.
196 Id.
197 Id. at 634.
198 Id.
199 Id. at 635.
hallways.\textsuperscript{200} She told her mother that she "didn’t know how long she could keep him off her," and worried that the only way she could get him to stop would be to kill herself.\textsuperscript{201} It was the criminal justice system, not the school, that finally put an end to the harassment: G.F. was arrested for sexual battery and he pleaded guilty to the charge in juvenile court.\textsuperscript{202}

A divided Supreme Court affirmed the legal obligation of schools to protect students from severe and pervasive sexual harassment by other students.\textsuperscript{203} While the decision recognizes that student-on-student sexual harassment disrupts a student’s ability to learn, the Court applied the same stringent standard it adopted in Gebser. A school board may be held liable only where it exhibits "deliberate indifference" to sexual harassment of which it has actual knowledge.\textsuperscript{204} The Court again rejected the use of agency principles, which they freely apply in the employment context, to impute liability to the school district—the school will only be liable for "its own decision to remain idle in the face of known student-on-student harassment in its schools."\textsuperscript{205}

3. (Mis)Understanding the Law: Backlash to the Recent Developments

The Supreme Court’s recent attention to the issue of sexual harassment shows its firm commitment to the eradication of sexual harassment in the workplace, and to clarifying what has been viewed as serious confusion regarding the law.\textsuperscript{206} There seems to be no question that the most recent sexual harassment laws in the United States have had some positive effect on corporate culture, as individuals have begun to alter their behavior in the workplace\textsuperscript{207} and American companies have reacted to the stricter burdens placed on them to prevent sexual harassment in the workplace.\textsuperscript{208} According to Bur-

\textsuperscript{200} Id. at 634.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 633.
\textsuperscript{204} Id.
\textsuperscript{205} Id. at 641–42.
\textsuperscript{206} See generally Zalesne, supra note 17, at 355–68.
\textsuperscript{207} Id. at 352 n.6.
\textsuperscript{208} Today, approximately nine out of every ten companies have a sexual harassment policy. CNN Morning News (CNN television broadcast, June 26, 1998). Many of these companies are enforcing "fraternization" policies which outright ban personal or romantic relationships in the workplace, even when both parties consent. For example, United Postal Service, American Express, Motorola, Wal-Mart, Safeco, Harvard University, and Tufts University, among many others, all have policies that bar relationships between superiors and subordinates. See Stephanie Armour, Romance at Work Tricky to Manage: Even Consensual Relationships Can Hurt Morale, USA TODAY, Jan. 23, 1998, at B2; Lisa Black, Power Imbalance Is Key to Most Policies on Sex, CHI. TRIB., Jan. 29, 1998, at 1; Walter V. Robinson & Peter G. Gosselin, At Many Firms, Consent Doesn't Make Sex OK, TIMES PICAYUNE, Feb. 1, 1998, at A10.
linton" and Faragher, employers can be liable for the harassment of an employee by a supervisor. However, liability can be avoided if the employer exercises reasonable care to prevent or correct the offending behavior, as long as there was no tangible detriment to the employee, and the employee failed to take advantage of the opportunities offered by the employer. This law has encouraged companies to develop sexual harassment policies and to train and educate employees in sexual harassment awareness to prevent liability. Experts note that millions of corporate dollars have been spent training workers about the hazards of perpetuating sexual harassment and educating employers about the hazards of condoning it. If nothing else, the laws have served to heighten our consciousness about sexual harassment.

But there is still a long way to go. Studies show that despite recent educational and legal efforts to prevent sexual harassment, anywhere from one-third to one-half of all working women are still sexually harassed at some point during their working lives, and "the incidence of sexual harassment has declined little, if at all, in almost twenty years." The media has arguably played a large part in shaping our society's perceptions about sexual harassment and the state of the law in that area. The media has consistently and overwhelmingly reported the recent developments in the law as overly pro-plaintiff, but it has not always

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211 Burlington, 524 U.S. at 753.
212 Id. at 765.
213 See supra text accompanying note 208.
214 For example, since the Supreme Court's 1998 Faragher decision, many employers have "set up stronger anti-harassment programs with more training and a clearer path to making a complaint." Ellen Forman, It Can Happen to You: Employers Have Been Sent a Strong Message by Two Recent Sexual Harassment Rulings: Stomping Out On-the-Job Sex Harassment is a Top Priority, SUN SENTINEL, Aug. 16, 1999, at 16. According to Anne Marie Estevez, a labor litigation partner at a law firm, "large employers are listening to the court and taking the message of a thorough prevention program seriously." Id. at 16. Garry Mathiason, a senior partner in the country's largest employment and labor law firm explains: "The first phase, the rush to adopt corporate harassment policies and procedures, occurred in the first two years after the Supreme Court Rulings . . . . [M]ost companies are now in the second phase: training managers to investigate and document harassment complaints properly." Joseph A. Slobodzian, Increase in Harassment Cases, EEOC Says, NAT'L L.J., July 3, 2000, at B1; see also Laura Koss-Feder, Doing Business With: Harassment Policy Not Just for the Big Guns, and It's Easy, NEWSDAY, Jan. 4, 1999, at 5 (quoting Presidents and CEOs from various companies discussing the need to create a policy as a precaution to protect themselves and their employees).
215 Slobodzian, supra note 214, at B1 (noting that the Supreme Court rules have prompted a "rush to attorneys and consultants who specialized in providing model sexual harassment policies and training for companies").
217 Id.
218 See, e.g., John Gallagher, Friends of the Court, ADVOCATE, Mar. 31, 1998, at 13 (reporting that the Oncale decision has "made for a safer workplace"); Same-Gender Harassment, supra note 173, at 1 (referring to Oncale decision as "case of enormous impor-
painted a complete and accurate picture of the current state of law. The
*Oncale* decision, while opening the door to claims by men against other
men, might actually restrict the rights of same-sex plaintiffs. The em-
ployer liability cases, while expanding the scope of recovery for plaintiff-
s who can prove sexual harassment by a supervisor, sparked a feud
about the rights of the accused and the extent of the problem of frivolous
lawsuits, causing resentment by employees and employers alike. The
school liability cases, while recognizing the problems associated with
harassment of a student by teachers or other students, actually impose
higher standards on students suing for sexual harassment than on simi-
larly situated adult employees.

As a result of the deep misunderstanding of the state of the law,
many people have come to resent it and the accompanying change in be-
havior they see as necessary to comply with it. The law encourages com-
panies to voluntarily adopt sexual harassment policies, but due to a fear
of liability based on a lack of understanding of the law, companies have
adopted over-broad, zero-tolerance policies, where employees can be
disciplined, or even fired, for trivial offenses. People complain that
companies, living in fear of the disabling costs of sexual harassment
suits, are going off the deep end, forcing their employees into straight-
jackets of political correctness; similarly, employees, living in fear of
being fired for behavior that is objectively innocuous, are unnaturally
conforming their personal behavior to this new mold. An image has
emerged of people walking around their workplaces, stiff and inhuman,
feeling horribly constrained by a set of arbitrary rules imposed by the
"feminazis," afraid to talk to one another about anything personal. This,
in turn, has led to the common perception that sexual harassment laws
have tipped too far in favor of the accuser. Many believe that sexual har-
apsest has proven to be a useful tool for disgruntled employees looking
for a legal way to blackmail their co-workers or employers.

The media, by focusing attention on several extreme cases, has
helped to perpetuate the popular myth that employees can be guilty of
sexual harassment for engaging in innocuous interactions in the work-
place that have always been acceptable, and even viewed as welcome.
During the late 1990s, the news media reported several absurd instances
of sexual harassment law gone awry, leaving the public to believe that
those situations represent the norm. The media unerringly focused on

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220 See supra text accompanying notes 181–186.
221 See supra text accompanying notes 192 & 203–205.
222 See, e.g., McGinnis, supra note 185 ("In order to avoid lawsuits, companies thus
will react by creating inflexible, overbroad codes that are likely to chill much social be-
havior that does not constitute harassment.").
223 For example, in 1993 the media widely reported the story of a manager at Miller
Brewing Company who was fired after a co-worker complained she was offended when he
extreme, sensational cases in which employers overreacted because of their hostility, bewilderment, or confusion over new sexual harassment rules. The media’s exaggeration of the successes won by plaintiffs, combined with the disproportionate attention given to several sensationalized stories, has led to the perception that women now have a hold on the workplace. This perceived threat, based largely on misperceptions about the rigidity of the law, has led to a well-fueled backlash, which has severely limited the effect of the law on social behavior.

II. LAW AND SOCIAL CHANGE

Professor Martha Minow once stated, “there tend to be two kinds of people when it comes to the topic of ‘law and social change’—those who believe that law is an important instrument for social change and those who think not.” In fact, Professor Minow goes on to describe several variations on these two basic positions:

Some people think the law basically lags behind changes in society and gradually catches up. Some believe in contrast that law can occasionally prompt changes in society but only occasionally and often unintentionally. Others emphasize the unintended consequences of law reform efforts. The role of law, for some, is most significantly a cultural medium that influences people’s modes of expression and everyday hopes and fears. Quite in contrast are those who agree that law does not or should not produce social change.

talked about a previous night’s Seinfeld episode involving a woman whose name (Dolores) rhymed with a female body part. See, e.g., Dennis McCann, Seinfeld Trial’s Story Line Isn’t Over Yet, MILWAUKEE J. SENTINEL, Apr. 29, 1998, at 1; Marshall H. Tanick, No Rhyme or Reason for “Seinfeld” Firing, NAT’L L.J., Aug. 18, 1997, at A19. The media also seized on a story about a theology professor who was disciplined for discussing a risqué tale from the Talmud involving sex (see, e.g., Nat Hentoff, Assaulted by the Talmud, PROGRESSIVE, Aug. 1, 1994, at 16; Bernard Levin, Banning Holy Writ, TIMES (London), July 8, 1994, available at 1994 WL 9160484), as well as a story about a graduate student told to remove a photograph from his desk that showed his “bikini-clad” wife because two women who shared his office space said the picture made them uncomfortable. See, e.g., Americans Lighten Up a Tad on the Topic of Sex—but It’s Still Legally Risky Subject in a Workplace, SUNDAY PATRIOT-NEWS, Feb. 22, 1998, at F1; James J. Kilpatrick, Sex and the Court, TULSA WORLD, Feb. 16, 1998, at 10. Similarly, the media widely reported another story about a six-year-old boy suspended for kissing a little girl classmate on the cheek. See, e.g., Sexual Politics, RICHMOND TIMES DISPATCH, May 1, 1998, at A18; John Temple, Postlude to a Kiss: “This Ain’t Over” Says Boy’s Father, NEWS & REC., Apr. 13, 1997, at A1. In each of those four cases, however, the facts were misreported or underreported. See generally Zalesne, supra note 17, at 360–65.

224 See generally Zalesne, supra note 17.
226 Id. at 171–72 (citations omitted).
Which of these positions one espouses depends, of course, on one's faith in people's ability to dissipate long-standing patterns of thought and behavior for economic, moral, social, or political reasons, in the face of judicial activity.

In the United States, imposition of moral values on our legal system has arguably altered public behavior in many positive ways. Most strikingly, in the 1960s, the civil rights legislation illegitimatized racist conduct and helped change racial attitudes. Similarly, "domestic violence has come out of the shadows" since the enactment of the Violence Against Women Act of 1994. "Once unavailable, then unmentionable, even illegal, contraception is now a given for most American women," largely due to two Supreme Court opinions granting the fundamental right to marital privacy in the use of contraception. The Supreme Court's forward-thinking decision in Griswold helped pave the way for the idea that abortion should be a constitutionally protected right, and presumably the number of abortions has increased since its legalization in 1973. The welfare system, by subsidizing non-marital births, has im-

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227 See id. at 171 (citation omitted) (stating that "Brown v. Board of Education stands as a remarkable and unusual moment of judicial leadership in advance of public opinions and practice" that helped eviscerate racism in our country); but see DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 1992 (arguing that law reform for racial justice has failed).

228 Anna Quindlen, Singing Praise to the Crazed, NEWSWEEK, Jan. 29, 2001, at 68.

229 Violence Against Women Act of 1994, Pub. L. No. 103-22, 108 Stat. 1941 (codified as amended at 42 U.S.C. § 13981 (1994)). The Violence Against Women Act "is a comprehensive effort to address the problems of violence against women through a variety of different mechanisms, including funding for women's shelters, a national domestic abuse hotline, rape education, and prevention programs, and training for federal and state judges." Léonore M. J. Simon, Therapeutic Jurisprudence: Sex Offender Legislation and the Antitherapeutic Effects on Victims, 41 ARIZ. L. REV. 485, 532-33 (1999) (citations omitted). It is often noted that there has been increased attention being paid on the national level to the issue of violence against women, id. at 532, and conviction rates for domestic violence have increased since the passage of the Violence Against Women Act. See, e.g., Austin Fenner, Domestic Violence Targeted, N.Y. DAILY NEWS, Sept. 24, 2000, at 1 (noting that in Queens, New York, the conviction rate for domestic violence misdemeanor cases jumped from thirty percent to fifty-four percent since the enactment of the Violence Against Women Act).

230 Quindlen, supra note 228, at 68.


233 See Roe v. Wade, 410 U.S. 113 (1973); PLANNED PARENTHOOD, FACT SHEET: MEDICAL AND SOCIAL HEALTH BENEFITS SINCE ABORTION WAS MADE LEGAL IN THE U.S. (Jan. 2000) ("estimates of the annual number of illegal abortions in the 1950's and 1960's range from 200,000 to 1.2 million"); at http://www.plannedparenthood.org/library/ABORTION/healthbenefit.html; Lisa M. Koonin et al., Abortion Surveillance—United States, 1997, MORBIDITY & MORTALITY WKL. REP., Dec. 8, 2000, at tbl.2 (indicating that since 1970, legal abortions have steadily increased from roughly 0.2 million in 1970 to roughly 1.4 million in 1988), available at http://www.cdc.gov/nccdphp/drh/surv_abort.htm. Even before Roe, abortion was widely available, as many hundreds of doctors secretly performed them, but the legalization of abortion presumably increased its availability for
licitly legitimized such births,\textsuperscript{234} and no-fault divorce laws remove most legal obstacles from obtaining a divorce, thereby destigmatizing divorce.\textsuperscript{235} "The victories over the past twenty-five years have been so incrementally successful that most Americans scarcely even notice unless they take the long view."\textsuperscript{236} Although many issues such as abortion and gay rights remain hotly contested, these causes have slowly "moved from being considered radical to being mainstream."\textsuperscript{237}

Since the beginning of the feminist movement, though, there has been an ever-present underlying backlash against women's equality. In her 1991 book, Susan Faludi commented that "the last decade has seen a powerful counterassault on women's rights, a backlash, an attempt to retract the handful of small hard-won victories that the feminist movement did manage to win for women."\textsuperscript{238} Gloria Steinem echoed those sentiments in an article for the ten-year anniversary issue of \textit{Ms. Magazine} back in 1978:

This seems to be where we are, 10 years or so into the second wave of feminism. Raised hopes, a hunger for change, and years of hard work are running head-on into a frustrating realization that each battle must be fought over and over again at different depths, and that one inevitable result of winning the majority to

\footnotesize{people who could not have formerly afforded one. \textit{See} Garrow, \textit{supra} note 232, at 834.}

\footnotesize{There is also a widely held belief that the \textit{Roe v. Wade} case "created an intensely energized right to life movement" which would not have taken on the life it did absent the Supreme Court's mandate in 1973. \textit{See} Garrow, \textit{supra} note 232, at 840.}

\footnotescript{\textsuperscript{234} \textit{See Gertrude Himmelfarb, One Nation, Two Cultures} 63 (1999). Of course the law had already abandoned the harsh treatment of "bastards." \textit{See} Andra J. Hedrick, \textit{Decedents' Estates—Bilbrey v. Smithers: Limitations on Post-Death Paternity Claims for Purposes of Intestate Succession in Tennessee}, 27 U. MEM. L. REV. 517, 519 (1997) (citation omitted) (noting that "[t]raditionally, the law has treated nonmarital children less favorably than children born within the bonds of matrimony," but "[r]ecognizing the harshness of this rule, the individual states have gradually expanded the rights of nonmarital children by statute and judicial opinion"). But by actually subsidizing such births, the government implicitly sanctioned them.}

\footnotescript{\textsuperscript{235} \textit{See} Himmelfarb, \textit{supra} note 234, at 63. Arguably, however, the move to no-fault divorce was in response to already changing cultural and moral views about marriage and divorce. Carl E. Schneider, \textit{Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse}, 1994 UTAH L. REV. 503, 522 (1994). Many see the adoption of the no-fault divorce as an acknowledgment of a practice that already existed, rather than as a precursor to a change in social attitudes. \textit{See} Minow, \textit{supra} note 225, at 171. Before the change in the law, a spouse who wanted out of a marriage would have to demonstrate that the other spouse was to blame for the breakup of the marriage. \textit{Id}. Evidence has shown that many thousands of people manufactured evidence under the blame system, indicating that the desire to allow divorce without proving fault had been around well before the change in the law. \textit{Id}.}

\footnotescript{\textsuperscript{236} Quindlen, \textit{supra} note 228, at 68.}

\footnotescript{\textsuperscript{237} \textit{Id}.}

\footnotescript{\textsuperscript{238} \textit{Susan Faludi, Backlash: The Undeclared War Against American Women} xviii (1991).}
some changed consciousness is a backlash from those forces whose power depended on the old one.\textsuperscript{239}

Frequent flare-ups of resistance to women’s rights are not random, but rather occur when men fear that women are making progress that will threaten men’s economic and social well being.\textsuperscript{240} These inevitable setbacks have severely impaired the social and economic progress of the last several decades.

The hotly contested nature of the law in the United States and the lag in social change may be instructive on the situation in South Africa. South Africa naturally presents a very different set of challenges than the United States, where a vastly different political economy and social climate abounds as a result of the legacy of apartheid, the level of economic development, the political power of the trade union movement, and the extent of unemployment.

Since the end of apartheid, South African women have made great gains in representation in government, law, and society. The Constitution “stands out among contemporary constitutions for its evident concern for women,”\textsuperscript{241} proclaiming non-sexism to be a “foundational principle of the South African state.”\textsuperscript{242} Gender studies programs have been established in higher education, and the public has begun to recognize the negative impact of domestic violence on women’s equality. Law, certainly an important mechanism for change, has been successfully used to remove the most blatant discrimination against women. Since 1993, South African women have experienced some significant legislative victories, including the Promotion of Equality and Prevention of Unfair Discrimination Act,\textsuperscript{243} Commission on Gender Equality Act,\textsuperscript{244} Customary Marriages

\textsuperscript{239} Gloria Steinem, \textit{Far From the Opposite Shore, Or How to Survive Though a Feminist}, MS. MAG. (1978).

\textsuperscript{240} \textit{FALUDI}, supra note 238, at 46. The media has a history of inflicting damage on feminists and other progressives. As Faludi noted:

In the last decade, publications from the \textit{New York Times} to \textit{Vanity Fair} to the \textit{Nation} have issued a steady stream of indictments against the women’s movement, with such headlines as “when feminism failed” or “the awful truth about women’s lib.” They hold the campaign for women’s equality responsible for nearly every woe besetting women, from mental depression to meager savings accounts, from teenage suicides to eating disorders to bad complexions. The “Today” show says women’s liberation is to blame for bag ladies. A guest columnist in the \textit{Baltimore Sun} even proposes the feminists produced the rise in slasher movies. By making the “violence” of abortion more acceptable, the author reasons, women’s rights activists made it all right to show graphic murders on screen.

\textit{Id.} at xi.

\textsuperscript{241} \textit{HUMAN RIGHTS YEARBOOK, supra} note 34, at 296.

\textsuperscript{242} \textit{Id.} at 296.

\textsuperscript{243} Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The goals of this Act are to facilitate the implementation of relevant sections of the South African Constitution, and to facilitate compliance with certain international law obligations
Act,²⁴⁵ Domestic Violence Act,²⁴⁶ amendments to the Maintenance Act,²⁴⁷ the Choice on Termination of Pregnancy Act,²⁴⁸ and the Guardianship Act.²⁴⁹

hastings having to do with racial and gender discrimination. Id. § 2. The EEA establishes an affirmative duty on the part of the state to promote and achieve equality by developing awareness of fundamental rights, enacting further legislation, and providing assistance, advice, and training on issues of equality. Id. § 25. It prohibits unfair discrimination against any person (by the state or by any person), on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Id. § 1. Additionally, any other ground is prohibited if it causes systematic disadvantage, undermines human dignity, or seriously affects equal enjoyment of rights and freedoms. Id. Measures designed to “protect or advance persons or categories of persons disadvantaged by unfair discrimination” do not constitute unfair discrimination. Id. § 14. See generally AMERICAN SOCIETY OF INTERNATIONAL LAW, SOUTH AFRICA: PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT (June 17–23, 2000), at http://www.asil.org/lib/lib0315.htm.

²⁴⁴ Commission on Gender Equality Act 39 of 1996. This Act was created pursuant to § 119 of the Constitution, which provided for the establishment of a Commission on Gender Equality. Id. pmbl. The object of this Commission is to promote gender equality and to advise and make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation that affects gender equality and the status of women. Id.

²⁴⁵ Customary Marriages Act 120 of 1998. This Act gave legal recognition to all existing African customary marriages, as well as future customary marriages that are in compliance with the provisions of the Act. See generally Johan D. van der Vyver, CONSTITUTIONAL PERSPECTIVE OF CHURCH-STATE RELATIONS IN SOUTH AFRICA, 1999 BYU L. REV. 635, 663 (1999).

²⁴⁶ Domestic Violence Act 116 of 1998. This Act includes in its definition of “domestic violence”: physical abuse; damage to property; economic, emotional, verbal, and psychological abuse; and stalking. Id. § 1(viii). Under the Act, a “domestic relationship” includes not only legally sanctioned marriages but also those married according to South African customary law and those who live or have lived together as though they were married, including persons in homosexual unions. Id. § 1(vii). The Act requires the police to inform a complainant of her rights under the statute and to arrest the alleged abuser without a warrant if the officer has a reasonable suspicion that an act of violence has occurred. Id. §§ 2–3. The Act also allows for: immediate interim protection orders when delay would create “undue hardship”; protection orders forbidding the abuser to enter the victim’s home or place of employment; orders requiring the abuser to pay the victim’s rent or mortgage payments; denying the abuser contact with his children if in the child’s best interests; omitting the victim’s physical address from the protection order; and any “additional conditions which it deems reasonably necessary to protect and provide for the safety, health, or wellbeing of the complainant.” Id. §§ 5(2), 7. See generally Penelope E. Andrews, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA: THE ROLE OF CULTURE AND THE LIMITATIONS OF THE LAW, 8 TEMP. POL. & CIV. RTS. L. REV. 425, 449–52 (1999) (examining provisions of the Domestic Violence Act).

²⁴⁷ Maintenance Act 99 of 1998. This Act allows courts to authorize employers to deduct maintenance payments from an individual’s salary. Id. § 28(b). It also allows for the seizing of the property of those who refuse to pay. Id. § 40(b). See generally South African Press Association, NNP DEMANDS BETTER PROTECTION OF WOMEN, WORLD REP., Aug. 9, 2000. AVAILABLE AT 2000 WL 24054851.

²⁴⁸ Choice on Termination of Pregnancy Act 92 of 1996. The Preamble of this Act recognizes the right of persons to security over their bodies and to make decisions concerning reproduction, and notes that the Act fulfills the values such as non-sexism which underlie a democratic South Africa. Id. pmbl. The new law permits an abortion on demand for any woman during her first twelve weeks of pregnancy. Id. § 2. An abortion from the thirteenth week through the twentieth is permitted to ensure the physical or mental health of the woman, if continued pregnancy would significantly affect the social or economic circumstances of the woman, if a substantial risk exists of severe physical or mental abnormalities
Women are at a critical juncture. Gender equality is central to the continued development of democracy in South Africa, but many women have yet to feel the effect of the new laws. Lack of education and resources, coupled with cultural notions about women, institutionalized gender stereotypes, and the priority given to racial issues, have interfered with women’s ability to take advantage of the new legislation, and caused their experiences and testimony to be discredited and devalued.

For law to affect social behavior, the law must have legitimacy. Yet traditional sexual harassment statues have often lacked the popular support necessary for widespread effectiveness. This Section examines the limitations of traditional sexual harassment statutes, and identifies a variety of cultural impediments to their full implementation.

A. Coercion vs. Acculturation: The Effect of Standard Sexual Harassment Self-Regulatory Legislative Schemes Depends on Their Cultural Legitimacy

The law can have two different effects on behavior: it can change the action people take by imposing economic costs on such actions (i.e., taxing an action or imposing other penalties), but it can also change beliefs people have about the taxed action. The former is consistent with the deterrence theory, an economic model under which “people commit crimes unless the law deters them with adequate punishments.” The latter is consistent with the normative model, which states that people commit crimes unless the law prohibiting them has legitimacy. Under either theory, however, the law cannot be relied upon as the sole method of altering workplace behavior.

in the fetus, or if the pregnancy resulted from rape or incest. Id. After the twentieth week, an abortion is permitted if the pregnancy would endanger the life of the woman, result in a severe malformation of the fetus, or pose a risk of injury to the fetus. Id. An abortion under this Act requires the informed consent of the woman, and does not require parental or spousal notification regardless of the pregnant woman’s age. Id. § 5. See generally Haroz, supra note 52, at 887–88 (examining provisions of the Choice on Termination of Pregnancy Act).

Guardianship Act 192 of 1993. Prior to this Act, fathers in South Africa were the natural guardians of minor children born within a marriage (mothers, then and now, are the sole guardians of illegitimate children). The 1993 Guardianship Act gives the mother of a legitimate minor child the same guardianship rights as the father. See generally Vivienne Goldberg, South Africa: Private Law in Transition; The Effect of the New Constitution, 33 U. LOUISVILLE J. FAM. L. 495, 498 (1995).

See infra 324–35.

See discussion infra Part II.C.


Id. at 111.

Id.
1. Deterrence Theory

The deterrence theory examines the use of punishment or sanctions to control socially undesirable behavior. Under both the American and South African sexual harassment legislative schemes, the method of enforcement relies on the use of legal sanctions as a strategic method of self-policing. Responsible self-policing is certainly a necessary element in controlling institutional power. But economic and legal incentives for compliance may not be sufficient. Under both laws, there is no requirement that companies implement sexual harassment policies: the law seeks the voluntary compliance of companies that fear the existence of moral or political force and want to avoid the liability and adverse publicity associated with a sexual harassment lawsuit. A study of ten United States corporations showed that, overwhelmingly, their goal in handling internal discrimination complaints was to resolve the complaints and avoid legal intervention, rather than to identify and eliminate practices of discrimination.255 These private management priorities and goals, which are purely economic, are inconsistent with the egalitarian principles of anti-discrimination law.

Traditionally, economic motives have not been sufficient to make companies responsive to social and community concerns. Empirical studies frequently show that “most companies are rather poor at implementing self-regulatory measures to eliminate discrimination” when the only incentive is economic.256 Louis Seidman, in his article about punishment as a deterrent to crime, attests that society depends on appeals to both self-interest and moral inhibitions to ensure compliance with social norms.257 He defines self-interest as “incentive structures that promise the potential criminal more pain than pleasure if he performs the criminal act,” and he defines moral inhibition as “a disinclination to perform an act even when the actor perceives it to be in his self-interest.”255 Seidman states:

Although the extent to which the threat of punishment actually deters crime is intensely controversial and probably unknowable, it can hardly be doubted that some people avoid criminal acts because of the threat of criminal sanctions. But it is certain as well that many others would refrain from criminal conduct

256 Id. at 24. Parker cites the United States Federal Sentencing Guidelines, which decrease fines for companies that have compliance programs, as an example of a successful voluntary corporate compliance program. Id. at 22.
258 Id. at 334.
even if there were no chance of punishment, simply because they believe that the conduct is reprehensible.\textsuperscript{259}

Applying this theory to civilly actionable behavior, if economic sanctions are the only deterrent to "socially costly but privately beneficial behavior,"\textsuperscript{260} the actor will always balance the pleasure he gets from the harassing behavior against the risk and extent of the economic sanctions, and at least in some cases may conclude that it is "worth it" to engage in sexual harassment.\textsuperscript{261} It follows that economic sanctions alone may not be a sufficient deterrent to improper social behavior. What is needed is a more fundamental belief that the behavior at issue is morally wrong, so that the actor will not engage in the conduct even if the pleasure it would give him would outweigh the costs. Without the added moral inhibitions, voluntary compliance may not be a comfortable source on which to rely.

2. Normative Theory

The normative theory examines the use of social and cultural influences to control "immoral" behavior. "No society exists in which law is the sole regulatory force: there are also religion, gossip, the threat of scandal, and the subtler reinforcements of socialization."\textsuperscript{262} The law must work in conjunction with these other control forces to have maximum effect. The normative theory operates under the assumption that people and institutions care deeply about their reputations. Under the normative theory, law helps in part to alter the inferences drawn about a person who engages in a taxed action. This, in turn, can lead to non-legal mechanisms of cooperation such as gossip, disapproval, or ostracism.\textsuperscript{263}

There is an argument that the passage of a law "signals the existence of a national consensus" denouncing the regulated behavior, thereby helping to create a societal norm.\textsuperscript{264} Under this theory, even if a majority believes the conduct at issue is morally wrong, "persons who do not

\textsuperscript{259} Id. at 335.
\textsuperscript{260} Posner, supra note 252, at 4.
\textsuperscript{261} Parker, supra note 255, at 35-36 (noting that "whatever penalty is set will always be too small to deter those whose wrongdoing is so profitable it does not matter" (citing John Braithwaite, On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of Republican Separation of Powers, 47 U. Toronto L.J. 305 (1997))); see also Posner, supra note 252, at 27 (noting that "people violate social norms simply because they care more about the intrinsic benefits they obtain from a behavior than about the reputational consequences").
\textsuperscript{262} Daisy Hilse Dwyer, Outside the Courts: Extra-Legal Strategies for the Subordination of Women, in AFRICAN WOMEN & THE LAW 90 (Margaret Jean Hay & Marcia Wright eds., 1982).
\textsuperscript{263} Posner, supra note 252, at 4. For example, as Posner points out, "people draw different inferences today than they did in the past about the characters of those who engaged in racial discrimination." Id. at 33.
share these views may be unaware of this consensus because they most often associate with others who share their views and they exaggerate the typicality of those views." The very passage of a law signals to those people that, as a society, we view the behavior as inappropriate and that they will be penalized both socially, through reputation, and economically, through sanctions, for engaging in it.

Scathing reports, with the proper attention, could bring increased pressure, public disapproval, and shame upon companies in non-compliance with sexual harassment law. Thus, efforts to educate society about sexual harassment by publication of studies showing companies' insensitivity to the problem and detailed reports of their violations, may encourage companies to respond and take steps toward prevention.

But under the normative model, people obey the law only when they see it as truly legitimate and reflective of societal norms. People are deterred from committing a crime either because they "believe that the law is morally right and they seek to engage in moral behavior," or because they "believe that they should follow any law that is created by a legitimate authority." So if a law has legitimacy, it is more likely that people will obey it, not because they derive utility from obeying a legitimate law, but because they are likely to obtain future returns when others see them obeying a legitimate law. If the law lacks legitimacy—that is to say, if there is the universal sense that the law does not reflect the majority perspective—then it is less likely that the law will be obeyed.

History has shown that in some instances law can enter and shape private institutions. However, we must understand those institutions as social and political entities, as well as legal and economic ones. Institutions will respond to cultural mores and other outside influences out of a desire for legitimacy. But for maximum effectiveness of nonlegal mechanisms of cooperation, the law itself must have legitimacy. Companies need to understand the harm of sexual harassment, and why it amounts to sexual discrimination, before they will see compliance as a means toward external legitimacy.

255 Id.
256 Id. Beale argues, for example, that enactment of a federal hate crime law, though not technically necessary for enforcement of hate crimes since the conduct in question is already a crime under state law, is necessary to "signal the existence of a national consensus denouncing bias-motivated crimes and affirming that the groups in question are full and equal members of society." Id. Similarly, the visible enforcement of law can serve to strengthen societal norms because it signifies a "reaffirmation, a validation, of the moral sense of society." HIMMELFARB, supra note 234, at 66.
257 POSNER, supra note 252, at 111.
258 Id. People also violate social norms because they change so quickly that people do not always have adequate information. Political correctness norms are a recent example, having changed "so rapidly that people could be sanctioned for conduct that was considered innocent a few years earlier." Id. at 28.
259 See HIMMELFARB, supra note 234, at 63 (stating that "[l]aw can change incentives, and incentives can shape behavior"); see also supra notes 208–215 and accompanying text.
B. Legitimacy of the Law Depends on Full Understanding of the Harm of Sexual Harassment

Sexual harassment legislation is often viewed as lacking legitimacy because of what is commonly perceived as an improper regulation of personal and private relations in the workplace. Although it is often said that society cannot legislate morality,\(^{270}\) morality has, indeed, always been an essential source of the law.\(^{271}\) The State has dictated a code of morality

\(^{270}\) See, e.g., GREAT BRITAIN, COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION 24 (1957) ("[T]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business."); cited in EDWIN M. SCHUR & HUGO ADAM BE- DAU, VICTIMLESS CRIMES: TWO SIDES OF A CONTROVERS Y 5 (1974); GILBERT GEIS, NOT THE LAW’S BUSINESS: AN EXAMINATION OF HOMOSEXUALITY, ABORTION, PROSTITUTION, NARCOTICS, AND GAMBLING IN THE UNITED STATES x (1979); Karen T. White, The Court-Created Conflict of the First Amendment: Marginalizing Religion and Undermining the Law, 6 J. LAW & PUB. POL’Y 181, 204 (1994) (reporting Justice Holmes’ statement that "you can’t legislate morality").

\(^{271}\) See Don Welch, The State as a Purveyor of Morality, 56 GEO. WASH. L. REV. 540, 542 (1988) ("Morality serves as a source of law. Laws result from community choices about values we wish to enhance, rights we want to protect, and goals we deem important to pursue."); see also White, supra note 270, at 204 (reporting Supreme Court nominee Robert Bork’s response to the argument that we shouldn’t legislate morality that "we legislate little else"); Stephen Macedo, Morality and the Constitution: Toward a Synthesis for “Earthbound” Interpreters, 61 U. CIN. L. REV. 29, 29 (1992) (noting that “morality must play some role in legal interpretation . . . . The question there is not whether moral theory but which moral theory”).

Some believe the moral agenda was set by the will of God, and since the earliest development of American law, for example, we have used moral or religious bases to formulate secular laws. Interestingly, on many sensitive issues involving moral prohibitions, both sides have been known to make reference to the Bible in support of their arguments. For example, in the hotly contested debate over the legalization of abortion, pro-lifers often argue that in the Bible God recognizes the life of an unborn fetus ("Now the word of the Lord came to me saying, ‘before I formed you in the womb I knew you.’" Jeremiah 1:4–5), while pro-choicers have argued that the loss of a fetus is not treated as the loss of a life in the Bible (reading Exodus 21:12, 22 together, "[W]hoever strikes a person mortally shall be put to death . . . . When people who are fighting injure a pregnant woman so that there is a miscarriage, and yet no further harm follows, the one responsible shall be fined what that woman’s husband demands, paying as much as the judges determine."). See generally Roy Bowen Ward, The Use of the Bible in the Abortion Debate, 13 ST. LOUIS U. PUB. L. REV. 391, 396, 398 (1993). Similarly, in arguments about the morality of the death penalty, both sides frequently reference biblical passages. See John H. Blume & Sheri L. Johnson, Don’t Take His Eye, Don’t Take His Tooth, and Don’t Cast the First Stone: Limiting Religious Arguments in Capital Cases, 9 WM. & MARY BILL RTS. J. 61 (2000) (noting the surprising frequency with which both prosecutors and defendants use religious quotations or allusions in their arguments). Death penalty proponents have cited the “eye for eye, tooth for tooth” passage in Leviticus 24:19–21, while anti-death penalty advocates have referenced Exodus 20:13 ("Thou shalt not kill"). See id. at 67. In similar manner, "prohibitions on the sale of alcohol on Sunday evolved from British and colonial laws that codified the Fourth Commandment’s requirement that the Sabbath be respected," and prohibitionists have argued that drinking is implicitly prohibited in the Bible (Proverbs 20:1: "Wine is a mocker, strong drink a brawler, and whoever is led astray by it is not wise."). Anti-prohibitionists, however, have cited 1 Timothy 5:23 in support of their argument against prohibition ("No longer drink only water, but take a little wine for the sake of your stomach and your frequent ailsments."). See generally Steven L. Lane, Liquor and Lemon: The
for thousands of years, and today, our whole criminal justice system, if not our entire legal system, imposes moral beliefs on our society.\textsuperscript{232} There is no universally accepted moral truth. Generally moral practice is culturally driven, and within all cultures there is debate over whether and when legislation of morality is proper. Most cultures would agree that conduct involving an unmistakable victim, such as murder or theft, is immoral and would have no problem criminalizing such conduct. Victimless crimes, and in particular those involving intimate issues, however, are more controversial. Typical examples of “victimless crimes” (usually defined as crimes in which all participants consent and are unlikely to initiate an enforcement action)\textsuperscript{273} include homosexual behavior, abortion, prostitution, narcotics, and gambling, and are generally prohibited or condoned in a society, depending on the culture’s view of the morality of the act.\textsuperscript{274} Within each of those issues, debate rages over whether the


Others, in line with Nietzsche, and other post-French Revolution philosophers, believe “God is dead.” See PORTABLE NIETZSCHE 124 (Walter Kaufmann ed., Viking Press 1954). So is absolute morality dictated by God (i.e., what is good, what is bad, etc). As a result, the State was required to put forth the moral agenda—in part to avoid obvious chaos if human beings determined on an individual basis what is “moral” and in part to assert its power for the benefit and survival of the political and economic ruling class. Under this view, secular morality has taken the place of the traditions of religious faith.

\textsuperscript{232}For example, aside from some of the more hotly contested moral issues such as abortion or capital punishment, the government has promoted its own view of morality through regulations such as “sin taxes, dry-county ordinances, church tax exemptions, licensing and permit requirements, inheritance laws, child-support laws and other legislation.” Timothy G. Barrett, \textit{Is Discrimination Against Illegitimate Children Worthy of Stricter Scrutiny Under the Constitution?—The Relationship Between State Intestate Succession Statutes and the Social Security Act in Claims for Child Benefits for Illegitimate Children}, 33 U. OF LOUISVILLE J. OF FAM. L. 79, 99 (1994). Similarly, Professor Bellah notes that “tax law generally has moral consequences, as does criminal law, family law, and libel law.” Robert N. Bellah, \textit{New Perspectives in the Law of Defamation: The Meaning of Reputation in American Society}, 74 CALIF. L. REV. 743, 751 (1986).

\textsuperscript{273}Certain acts are said to be victimless not because there are in fact no victims, but rather, because “the victimization from them is more remote and/or more arguable than in the case of most other acts defined as criminal. They also involve willing exchanges of desired goods or services, and it is only rarely that a participant will initiate an enforcement action.” White, supra note 270, at 204.

\textsuperscript{274}Incest and polygamy, for example, are widely viewed as immoral and are therefore illegal in the United States but are not banned in all cultures. An apt example is under customary law in South Africa, where the law of polygamy allows male South Africans to take more than one wife, but does not allow female South Africans to take more than one husband. See Haroz, supra note 52, at 874. Issues such as gay marriage, sodomy, prostitution, pornography, and abortion are more hotly debated in the United States, as only some percentage of the American population views the conduct as immoral. See, e.g., URVASHI VAID, VIRTUAL EQUALITY 20 (1993) (“For the past twenty years, the National Opinion Research Center’s Annual General Social Survey has consistently reported that between 70 and 77 percent of the American public believe that homosexual relations are ‘always wrong’ . . . . [I]n the eighties, 66 percent to 75 percent of Americans thought homosexuality was immoral; in surveys done in the nineties, 50 percent to 66 percent of those surveyed thought the same.”), cited in Carlos A. Ball, \textit{Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism}, 85 GEOR. L.J. 1871, 1910 n.209
majority should impose its views of morality on the minority. As a society we have not reached consensus on which of those issues has social costs and to what extent the social costs outweigh the benefits of individual freedom and choice.

With respect to sexual harassment, many see recent legislative and judicial attempts at altering workplace interactions as inappropriate legislation of morality. Critics have portrayed excessive legislation of personal interactions at work as stifling, unhealthy, outdated, hypocritical, and repressive. It is a mistake, however, to discuss the morality of sexual harassment as if it were a victimless crime and to engage in a debate about whether the behavior itself is natural. Sexual harassment is not a victimless crime—it inflicts physical, emotional, psychological, and economic harm on its victims and society. Therefore, it falls in the category of immoral behavior that requires government regulation.

Resistance to the proper implementation of new sexual harassment laws is often fueled by misinformation about the ways in which sexual harassment can harm its victims. Proving a case of sexual harassment can be difficult as there are often no witnesses or documentary proof; in many sexual harassment cases, there is no physical injury and the psychological injury may be more difficult to see. In fact, many types of intimidating or hostile workplace behavior which presumably fall under a statute's definition of sexual harassment often go unnoticed because the

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(1997); Richard L. Gray, Note, Eliminating the (Absurd) Distinction Between Malum in Se and Malum Prohibition Crimes, 73 WASH. U. L.Q. 1369, 1371 n.15 (1995) (citing opinion polls to show that "the morality of abortion remains a divisive issue in America").

25 Carl Schneider explains:

Sexual morals have come to connote a narrow, rigid, prudish, restrictive, and repressive regime of outdated ideas hypocritically stated and heartlessly imposed. "Puritan" and "Victorian" are not complimentary adjectives. They suggest, first, attitudes toward sexual and thus personal relations that are not just unreasonable, but in the therapeutic view, actively unhealthy, that inhibit successful sexual and thus personal exchange, that burden sexual life with guilt, that repress what is natural, that darken with gloom what ought to be bright with joy. They suggest, second, moral attitudes that are unwholesome: grim, hypocritical, meddlesome, censorious, unreasonable, rigid, and harsh. Worse, such moral arguments seduce their makers into an arrogance that binds them to the error and even immorality of their position.

Schneider, supra note 235, at 537–38.

25 See infra text accompanying notes 280–290.

26 As Justice Marshall said in the context of capital punishment, "American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and ... if they were better informed they would consider it shocking, unjust, and unacceptable." Gregg v. Georgia, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting). Although the death penalty and sexual harassment are radically different issues, the severity of which need not be compared, it seems that as to the reality of the extent of understanding the problem, an apt comparison could be drawn.

27 See infra text accompanying notes 284–290.
behavior is still perceived as acceptable and normal. People resist change when they do not understand why the change is necessary.

Legislative efforts will have limited success in curbing sexually harassing behavior in the workplace without an understanding of the moral, economic, and social harm of sexual harassment and, importantly, why it amounts to sexual discrimination. For companies and courts to take real notice, they must understand that it is not only the target employee who is harmed by sexual harassment, but also the community that tolerates it.

The physical effects of sexual harassment on the target employee are, of course, the easiest to identify. Many hostile work environment cases involve physical assault or even rape. Sexual harassment often leads to sexual harassment trauma syndrome, which can involve physical symptoms such as headaches and nausea, or psychological stress symptoms such as nervousness, fear, or anger. Even if a harasser’s unwanted physical touching does not directly lead to physical injury, permitting such behavior may encourage other physical violence against women, as can exposure to sexually degrading, violent, or pornographic material.

Often there is injury to the victim that is not as easy to see. Sexual harassment violates privacy and liberty rights. There is a well-established link between violence and equality that has been reflected in law and culture since the 1960s. Sexual harassment is founded on a broader structural gender inequality. Sexual harassment is a manifestation of gendered power relations of coercion and subordination, and obstructs women from achieving equality in the workplace. Not only does sexual harassment impair an employee’s job performance, but often times it leads to employees being fired or forced to leave their jobs, even if they do not file a complaint. Thus, individual employees who are victims of

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279 See Felicity Kaganas & Christina Murray, Law and Women's Rights in South Africa: An Overview, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER, supra note 31, at 23; BENOKRATTS, supra note 3, at 11. In J v. M for example, a senior executive was found to have sexually harassed a much older woman by “caressing and/or slapping her buttocks and fondling her breasts.” J v. M, 10 I.L.J. 755 (IC) (1989). Despite this behavior, he was able to obtain a petition from “all the ladies in the office controlled by him... pleading for compassion and stating that they did not feel offended or sexually harassed” by his behavior. Most likely, those women would not have signed the petition if that behavior were viewed as a serious problem. Sutherland, supra note 80.


281 Id.

282 Id.

283 Id. at 93.

284 Id.


286 Reddi, supra note 31, at 119.

sexual harassment also suffer economic detriment for many reasons. As explained by one commentator, "[v]ictims of sexual harassment who change jobs have lower long-term earning capacity; those who remain on the job may be hampered by their harassing supervisors or may refuse certain opportunities for advancement in order to avoid harassment." Sexual harassment may also "diminish[ ] their professional credibility and depriv[e] them of the cooperation of colleagues .... By inhibiting the careers of females in particular, sexual harassment contributes to the wage gap between the genders." Finally, sexual harassment may "create resentment among male colleagues, discourage men in positions of authority from serving as mentors to women, irreparably damage victims' prospects from developing warm working relationships with colleagues and for expanding their professional networks, and impair their prospects for securing employment elsewhere." Sexual harassment is the ultimate reminder to women of their role and status in society as sex object, homemaker, mother, and caregiver. Sexual harassment prevents women from achieving positions of authority and serves as an impediment to political and economic power.

Sexual harassment also has high economic costs for the company that fails to prevent it, as well as the society that tolerates it. Sexual harassment is inefficient for the company which allows it, most obviously because it can lead to expensive litigation, but also because companies will bear the economic costs of job turnover, sick leave, and decreased productivity.

Evidence shows that this deeper understanding of the harm associated with sexual harassment has not yet fully occurred in the United States: "Despite all the recent ballyhoo over sexual harassment in the workplace, corporate America still doesn't really 'get it' much less understand how to put an end to it." This applies to employees, expected to conform their behavior to the law, as well as employers:

[W]hile the American public knows that there are rules governing sexual behavior in the workplace, the source of these rules is largely mysterious. They were authorized through an arcane process of statutory interpretation by the federal judiciary; their specific content has been generated largely in various federal administrative agencies that are run by faceless experts who are themselves influenced by lawyers and more experts. The government's rules involve immediate and highly intimate matters, but the authorities who produce these rules, as well as the intel-

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288 Id.
289 Id. at 781.
290 Feary, supra note 280, at 95.
291 Id. at 95.
292 Id. at 78.
lectual processes used by these authorities, are distant and un-
seen. Most people, of course, accept the rules and try to live by
them without much thought about their specific sources. But this
submission involves a degree of fictionalization because the
rules treat intimate matters in ways that do not accord with or-
dinary experience. Some of their main premises—for example,
that the workplace is an inappropriate place for sexual flirtation
or that sexual advances toward women with subordinate status
are inherently exploitative—are widely improbable to most Ameri-
cans, as was emphatically demonstrated by the success of
President Clinton’s argument that any sexual improprieties be-
tween him and a female intern in his offices were a private mat-
ter. Millions of Americans in workplaces across the country
nevertheless submit to regulations that must seem to them
strange, a mysteriously scripted national account of human
sexuality that has intense psychic significance but that is, in im-
portant respects, unreal.293

Because of the fundamental lack of understanding of the harm caused by
sexual harassment, the new United States sexual harassment laws have
been widely viewed as unnecessary at best. Many believe that the protec-
tion afforded women is not worth the unintended chilling effect and
creation of an oppressive and stifling environment.294 Based on that be-
lief, some employers refuse to respond appropriately to employee’s com-
plaints, and some judges think sexual harassment matters do not belong
in court.295

293 Robert F. Nagel, Privacy and Celebrity: An Essay on the Nationalization of Inti-
294 Zalesne, supra note 17, at 366.
295 See, e.g., Rabideau v. Osceola Refining Co., 805 F.2d 611, 615, 622 (6th Cir. 1986)
(holding that the plaintiff’s “irascible and opinionated personality and her inability to work
harmoniously with co-workers” was the source of her problems, and not the sexually ex-
licit poster displayed in her workplace and the constant barrage of insults and obscenities
from her supervisor; also holding that the defendants’ use of obscenities and the preva-
ently displayed pictures of nude or scantily clad women in many employees’ offices “had
a de minimis effect on the plaintiff’s work environment when considered in the context of
a society that condones and publicly features and commercially exploits open displays of
written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and
in other public places”); Downes v. Federal Aviation Admin., 775 F.2d 288, 294 (Fed. Cir.
1985) (holding that for conduct to amount to sexual harassment it should “be repeated to
the point where it is ‘routine’ or ‘of a generalized nature’” or “become standard operating
procedure” in the company); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 211–12, 213–14
(7th Cir. 1985) (holding that even if all the facts alleged by plaintiff were true, there was
“no evidence whatsoever” that defendant’s conduct was “so pervasive or psychologically
debilitating that they affected [plaintiff’s] ability to perform on the job,” where plaintiff
alleges that one of her superiors “repeatedly propositioned her, would wink at her and also
suggested he give her a rub-down,” and another “slapped her on the buttocks” and “told her
he knew she must moan and groan while having sex”); see generally Casey J. Wood, “In-
viting Sexual Harassment”: The Absurdity of the Welcomeness Requirement in Sexual Har-
Evidence shows that sexual harassment is even less understood in South Africa. In South Africa, there is a distinct history of employers, police officers, and judges failing to take claims of sexual harassment seriously. The Industrial Court's approach to sexual harassment cases, for example, has, in the recent past, been one of utilitarianism. That is, the court has generally viewed the employer's obligation as one of "capitalist rationality" rather than one of moral obligation. As the Gregory court noted, in referring to former Industrial Court decisions, "it is conceivable that the corporate value of the abuser to the organization might so far outweigh the value of the abused, that it is 'logical' that little or no action is taken against the former." For example, in a 1996 case, the court ordered only a two-week suspension without pay of a seriously abusive employee, because of his being "valued by the company both as a skilled and efficient employee as well as an effective shop steward." That court clearly did not understand the value to a low-level employee, to the company, and ultimately to the larger society in which it operates, of a tolerable work environment for all employees.

The Industrial Court showed a similar lack of sympathy toward victims of sexual harassment in a 1997 case. In Sadulla v. Jules Katz & Co. an employee was fired based on allegations that he had invited a female employee to watch a pornographic movie with him, described some of the scenes in the video to her, asked her if she "used her finger when she gets a sexual urge," and asked her whether she used a vibrator. Despite a finding that the employee had, in fact, engaged in such conduct, the court found that there was no "real victim" since they were "two willing and consenting adults," noting that it is often difficult to distinguish between "the real victim and the pretended or ridiculously hypersensitive victim." Although the woman indicated that the male employee's conduct was unwelcome and spurned, the court failed to see how the complainant was truly victimized. The court felt she had not adequately indicated her offense at his conduct, and thus refused to punish the aggressor.

In a more recent case, Gregory v. Russells, Ltd., an employee was fired for alleged sexual harassment and later reinstated. A female em-


297 Id.

298 Id.


301 Id. at 1483–84.

302 Id. at 1488.

303 Id. at 1486.

304 1999 (20) I.L.J. 2145 (CCMA).
ployee complained that he had brought a *Hustler Magazine* into her office, asked her to look at it and left it on her desk. When she refused, he told her "not to act like a fucking virgin."305 She also complained he "grabbed her from behind" and asked her to apply ointment to a sore on his penis that he had gotten from having sex with an eighteen-year-old the previous night.306 Despite the fact that the employee denied those charges, the court believed the victimized employee to be particularly credible, found most of her accusations to be true,307 and found the male employee to be guilty of harassment in the form of a hostile work environment claim. Considering, among other things, "evidence of his competence as a manager" and his "corporate worth," the court nonetheless decided to reinstate him, averring that appropriate sanctions would have been "a stern reprimand, a final written warning and perhaps psychological counseling."309 Here, the court recognized that harassment had occurred, but failed to see how it harmed the victim.

As the *Gregory* court pointed out, the history of jurisprudence in South Africa on the subject of sexual harassment is one of "indulging the sexual peccadilloes of a senior employee."310 In the past, employers and courts have, for productivity reasons, cared more about pleasing high-ranking employees than about the well being of more dispensable workers. The *Gregory* court noted that "strict rules prohibiting sexual interplay in the workplace, even that which is found offensive, may interfere with the productivity of (male) employees used to functioning in a macho corporate culture."311 It hardly needs stating that this court did not see the negative productivity implications of a hostile work environment.

In both cultural examples, because of a lack of understanding of the real harm of sexual harassment, society permitted such conduct to go unchallenged. Lack of enforcement of the law tends to legitimize the prohibited conduct, and ultimately it becomes a societal decision to again permit such practices.312

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305 Id. at 2148.
306 Id. at 2148–49.
307 Id. at 2155, 2157–58. While finding that the employee did reference a sore on his penis, the court did not find that he also asked her to apply ointment to the wound. *Id.* at 2158.
308 Id. at 2170.
309 Id.
310 Id. at 2163.
311 Id. at 2162.
312 Lack of understanding of the harm of sexual harassment renders it low priority in many societies. But even to the extent a society has decided that sexual harassment is harmful and has decided to punish sexual harassers, making that a reality might be difficult in a country embroiled in war, or other vast social and economic transformation. See generally Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement, 73 U. COLO. L. REV. 1* (2002) (arguing in the context of capital punishment that "major long-term national event[s], such as war or economic crisis" can distract a society from issues perceived as less important). In South Africa, for example, many believe that, given the severe impact of apartheid on the overall well-being of blacks, at this
C. Political, Economic, and Cultural Impediments to the Full Understanding and Effective Implementation of Sexual Harassment Legislation

Law does not exist outside of culture. In order to evaluate properly the effect of sexual harassment legislation on social behavior in any particular country, it is first essential to understand the social setting in which the law functions, including the cultural and historical background of that country. To be sure, cultural norms, biases, and traditions can often serve as barriers to the full implementation of sexual harassment laws. The following Subsections identify cultural impediments to legal reform in the context of South African and American experiences, and attempt to use those experiences to facilitate the transition for other countries facing similar obstacles.

1. Unequal Access to the Law: Socio-Economic and Cultural Limits to the Full Implementation of Sexual Harassment Legislation

In spite of good intentions for broad protections, law reform does not mean equality is a reality for most women—the mere enactment of progressive sexual harassment legislation does not guarantee that it will be effectively used or that women will fully benefit from it. The effectiveness of any law depends in large part on the ability of the intended beneficiaries to take advantage of that law. This requires knowledge of the law, willingness to complain, and financial resources to bring a suit on the part of the aggrieved. These factors will vary among different cultures, depending on attitudes regarding litigation and trust in the legal system, as well as the status women have achieved in the workplace.

Studies show that factors such as gender, race, education level, and income level affect the probability that a victim will file a lawsuit based on discrimination in the workplace.\(^{313}\) For example, evidence suggests

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point in their history there is rightly more concern with racial equality than with gender issues. Rene Grawitzky, Companies Warned to Act Against Offensive E-Mail, BUS. DAY (S. Afr.), Jan. 7, 2000, at 1 (describing “management” as “more concerned at this time with racial equality,” and still “insensitive to gender issues”). And to the extent there is concern over the treatment of women in South Africa, it involves the rampant physical abuse and rape. South Africa is a country with alarmingly high rates of crime, racially motivated violence, and violence against women. See Hope and Fear in South Africa, HINDU, June 2, 1999 (on file with author) (“South Africa has some of the highest rates of murder and reported rape in the world.”); S. Africa Police Probing Attack on American, L.A. TIMES, Nov. 13, 2000, at 11; South African Press Association, The Demon of Racism Still Lurks in SA, Sept. 1, 2000, available at 2000 WL 24056791; Johnson, supra note 10, at 497 (in South Africa, a woman is killed by her husband or boyfriend every six days and a rape occurs every 30 seconds). Despite these facts, sexual harassment is considered a low priority. Accordingly, sexual harassment, especially if it is non-physical, is often tolerated in the workplace.

that women in the United States are generally less likely to bring a lawsuit than men.\textsuperscript{314} At least two theories have been advanced to explain this: "the first theory addresses the inevitable economic and non-economic costs that the individual incurs upon filing a complaint. The second theory attributes this disparity to the perception which women hold of their historical and legal status in society, particularly in the workplace."\textsuperscript{315} Likewise, African Americans are less likely than whites to bring workplace discrimination claims because they are less likely to win Title VII cases,\textsuperscript{316} they have less confidence in the United States judicial system,\textsuperscript{317} and "black women typically have poor mobility and scarce resources with which to file a suit."\textsuperscript{318}

In South Africa, women are even more reluctant to assert their legal rights because of their cultural upbringing to be humble, submissive, and unassertive.\textsuperscript{319} Women are also often reluctant to report violence against them because of the social stigma, shame and humiliation associated with such claims, the fear of being ostracized by their families and communities if they report the harassment, and the fear of reprisal, retaliation, or loss of employment.

Income level also contributes to the likelihood of filing suit. The "stakes hypothesis" suggests that "the higher a person's salary, the greater the likelihood of filing because the person's 'stake' in the outcome is greater or because they would stand to lose more by not protecting their rights through filing suit."\textsuperscript{320} Also, victims with higher education levels are likely to file lawsuits more frequently,\textsuperscript{321} most likely because


\textsuperscript{315} Hoyman & Stallworth, supra, note 313, at 62.


\textsuperscript{317} See Andrew D. Leipold, The Dangers of Race-Based Jury Nullification: A Response to Professor Butler, 44 UCLA L. Rev. 109, 119 n.49 (1996) (stating that "a substantial minority of black Americans have either 'very little' confidence (37\%) or 'no' confidence (7%) in the criminal justice system" (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 1994 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 171 tbl.2.38 (1995))).

\textsuperscript{318} Hoyman & Stallworth, supra, note 313, at 72.


\textsuperscript{320} Hoyman & Stallworth, supra, note 313, at 73.

\textsuperscript{321} Id.
they better understand their legal rights. The type of employment might also impact a woman's decision whether to sue. In the United States, for example, workers in kitchens, textile factories, and clerical areas are less likely to sue their employers "because they lack knowledge of the law; they do not have adequate access to the legal system; they are more concerned about losing their jobs; or they worry over the length and cost of the litigation." Finally, people who have experienced a lifetime of "double discrimination," such as discrimination on the basis of both race and gender, "may be more likely to produce survival oriented coping strategies," making them more likely to "continue in the workplace and remain silent about the harassment."

In South Africa, the most likely victims of sexual harassment are black women. Women occupy the lowest status jobs and, specifically, black women sit on the lowest rung of the working ladder. "In South Africa, many black women have little education, time or resources. It is unrealistic to expect them to know how to write and present comprehensive complaints in legal language." Therefore, it is no surprise that the highly educated, urbanized women in South Africa have benefited most from legislation like the Employment Equity Act. For example, as Amien and Paleker noted, "even though the Constitutional Court has been vocal about its advancement of gender equality, it is noteworthy that the only litigants who have evoked the equality clause in the Constitutional Court have been either men or persons of financially privileged backgrounds."

One might expect, then, that a high percentage of women subjected to sexual harassment in South Africa have hesitated and will continue to hesitate to file a lawsuit.

Cultural attitudes about litigation also play a large role in assessing the likelihood that a victim of sexual harassment will file a lawsuit. Generally, the belief prevails that there is an excessive amount of litigation in the United States, a country often characterized as the most litigious in the world. In South Africa there are many reasons relating to the judi-

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\begin{itemize}
  \item[324] See supra note 52 and accompanying text.
  \item[325] Beth Goldblatt, A Feminist Perspective on the Law Reform Process: An Evaluation of Attempts to Establish a Family Court in South Africa, 13 S. Afr. J. on Hum. Rts. 373, 398 (1997). For example, in the South African context, it is difficult to imagine a black female domestic worker taking her white male employer to court for sexual harassment.
cial system and the litigation process that might cause an injured person to choose not to bring a suit.\textsuperscript{328} For example, in South Africa the courts continue to be staffed primarily by men, and "a white male-dominated court system has contributed to cementing black women's distrust."\textsuperscript{329} Many women feel that reporting the problem would be of no use because of indifference or hostility on the part of police and judicial authorities. Also, it has been suggested that "the legal system is currently too embattled with rising crime rates to take gender issues as seriously as it might otherwise take them."\textsuperscript{330} Thus, women often prefer alternative dispute resolution to subjecting themselves to gender-biased courts.\textsuperscript{331}

Most sexual harassment goes unreported in South Africa. Lisa Vetten, Gender Specialist at the Centre for the Study of Violence and Reconciliation, has said that "sexual harassment is one of the most underreported crimes, because it was often hard for women to decide if comments or behavior were 'inappropriate'—it is also difficult to know what one can do about it."\textsuperscript{332} One study of the extent of sexual harassment in Pretoria found that "a lower reporting rate was recorded among the victims of sexual harassment than sexual assault."\textsuperscript{333} Of the women surveyed who said they had been sexually harassed, only thirty-five percent reported the offense to the police, whereas fifty-seven percent of women who said they had been sexually assaulted later reported the attack to the police. Reasons advanced for the failure to report include believing the crime was not serious enough (eighteen percent), feeling ashamed (thirty-six percent) and feeling that the police would not be able to help (twenty-seven percent).\textsuperscript{334} Although the laws may change some of the structures and procedures in the courts "many of the problems related to

and federal courts, one for each twelve and one-half persons in this country"); Marcia Sielaff, \textit{Legal Sewer: United States Reigns Supreme in its Litigious Idiocy}, \textit{Phoenix Gazette}, July 23, 1991, at A11 (reporting that "America has almost three times as many lawyers per capita as Britain"); Marc Galanter, \textit{An Oil Strike in Hell: Contemporary Legends About the Civil Justice System}, 40 \textit{Ariz. L. Rev.} 717, 720 (1998) (describing the widely shared grievances among Americans about "the litigation explosion, undeserving claimants, excessive regulation, the legalization of life, and the ascendency of lawyers").

\textsuperscript{328} See, e.g., Kevin Maler, \textit{Twin Cities Stocks Column}, \textit{St. Paul Pioneer Press}, July 16, 2000, \textit{available at} 2000 WL 24230200 (suggesting that until recently, South Africans would not have even considered litigation an option for resolving disputes in many situations).

\textsuperscript{329} Romany, \textit{supra} note 10, at 867.


\textsuperscript{334} Id.
a lack of resources, poor administration and unskilled staff are likely to continue to hamper people's access to justice in South Africa.\footnote{Goldblatt, supra note 325, at 375.}

The situation in the United States, despite gradual improvements over the first thirty years, still has a long way to go. As sexual harassment has become accepted by the courts as an actionable claim of sex discrimination, more and more women have felt comfortable asserting their legal rights, and as more women enter the workforce and achieve higher job status, more and more victims have had the financial resources to bring a lawsuit. Accordingly, sexual harassment claims have increased quite significantly in the past decade.\footnote{A 1997 study showed that the number of sexual harassment claims filed with the Equal Employment Opportunity Commission increased from 6800 in 1990 to 16,000 in 1997. See 144 CONG. REC. E1081–82 (daily ed. June 10, 1998) (statement of Rep. Hamilton) (noting that sexual harassment claims have increased as more women have entered the workforce). See generally Christine Coyne, Anjelino v. New York Times Co.: Granting Men Standing to Fight Injuries Received as a Result of Sexual Discrimination Towards Female Co-Workers, 45 VILL. L. REV. 651, 652 (2000).}

But despite increased financial ability of some women to take advantage of the law, increased awareness of the law, and fairly accepting cultural attitudes toward litigation, many female employees still fail to report sexual harassment.\footnote{Coyne, supra note 336, at 652–53 n.7; see also Lawton, supra note 216, at 86 (noting that “very few (as low as five percent . . .) officially report sexual harassment to those in authority”); John Whitehead, supra note 287, at 778 (noting that “despite popular belief, sexual harassment is not grossly over-reported; rather, many experts believe that it is under-reported. Only a minority of victims tell someone that they have been harassed”).} One survey showed that women are more likely to ignore a harassing incident or use informal means of dealing with the harassment than to report it to the appropriate authority.\footnote{Lawton, supra note 216, at 86.} despite the fact that three out of every four respondents knew about the available channels for formal reporting.\footnote{Id. at 87.} Reasons given for victims’ failure to report include “(a) positive results were not likely to come of reporting, (b) the benefits of reporting would not outweigh the repercussions, (c) they had no control over the procedure, (d) their complaint would be trivialized, and (e) reporting would exacerbate rather than relieve their situation.”\footnote{Id. at 140; see also Whitehead, supra note 287, at 778 (noting that women fail to report sexual harassment for three general reasons: “First, the workplace climate indicates the problem will not be taken seriously, so victims fear no one will respond. Secondly, women are afraid they will be blamed as they have seen others blamed . . . . Thirdly, women do not want to hurt the harasser”); Frank C. Morris, Jr., Employment Discrimination and Civil Rights Actions in Federal and State Courts: Creating a Harassment-Free Workplace in the Wake of Ellerth and Faragher, SE70 ALI-ABA 117, 128 (2000) (explaining that the “reluctant reporter” is generally a victim of sexual harassment who fails to report incidences of sexual harassment based on “fear of retaliation, increased harassment, and/or need for the job”).} These reasons are not unlike reasons given by many South African women for failure to report. Thus, even in light of recent Supreme Court attention to the problem of sexual harassment and

\footnotetext[335]{Goldblatt, supra note 325, at 375.} \footnotetext[336]{A 1997 study showed that the number of sexual harassment claims filed with the Equal Employment Opportunity Commission increased from 6800 in 1990 to 16,000 in 1997. See 144 CONG. REC. E1081–82 (daily ed. June 10, 1998) (statement of Rep. Hamilton) (noting that sexual harassment claims have increased as more women have entered the workforce). See generally Christine Coyne, Anjelino v. New York Times Co.: Granting Men Standing to Fight Injuries Received as a Result of Sexual Discrimination Towards Female Co-Workers, 45 VILL. L. REV. 651, 652 (2000).} \footnotetext[337]{Coyne, supra note 336, at 652–53 n.7; see also Lawton, supra note 216, at 86 (noting that “very few (as low as five percent . . .) officially report sexual harassment to those in authority”); John Whitehead, supra note 287, at 778 (noting that “despite popular belief, sexual harassment is not grossly over-reported; rather, many experts believe that it is under-reported. Only a minority of victims tell someone that they have been harassed”).} \footnotetext[338]{Lawton, supra note 216, at 86.} \footnotetext[339]{Id. at 87.} \footnotetext[340]{Id. at 140; see also Whitehead, supra note 287, at 778 (noting that women fail to report sexual harassment for three general reasons: “First, the workplace climate indicates the problem will not be taken seriously, so victims fear no one will respond. Secondly, women are afraid they will be blamed as they have seen others blamed . . . . Thirdly, women do not want to hurt the harasser”); Frank C. Morris, Jr., Employment Discrimination and Civil Rights Actions in Federal and State Courts: Creating a Harassment-Free Workplace in the Wake of Ellerth and Faragher, SE70 ALI-ABA 117, 128 (2000) (explaining that the “reluctant reporter” is generally a victim of sexual harassment who fails to report incidences of sexual harassment based on “fear of retaliation, increased harassment, and/or need for the job”).}
consciousness raising over the past several decades in the United States, many women are still reluctant to assert their legal rights. This trend should be instructive to other countries with developing sexual harassment laws.

2. Institutional Gender Bias: Inaction and Resistance of Officials

A law’s effect on social change depends not only on access to the law and the content of the law, but also on its interpretation and enforcement. Even the best intentioned law will not have the anticipated effect on the lives of real people if those called upon to evaluate the underlying incidents are laden with biases about the crime and its victims.

In the United States, laws protecting women from violence, such as rape or domestic abuse, have encountered ongoing resistance from law enforcement and courts. In our recent history, judges have frequently blamed the victim, minimized the severity of the conduct, or denied the victim’s experiences. Courts have often protected sex offenders who “may have been reacting ‘normally’ to provocative dress and sexual permissiveness” and punished rape victims who are viewed as having precipitated the crime. Women have been stereotyped as “seductive deceitful temptress[es]” who provoke and are “thus responsible for the violence against [them].” Victims of domestic violence are subject to “similar biases that reflect the long cultural and legal treatment of wives and women as property.”

The examples of gender bias in American sexual harassment jurisprudence often involve a female plaintiff subjected to severely abusive behavior, but not vindicated because of her own unsympathetic behavior. For example, in Reed v. Shepard,


342 Norma J. Wikler, On the Judicial Agenda for the 80’s: Equal Treatment for Men and Women in the Courts, 64 JUDICATURE 202, 203 (1980) (noting that there is “overwhelming evidence that gender-based stereotypes, biases and myths are embedded in...the attitudes, values and beliefs of some of those who serve as judges”).

343 Id. at 206 (citing a Wisconsin case in which the victim was simply wearing blue jeans at the time she was attacked).

344 See id. at 206 (citing a California case in which a rape victim was said to have invited the rape by hitchhiking).

345 NAT’L CONFERENCE OF STATE TRIAL JUDGES, AM. BAR ASS’N, JUDGES’ BOOK 68 (1989). One commentator has noted that “such reckless behavior as walking at night, crossing a park at a certain hour, or talking to a strange man, may be enough to turn a victim into a co-conspirator in the eyes of the judge.” Terri Villa-McDowell, Privacy and the Rape Victim: The Inconsistent Treatment of Privacy Interests in Two Recent Supreme Court Cases, 2 S. CAL. REV. L. & WOMEN’S STUD. 293, 328 (1992).

Plaintiff was . . . handcuffed to the drunk tank and sally port doors, . . . subjected to suggestive remarks, . . . physically hit and punched in the kidneys, . . . her head was grabbed and forcefully placed in members’ laps, . . . a cattle prod with an electrical shock was placed between her legs, . . . she was placed in a laundry basket, handcuffed inside an elevator, handcuffed to the toilet and her face [was] pushed into the water and maced.347

The court held that the defendants’ abhorrent conduct was “welcome,” simply because “the plaintiff used vulgar language, told dirty jokes, participated in suggestive gift-giving, and sometimes did not wear a bra to work.”348 The court’s failure to recognize the violent and abusive nature of the defendant’s conduct reflects its deeper gender-based stereotyped view of the “type of women” who are victims of sex-related crimes. As our experience in the United States has shown, “police, prosecutors, and judges can and do undermine anti-violence legislation and strategies by disavowing the severity of the violence.”349

Gender bias is equally prevalent in South Africa, but uniquely so. The South Africa Constitutional Court,350 progressive in its treatment of equality issues, has taken strong feminist positions and has shown particular sensitivity to all forms of marginalization and exclusion.351 The

347 939 F.2d 484, 486–87 (7th Cir. 1991).
348 Id.; see also Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1010 (7th Cir. 1994) (explaining that the trial court found that the plaintiff “welcomed” severely abusive behavior through her use of profane language and “crude behavior” in the workplace); Brown v. Perry, 184 F.3d 388, 397 (4th Cir. 1999) (holding that the plaintiff “utterly failed to avoid harm” when she “unnecessarily put herself in a situation that permitted repetition of . . . the advances”). See generally supra text accompanying notes 343–346.
349 Rivera, supra note 341, at 125.
350 The Constitutional Court “has the last word on the interpretation and enforcement of the Constitution, while the Supreme Court of Appeal has the final say on all other matters.” Justice Albie Sachs, Equality Jurisprudence: The Origin of Doctrine in the South African Constitutional Court, Tenth McDonald Lecture (1998) (edited transcript on file with author). The Constitutional Court is currently comprised of nine men and two women (Yvonne Mokgoro and Kate O’Regan). Constitutional Court of South Africa, Judges of the Constitutional Court, at http://www.concourt.gov.za/judges/index.html (last visited Mar. 12, 2002).
351 Sachs, supra note 350. Justice Sachs notes that:

The main focus of equality jurisprudence is what I would call the human rights dimension. Equality as we understand it in the contemporary world is associated with non-discrimination. It is designed to deal with the ways and means whereby societies marginalise, oppress, diminish, or demean people because they are what they are.

Id. The test was first established in Harksen v. Lane, where the Court enumerated the following factors for determining whether conduct amounts to unfair discrimination:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage . . . (b) the nature of the provision or power
Court's approach to equality is fundamentally different from most countries,' including the United States,' focusing primarily on "respect for the equal worth and dignity of all human beings."332 Likewise, South Africa's Parliament has been particularly sympathetic to gender issues. Since at least one-third of African National Congress ("ANC")333 members of Parliament must be women,334 South Africa is now among the top ten countries in the world with respect to representation of women in Parliament.335 As a result, women have seen great legislative victories over the past several years.336

and the purpose sought to be achieved by it . . . (c) the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

Harksen v. Lane, 1997 (11) BCLR 1489, 1510F–1511B. The goal of the South African constitutional order is to achieve equal treatment in a way that "prevent[s] further disadvantage" and "remed[ies] the consequences of unfair discrimination endured by already vulnerable and historically disadvantaged groups." AMIEN & PALEKER, supra note 326. at 2. For example, in National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517 (CC), the Constitutional Court found that the common law crime of sodomy violated the constitution because, among other things, it "constitutes an infringement of the right to dignity." In President of the Republic of South Africa v. Hugo, 1997 (6) BCLR 708 (1997 (4) SA 1) (CC), the Constitutional Court upheld the "Presidential Act" which ordered the release of, among others, mothers of children under twelve, but not similarly situated fathers, because the impact of the measure did not undermine human dignity. Similarly, in Prinsloo v. Van der Linde and Another, 1997 (6) BCLR 759 (CC), the Court rejected plaintiff's equality challenge based on a statute which treated people living in non-fire controlled zones differently from people living in fire-controlled zones, because his dignity was not assailed. See also Brink v. Kitshoff, NO 1996 (6) BCLR 752 (1996 (4) SA 197) (CC) (striking down a law where the estates of women married to insolvents were treated differently from the estates of men married to insolvents); Fraser v. Children's Court, 1997 (2) BCLR 153 (CC) (declaring a statute invalid that said that the consent of both parents is required for adoption when the parents are married, but only that of the mother when the parents are not married, recognizing the importance of encouraging paternal responsibility for and involvement in child-rearing); Larbi-Odam v. Member of the Executive Council for Education, 1997 (12) BCLR 1655 (CC) (striking down a law that precluded non-nationals from becoming members of the permanent teaching staff); Walker v. Pretoria Municipality, NO 1988 (3) BCLR 257 (1998 (2) SA 363) (CC) (holding that plaintiff, who argued he was called upon to pay full metered rates for water and electricity while people living in the Black townships had their rates subsidized, among other things, was not the victim of unfair discrimination on the basis of race under the circumstances).

Sachs, supra note 350.


AMIEN & PALEKER, supra note 326, at 48.

See supra notes 243–249 and accompanying text.
However, despite the unequivocal support at the highest legislative and judicial levels for gender equality, sensitivity to gender issues is not the same at the local levels. The "Report on the Audit of Legislation that Discriminates on the Basis of Sex and Gender" describes inherent discrimination in the local electoral system, in which there is typically no quota system, just the discretion of political parties.\textsuperscript{357} As for the court system, women continue to receive inadequate protection from the lower courts. In 1998, only one-quarter of court personnel were women, two of thirty-four chief magistrates were women, and all attorneys general were men, leaving women distrustful of the criminal justice system.\textsuperscript{358}

Furthermore, evidence shows that South Africa's experience with rape enforcement is still characterized by gender bias to some degree.\textsuperscript{359} In one case, for example, in which a father was accused of raping his fourteen-year-old daughter,\textsuperscript{360} the judge suggested that maybe it was the girl's fault for flirting with her father.\textsuperscript{361} Charlene Smith, a forty-two-year-old South African rape survivor relates the following account of her experience with the police:

Five days after I was raped, the police lost everything. I complained to the minister of police who contacted the commissioner's office, who said there was no such case. The guy was calling me three or four times daily telling me he loved me, threatening to return to kill me. I taped the calls. The police lost the tapes.\textsuperscript{362}

\textsuperscript{357} Gerntholtz, supra note 43.


\textsuperscript{359} See Press Release, Human Rights Watch Women's Project & Human Rights Watch/Africa, Medico-Legal System Fails Women Victims of Violence (Aug. 8, 1997), at http://www.africapolicy.org/docs97/sa9708.hrw.htm (reporting that "women victims of rape or assault in South Africa face a criminal justice system that is too often unable or unwilling to assist them in their efforts to seek redress. The police are frequently callous or disinterested in their treatment of women and the court system is little better"); Janine Pokroy, Police Sensitivity to Rape Survivors: Police Perceptions (1999) (abridged A.B. dissertation, University of Witwatersrand) (reporting findings that "police intervention for raped women is inadequate and often apathetic and unsympathetic"); available at http://www.speakout.org.za/legal/police/police_sensitivity.html; South African Press Association Leon Visits Rape Crisis Centre on Cape Flats, WORLD REP., Mar. 27, 2001, available at 2001 WL 16987780 (reporting, after visit to rape crisis center, that "rape survivors talked about secondary trauma—the experience of trying to report the crime and find treatment, support and justice").

\textsuperscript{360} See Time to Take a Stand, SOWETAN (Johannesburg), Oct. 28, 1999, available at 1999 WL 10804029 (discussing this case, which went to trial in the fall of 1999 in front of Judge John Foxcroft).

\textsuperscript{361} Id.

\textsuperscript{362} What's Happening to the Women in This Country is Genocide, JANE, May 2000, at 153, 154. Other have recounted equally disturbing experiences with the police:
The Women's Rights Project of the Human Rights Watch has estimated that less than one-third of reported rapes in South Africa are prosecuted, and among those prosecuted, only half result in convictions.\textsuperscript{363} When there is a conviction, judicial sentencing is inconsistent and often lenient.\textsuperscript{364} Rape victims are often disbelieved, accused of over-reacting, or blamed because of perceived sexual promiscuity.\textsuperscript{365} Even if a rape victim can prove the acts occurred, authorities often respond with claims that the conduct did not amount to rape, the crime was not serious enough because the victim lacked any serious injury, or the crime was not based on violence, but rather sexual gratification.\textsuperscript{366}

Considering the gender bias that pervades the handling of rape cases in all stages of the process in South Africa, it is not surprising that reactions to sexual harassment complaints have been even more apathetic. South African police, busy with issues involving racial violence and more serious physical violence against women, have not made sexual harassment a priority. In a survey of women who reported incidents of sexual harassment to the police, all of them said they were dissatisfied with the way the police treated them, and half reported that the police did not investigate their cases.\textsuperscript{367} The Constitutional Court has not yet decided any cases involving sexual harassment, but many lower courts have adhered to a similar discriminatory pattern of review. For example, although officially abandoned by the Supreme Court of Appeal in 1998,\textsuperscript{368} some courts continue to apply the "cautionary rule" in sexual harassment cases.\textsuperscript{369} This rule urges against convicting upon the word of the com-

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Last October a fourteen year old girl told a newspaper how she ran to the police after pouring hot oil over her father who was trying to rape her. After sitting in the waiting room for hours, she says she was taken by a policeman to a room where he forced her to lie across two chairs and raped her.

\textit{Id.} Similar stereotypical responses are seen in cases of femicide, where men accused of murdering their wives are given extraordinarily light sentences because of presumptions that the husband was provoked. \textit{See, e.g.,} S v. Ramontoedi, Unreported Case No: 188/96 Witswatersrand Local Division 23 (June 1996).


\textsuperscript{364} \textit{Id.} at 322.

\textsuperscript{365} \textit{See generally infra} notes 380–397 and accompanying text.


\textsuperscript{367} \textit{See, e.g.,} Louw, \textit{supra} note 333.

\textsuperscript{368} \textit{See} S v. Jackson, 1998 (4) BCLR 424, 430H (SCA) (holding that the cautionary rule in sexual assault cases is based on irrational and out-dated assumptions).

\textsuperscript{369} Although the highest court in South Africa abandoned the cautionary rule in 1998. "it is trite that legal enforcement does not always follow legislative or judicial pronouncements." Penelope E. Andrews, \textit{Globalization, Human Rights, and Critical Race Feminism: Voices from the Margins}, 3 J. Gender, Race & Just. 373, 381–82 n.42 (2000); see also \textit{New Life Sentences for Rapists Welcome}, \textit{Dispatch Online} (July 27, 1998) (noting that although the cautionary rule is no longer applied officially, "most of the magistrates are men, . . . some were appointed when it was still in place and subconsciously apply it"), at
plaintiff, because of the cultural belief that women are “devious and hysterical”\textsuperscript{370} and that they habitually lie about sexual offenses.\textsuperscript{371} Although not officially applying the cautionary rule, the judge in \textit{Ngantwini v. Daimler Chrysler} noted that “uncorroborated evidence of a complainant in sexual harassment matters must be approached with great caution.”\textsuperscript{372} Likewise, the court in \textit{Sadulla} required evidence to corroborate the sexual harassment victim’s testimony, because of, among other things, “hysteria that can cause a neurotic victim to imagine things which did not happen.”\textsuperscript{373} The continued application of such stereotypical assumptions validates the notion that women are not rational or credible witnesses and keeps women from asserting their rights when there are no other witnesses.

Resistance to sexual harassment law is driven in large part by deeply rooted gender-based stereotypes and patriarchal notions about women’s sexual roles and roles in the workplace. Despite the consciousness-raising of the past few years, in most countries women are still expected to perform particular roles in the workplace and family. This type of stereotypical expectation is perpetuated by images of women in popular culture in their traditional roles of nurturers and caregivers. In the United States, for example, advertisers continue to feature women “spooning cough medicine to their kids, agonizing over their spouse’s diarrhea, [and] pondering bath tub rings,” leaving the impression that “women seem to live only to cook and clean and please children and husbands.”\textsuperscript{374} Likewise, advertisers in South Africa continue to feature women “as victims and caregivers, for example, without their broader role being seen,”\textsuperscript{375} and women continue to be portrayed in these stereotyped roles in textbooks and by school teachers.\textsuperscript{376} “Even educated, successful women ... face expectations that they will fulfill a traditional role as obedient, serving wives.”\textsuperscript{377}

\textsuperscript{370} Johnson, \textit{supra} note 10, at 509.

\textsuperscript{371} See Andrews, \textit{supra} note 369, at 382 n.42.

\textsuperscript{372} 9 BALR 1061, 1066 (CCMA 2000).


\textsuperscript{374} Paul Farsi, \textit{Another World on Daytime TV: Advertisers Still Stuck in the ’50's}, DAL-

\textsuperscript{375} LAS MORNING NEWS, May 9, 1993, at 11.

\textsuperscript{376} Lindsay Barnes, \textit{African Media Give Women a Raw Deal}, CAPE ARGUS, June 11, 1998 (on file with author).

\textsuperscript{377} Martineau, \textit{supra} note 52, at 383.

\textsuperscript{377} Alexandra Zavis, \textit{Hopes Rise for Women’s Rights in the New South African Gender}, L.A. TIMES, Aug. 3, 1997, at A32. \textit{See also} Gail Smith, \textit{Just Don’t Say “No,” \textsc{Mail} \& \textsc{Guardian}}, Dec. 4, 1998, at F2 (stating that South Africa is still “caught up in the mythology of the kind, nurturing, caring, selfless mother”); Claire Keeton, \textit{South African Women “A Priority”}, \textsc{Sowetan} (Johannesburg), May 7, 1999, \textit{available at} 1999 WL 1083701 (reporting South Africa’s president Thabo Mbeki’s statement that “girls were often taught to be inferior and ‘wrong messages’ reinforced this, while family socialization did not encourage them to go beyond their traditional roles in society”).

This portrayal of women in their roles as caretakers, nurturers, and mothers is consis-
Eradication of ingrained gender norms can take generations. In the United States the Women's Rights Movement has been going on for many decades, and the cultural history of gender violence in South Africa is even more entrenched than it was here in the United States four decades ago. "Redefining as unacceptable that which previously has been acceptable will remain difficult unless society can acquire a different language, a language that reflects the experiences of those abused . . . ."378

3. Tradition of Violence Against Women and Preexisting Cultural Norms as Barriers to Change

As a form of oppression of women, sexual harassment cannot be controlled without an understanding of a culture's history with respect to violence against women and traditional beliefs regarding male aggressiveness.

In South African tradition and culture, violence against women is endemic. South Africa is a highly male-dominated and patriarchal society where women have limited power over their own lives and/or bodies. Women are often expected to follow gender-based, exploitative practices that keep them subordinated and powerless. It is a culture of sexual violence, estimated to have the highest incidence of reported violence against women in the world.379 One in three South African schoolgirls are victims of sexual abuse,380 and one in two South African women will get raped at least once in her lifetime.381 There is little evidence to suggest

tent with a deeply entrenched universal conceptualization of women's roles in societies around the world. For example, Germany has a cultural orientation deeply resistant to upsetting traditional family roles. See Valeria Fargion, Timing and the Development of Social Care Services in Europe, W. EUR. POL., Apr. 1, 2000, at 59 (2000). In many South American countries like Peru, "the traditional culture expects women to be submissive toward men." Sandra Orihuela & Abigail Montjoy, The Evolution of Latin America's Sexual Harassment Law: A Look at Mini-Skirts and Multinationals in Peru, 30 CAL. W. INT'L L.J. 326 (2000). Likewise, traditional ideas about women's roles continue to be obstacles preventing women from advancing in the workplace in most Asian countries. See More Women in Senior Positions Now, STRAITS TIMES, June 27, 2000, at 30; Korea Suffers Loss of Female Workers Due to Poor Childcare, KOREA HERALD, Aug. 26, 2000, available at 2000 WL 21234857.

378 Minow, supra note 295, at 1672.
381 Charlene Smith, Mbeki's AIDS Stand Intolerable, TORONTO STAR, July 11, 2000 (on file with author).
these numbers are decreasing. South African boys are taught that rape is "macho," and many view it as "fun" and "harmless." Girls are taught that "male violence is the condition against which their rights and freedom are negotiated." Sexual abuse is so common that it is discussed in a casual way, and many adolescents see it as an "expression of love."

These endemic attitudes stem in part from deeply entrenched cultural norms, such as the belief that "forced sex with your girlfriend is not rape because she's yours," or the belief that any forced sex with someone you know does not constitute sexual violence. One study showed that eight of ten young men think that women are generally responsible for causing sexual violence and that women are "asking for it" if they wear tight clothing. Young girls are even blamed for rapes of eighty-year-old grandmothers: "After seeing her we are aroused. When you turn the corner and you see a granny, then you just shove it in." Another study revealed that it is a commonly held view in South Africa that men have "insatiable urges to have sex with an unlimited number of women," a finding consistent with the common view that "once aroused, a man cannot control his sexual urges and is not henceforth responsible for his actions." In a separate study, one half of the boys interviewed said they thought "when a girl said 'no' she usually meant 'yes,'" a third of the boys thought that "girls who were abused were 'looking for it,'" and one out of ten believed the victims enjoyed the experience.

The normality of violence against women in South African culture has also affected women's attitudes about sexual violence. Most women

382 In fact, reports indicate that "the reported incidence of rape and attempted rape increased by 20 percent from 1994 to 1999—though there are serious concerns about the quality of the statistics." See S. AFR. POLICE SERV., supra note 381.
383 Schuler, supra note 379 (citing a survey of 1500 students from South African black townships which found that 25% of boys between the ages of twelve and twenty-two consider gang rape to be fun).
384 Gumisai Mutume, South Africa Education: Violent Crime Begins in the Classroom, INTER PRESS SERV., Feb. 20, 1998 (on file with author) (quoting the report "Gender Equity in South Africa" submitted by the Gender Equity Task team).
386 Id.
387 Tom Masland, Breaking the Silence, NEWSWEEK, July 17, 2000, at 32.
388 Id. (citing a three-year study released in June, 2000 by Johannesburg's Southern Metropolitan Local Council).
389 Usdin & Ramafoko, supra note 385.
390 Id.
391 Corinna Schuler, A Small Step in Combating AIDS, CHRISTIAN SCI. MONITOR, Nov. 24, 1999, at 8 (quoting a study by social psychologist Catherine Campbell published in 1999 in Social Science Medicine, a research journal).
392 Usdin & Ramafoko, supra note 385.
393 One in Three Schoolgirls Sexually Abused, supra note 380 (citing a study published in January of 1999 by a non-government organization). This is also a problem in the United States, but one that we have been dealing with for the past few decades. See infra notes 410 – 415 and accompanying text.
do not believe they have a right to disobey men. 394 A study conducted by CIEA Africa, an NGO researching sexual violence, showed that "12% of young girls do not know they have a right to refuse sex in relationships" 395 or avoid sexual abuse. 396

Many of these widely held beliefs are confirmed by a tradition of tolerance toward sexual crimes by families of children who have been raped, who will often accept very small bribes to drop the matter, 397 and by legal authorities, who are known to blame the victim completely or grant very light sentences. 398 As stated by Johanna Kistner, a clinical psychologist who runs a counseling program for rape victims and rapists in Johannesburg, "South Africans have simply become used to employing violence as a means of resolving conflict or asserting power over others." 399

The United States has experienced a similar history of violence against women, and it was not too long ago that many of the South African beliefs and stereotypes about women and rape were commonly held here in the United States. 400 Historically, American law has condoned violence against women. During the nineteenth century, it was a commonly held view that a man should be permitted to beat his own wife, so long as the stick was "no thicker than a man's thumb," based on the idea that a husband had the "marital right" to discipline or restrain his wife. 401 By the 1870s, this practice was officially abandoned, but until very recently, courts regularly continued to give wide leeway to husbands in the treatment of their wives under the guise of preserving the sanctity and privacy of the marriage. 402 Today, despite the recent enactment of the Violence Against Women Act in 1994, 403 a reported 12.1 million women have been raped, 404 and "[l]ittle suggests that the incidence of rape is decreasing." 405 A shocking 1998 survey of college students revealed that "one in twelve college men admitted to committing rape. Another study

395 Usdin & Ramaphoko, supra note 385.
396 Masland, supra note 387.
397 Smith, supra note 381 (noting that "a rapist can pay compensation of as little as S3 to the family whose child he has raped, and the matter ends there").
398 See supra notes 364–365 and accompanying text.
399 Dynes, supra note 379.
400 In fact, many would argue that those stereotypical beliefs are still held by many Americans today. See infra notes 408–409 and accompanying text.
402 Id. at 888.
403 Id. at 891.
405 Id.
found forty-three percent of college males reporting that they had engaged in coercive sex.”

The high incidence of rape in the United States is commonly thought to be a reflection of cultural and social norms that accept gender inequality and even encourage rape. As in South Africa, the social norms are based in large part on the familiar myths about rape, such as “women, motivated by revenge, blackmail, jealousy, guilt, or embarrassment falsely claim rape after consenting to sex; women fantasize about being raped; only ‘bad’ women are raped; and women provoke rape through their appearance and behavior.” One comprehensive study of rape in America showed that “sixty-six percent of one sample group believed that women’s behavior and/or appearance provoked rape. Thirty-four percent believe that ‘women should be held responsible for preventing their own rape.”

Stereotypes about women and rape are not the same for all women across racial lines. In the United States, black women are often stereotyped as “naturally voracious” and more likely to have consented to sex, than white women. Black rape victims are also more likely to be seen as having suffered little harm from a sexual assault because of their perceived sexual experience. Further, “if a Black woman is poor, addicted to drugs or alcohol, or involved in prostitution, she does not have a prayer that her charges of sexual assault will be taken seriously.” Many black victims’ claims of rape have been disbelieved for those reasons,

406 Id. at 576.
407 See id. at 577–78, 582 (noting that men “rape in conformity with, rather than in defiance from, social norms”); see also Christina E. Wells & Erin E. Motley, Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation, 81 B.U. L. REV. 127, 158 (2001) (noting that “men who rape have simply internalized certain cultural and sex role norms”).
408 Wells & Motley, supra note 407, at 148–49. Morrison Torrey summarizes the myths about rape which have been popularly believed in American culture:

[W]omen mean “yes” when they say “no”; women are “asking for it” when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped; women are vengeful, bitter creatures “out to get men”; if a woman says “yes” once, there is no reason to believe her “no” the next time; women who “tease” men deserve to be raped; the majority of women who are raped are promiscuous or have bad reputations; a woman who goes to the home of a man on the first date implies she is willing to have sex; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; a man is entitled to sex if he buys a woman dinner; [and] women derive pleasure from victimization.

409 Baker, supra note 404, at 587.
412 Dougan, supra note 410.
413 For example, in one case, a juror argued for an acquittal of a man accused of raping
and these myths "play an important role in the way judges, jurors, and others perceive testimony in rape trials" in the United States.414

Violence against women succeeds in the workplace because of unequal power relations between the sexes in the typical workplace hierarchy. Power disparities are typically the result not of "nature or evolution, but societies which, through legislation and social custom, have made women second-class citizens."415 Such a cultural reality will undoubtedly have a grave impact on a country's sensitivity to sexual harassment law.

4. Prudish or Promiscuous?: Cultural Attitudes About Sex and the Effect on Perceptions of When Sexual Harassment Has Occurred

Since sexual harassment laws prohibit sexual behavior in the workplace, a society's attitudes about appropriate sexual behavior will sharply affect its approach to the legislation. Compared to most other Western societies, Americans have typically been viewed as more prudish about sex,416 often described as having "puritanical,"417 "conservative,"418 and "reserved"419 attitudes about sex. Stringent sexual harassment laws are

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a young African American woman "on the grounds that a girl her age from 'that kind of neighborhood' probably wasn't a virgin anyway." Taylor-Thompson, supra note 411, at 1294. Another juror told researchers, "Negroes have a way of not telling the truth. They've got a knack for coloring the story. So you know you can't believe everything they say." Id.

414 Schick, supra note 401, at 889 n.16.

415 Vetten, supra note 2.

416 See, e.g., James R. Petersen, Playboy's History of the Sexual Revolution, Part IX: 1980–1989—The Great Repression; History of Sexual Attitudes, PLAYBOY, Apr. 1, 1999 (on file with author) (describing a sexual counterrevolution under way in America, where "casual sex, spontaneous sex, [and] enthusiastic sex all were signs of irresponsibility").

417 See, e.g., The Place of Pornography, HARPER'S, Nov. 1, 1984, at 31 (referencing the comment of Al Goldstein, the publisher of Screw, that our society has long been dominated by "puritanical attitudes about sex"); Roger Cohen, Germany's Top Sex Businesswoman Hopes to Seduce U.S. Market, INT'L HERALD TRIB., Feb. 17, 2000, at 1 (describing the founder of a German erotic corporation's perception that the American market is "basically so conservative," as well as the founder's shock at the "puritanical streak that is much stronger than in Germany"); Abigail Caope Sagu, Puritanism and Promiscuity? Sexual Attitudes in France and the United States (1997) (unpublished paper presented at the Eastern Sociological Society, on file with author) (contrasting the "puritan United States" with the "Gallic or promiscuous French").

418 See, e.g., Fred A. Minnigerode, Attitudes Toward Homosexuality: Feminist Attitudes and Sexual Conservatism, 2 SEX ROLES 347, 351 (1976) (positing that our society's widespread conservative attitude about sex contributes to homophobia); Avedon Carol, Don't Get Fooled Again: Assailed in Britain, 38 N.Y.L. SCH. L. REV. 183, 189 (1993) (suggesting that our society's widespread conservative attitude about sex leads to acceptance and possibly encouragement of rape and domestic violence); Jessica Arons, Misconceived Laws: The Irrationality of Parental Involvement Requirements for Contraception, 41 WM. & MARY L. REV. 1093, 1129 (2000) (stating that teenagers have more conservative attitudes about sex than in the recent past); The Edge with Paula Zahn (Fox News Network television broadcast, Mar. 22, 2000) (presenting interview between Hugh Hefner and Paula Zahn, in which Hefner remarked, "I think we remain, quite frankly, a very conservative and Puritan people [in reference to] our attitudes towards sex").

419 See, e.g., HIMMELFARB, supra note 234, at 10 (contrasting the "relatively reserved ... bohemianism" of Greenwich Village with Bloomsbury, which was "flagrantly promis-
seen by critics as attempts to "stomp out people's fun," and have been referred to as causing the "desexualization of the United States." 420 Conversely, in many countries, sexual flirtation is viewed as second nature. 421 In these countries, suggestive remarks and flirtatious behavior in the workplace are often considered harmless, 422 and generally "the concept of sexual harassment is widely perceived as a Western plague that threatens to spoil the 'natural' relations between men and women." 423 Accordingly, understanding a country's social climate and its attitudes and customs about sex and flirtation is deeply critical to the evaluation and understanding of the effect of sexual harassment laws regulating conduct in the workplace. 424

The balance between freedom of expression and social control, which has been so difficult to find in the United States, might prove even

420 Tanya Martinez Shively, Sexual Harassment in the European Union: King Rex Meets Potiphar's Wife, 55 LA. L. REV. 1087, 1145 (1995) (citing Alan Riding, Harassment or Flirting? Europe Tries to Decide, N.Y. TIMES, Nov. 3, 1992, at A8); see also Vivienne Walt, Regarding Sexism on the Job, N.Y. TIMES, May 24, 2000, at G1 (observing "in the popular media and in innumerable café conversations, American workplaces are portrayed as humorless prisons"). Although these types of stereotypes are, of course, quite imprecise, they may still have a germ of truth to them. Even if they are not altogether true, it remains relevant to know whether they are still perceived as true. For example, in the United States there is a sense that our prudish attitudes about sex have been changing in recent years. See, e.g., HIMMELFARB, supra note 234, at 120 (referring to the "Europeanization" of American sexual attitudes); Eric Harrison, The SEX Revolution, TORONTO STAR, Oct. 12, 1999, available at 1999 WL 23997581 ("[I]n mainstream Hollywood movies, portrayals of sex have reached the point where serious actors in serious films no longer must decide simply whether they'll go nude. Now the question is whether they'll bury their faces in someone's crotch and, if so, then for how long and with the camera at which angle."). But many people most likely still continue to believe that Americans are generally prudish, and this stereotype probably continues to inform other countries' attitudes about our laws regulating sexual behavior.

421 For example, in France, "eroticism has helped to define the country." Walt, supra note 420 ("When one thinks of France, certain images spring to mind ... the French lover, whose seductive skills have long seemed as much a birthright as a good Bordeaux."). See generally Saguy, supra note 417, at 5 (describing the "high value the French have accorded to the expression of sexuality and seduction in social life"). In Italy, "flirtatious behavior is considered a natural part of male-female relationships." See Protocol Counts: Tone It Down, Americans, a Familiar Western Welcome Could Prove Overwhelming to These International Visitors, ROCKY MTN. NEWS, June 15, 1997, at 10W (citing "Protocolorida") guides for several nations for the Colorado International Trade Office). In Russia, physical contact is the norm. Id. ("Russians stand closer to people than Americans do."). Mexican men are often known for their machismo. Cecilia Rodriguez, Muy Macho: A Latina and a Gringa Consider the Animal in Its Mexican Lair, L.A. TIMES, Dec. 6, 1992, at 49.

422 Needless to say, it is typically the men that see such behavior as harmless. However, many women, conditioned to living under these conditions, also do not see the harm in such behavior.

423 Orihuela & Montjoy, supra note 377, at 323, 325 (citing Ladka Baverova, Czech Poll: Harassment of Women Is Common, N.Y. TIMES, Jan. 9, 2000, at A7). In Czechoslovakia, for example, sexual harassment is considered "a stupid invention of hysterical American feminists," and in many South American countries, "if a boss grasps a female employee by her shoulders ... it might just be considered 'graceless paternalism.'" Id.

424 Within a multi-cultural society, as well, cultural differences in attitude about sex might also affect the perception of whether sexual harassment has occurred.
more problematic in a country with South Africa’s cultural history. During the years of apartheid, South Africa was a country with “an official code of sexual behavior rooted in conservative Afrikaner Christianity.”

Sex was completely banned across race lines under the Prohibition of Mixed Marriages Act, which prohibited marriages between “whites” and “non-whites,” and under the Immorality Act, which prohibited, among other things, sexual intercourse between “whites” and “non-whites.” Not only were gays and lesbians considered indecent and immoral, but the country legally sanctioned discrimination against them, with anti-homosexuality laws found in each of its legal traditions. Legislation made it illegal for a male to commit “any act which is calculated to stimulate sexual passion or to give sexual gratification” to another male, and the common law punished “sodomy, frottage, mutual masturbation, and ‘other unnatural sex offences’ between men.” Continuing in a tradition of sexual intolerance, erotica and pornography of all kinds were also completely banned. The old Afrikaner regime “frowned on public dancing, banned TV until 1976 and enforced more than 100 censorship laws in an Orwellian attempt to protect strict Calvinist morality and white supremacy.”


427 See id. (citing § 16 of Immorality Act 23 of 1957).

428 Id.


430 Christiansen, supra note 429, at 1019.


434 And after 1976, “even a hint of nudity was banned on television.” Matloff, supra note 433.

435 Drogin, supra note 433.
Since the 1994 election, there has been a "rapid relaxation of the sexual taboos enforced by the old order." As discussed above, the country's new Constitution is among the most progressive and tolerant in the world, prohibiting discrimination against anyone on seventeen separate grounds including pregnancy, marital status, and sexual orientation, and distinguishing between sex and gender as two separate grounds of discrimination. New progressive laws have opened the door for a revolution of sexual mores.

The new South Africa is now sexually permissive, with a booming and still growing sex industry. Although not supported by national consensus, there has been a "proliferation of sex clubs and erotic cabarets," and nightclubs and restaurants are known to "offer everything from topless waitresses to jelly or oil wrestling and live sex shows." Sexually explicit films and magazines have been unbanned and have become "more risqué," while pornography is flourishing. Full frontal nudity is now being allowed, whereas prior to 1994, "photographs of female breasts couldn't be published without a censor's star covering the nipples." Newspapers are now filled with "lurid ads for prostitutes, massage parlors, and escort services," and brothels, and hard-core adult book and video stores are opening even in the most respectable neighborhoods. The sex trade, though still technically illegal, is also flourishing. The police have eased up on sex-related crimes, and at one

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436 Keller, supra note 425.
438 For example, the moral right, whose agenda is "to ensure that the Christian ethos of sex in marriage is maintained," has "serious problems" with the new sexual freedom. Pornography In South Africa: Draft Paper for SADC Conference ¶ 3.5 (Mar. 1998), at http://www.sn.apc.org/sadc_pvw/papers/porn.html. They argue that pornography "makes sex dirty and easy." Id. Alternatively, some feminists claim that pornography leads to violence against women.

These feminists focus on dehumanisation and the sexualization of brutality in a context that suggests endorsement or approval of such behaviour. They claim that pornography is a form of discrimination based on sex. It focuses on the presentation of women dehumanised as sexual objects, being raped, or physical hurt or in postures of subordination.

Id. ¶ 3.8. The feminist objections to pornography typically have nothing to do with morality or religious values. Id. ¶ 3.5.
439 Keller, supra note 425.
441 See, e.g., id.; Wells, supra note 30; Drogin, supra note 433; Matloff, supra note 433.
442 Keller, supra note 425 (quoting statement of Daniel Morkel, the chair of the appeals board that is the highest censorship authority).
443 Wells, supra note 30.
444 Wells, supra note 30; Drogin, supra note 433.
445 Drogin, supra note 433.
446 Id.
447 Wells, supra note 30; see also Andrew Maykuth, Prostitution Explodes in Cape
point, South Africa was even considering decriminalizing prostitution.\textsuperscript{445} This movement to "free the national libido" \textsuperscript{449} has been called the "second liberation movement."\textsuperscript{450}

The recent sexual revolution in South Africa could have anomalous effects on the enforcement of the sexual harassment law. The country has experienced a history of deprivation and is now making up for it. The "dizzying pace of change"\textsuperscript{451} in South Africa since the end of Apartheid could, however, lead to confusion about appropriate sexual behavior, and many feminists and anti-porn activists believe it could contribute to an increase in sexual violence.\textsuperscript{452}

Generally a more liberal sexual climate will promote more promiscuous behavior in the workplace, and sexual behavior in the workplace can contribute to a hostile work environment. If a society (particularly men) views legislation against any sexual or flirtatious behavior in the workplace as inconsistent with their culturally bestowed sexual freedom, it could lead to resentment about the law. These cultural attitudes about sex are likely to seriously influence interpretations of sexual harassment legislation.

III. CONCLUSION: FACILITATING THE TRANSITION FROM LEGAL STANDARDS TO SOCIAL NORMS

There are three basic ways in which a law can alter social behavior. First, the law can coerce change by penalizing individuals who do not follow its mandates. Second, the law can serve as a meter by which behavior is judged in a society. In this manner, the law can cause individuals to alter their behavior in order to be recognized by society as good. Third, the law can serve as an impetus for education about right and

\textit{Town, Seattle Times}, Dec. 12, 1999, at A30 (noting that "prostitution has proliferated like never before").

\textsuperscript{445} In 1997, the Gauteng Province submitted a proposal to the national government to decriminalize prostitution in hopes that it will influence changes to the Sexual Offenses Act of 1957 which makes prostitution illegal in South Africa. See Gumisal Mutume, \textit{South Africa: Gauteng Province Decriminalizes Prostitution}, \textit{Inter Press Serv.}, Nov. 7, 1997, available at 1997 WL 13257515. The African National Congress, at its national conference in 1997, supported the Gauteng initiative. See \textit{Sex Work: Decriminalization} (Mar. 1998), at http://www.sn.apc.org/sadc_pwav/papers/sexwork.html (SADC conference paper presented by Sylvester Rakgoadi, Secretariat for Safety and Security, Gauteng Province). In 1998, however, the Gauteng provincial government "quietly shelved plans to decriminalize prostitution, fearing a backlash from conservatives ..." \textit{Major News Items in Leading South African Newspapers}, XINJUA ENG. NEWSWIRE, July 21, 1998 (on file with author). The current law against prostitution has been criticized as highly discriminatory, as only the sex worker is prosecuted, but not the pimps or buyers of sex. See \textit{Revolutionary Country}, supra note 27, at 18A.

\textsuperscript{449} Keller, supra note 425.

\textsuperscript{449} Id.

\textsuperscript{451} Drogin, supra note 433.

\textsuperscript{452} See, e.g., Maykuth, supra note 447.
wrong, ultimately influencing a change in behavior because of an individual belief about the morality of the behavior.

Each of these steps is critical to the eradication of workplace sexual harassment. First, and most simply, governments must enact legislation which recognizes sexual harassment as an impediment to workplace equality and penalizes those who engage in sexually harassing behavior. Second, the law must be viewed as having external legitimacy—it must be seen as reflecting a majority cultural perspective so that companies are convinced that adherence to the law will be to their reputational, and therefore economic, benefit. Finally, in order for the statute to be truly effective as law, there must be individual moral acceptability, so that employers and employees cease to engage in the regulated conduct even if they could derive some benefit from it because they believe the behavior to be morally wrong.

The United States, South Africa, and at least thirty-eight other countries around the world, have, in fact, enacted legislation that penalizes individual employers for fostering a hostile work environment. In many countries, victims of sexual harassment can now recover damages (including punitive damages) for wrongs occurring in the workplace, and employers can be held responsible for the actions of their employees. Stringent global sexual harassment laws have encouraged many companies to develop sexual harassment policies and to train and educate employees about the hazards of sexual harassment and how to avoid liability. Undoubtedly, sexual harassment laws have brought the issue into our collective consciousness and have managed to alter behavior in certain cases.

But sexual harassment flows from the culture of a workplace, and corporate policies alone cannot produce a significant change in culture. Legal norms have no effect unless individuals and communities attempt to integrate them into their everyday lives. Integration will not occur if the law is perceived as lacking legitimacy. The next step, then, is to educate the public about the law and why it is necessary to achieve justice in the workplace.

Legal education must occur on several levels. First, the law will have no effect if intended beneficiaries do not understand their rights and do not know how to go about asserting them. Accordingly, education must start with detailed analysis of the law so that employees understand the type of conduct prohibited and the procedural mechanisms for filing a grievance. Education must also include teaching individual employees about the legal and economic consequences of engaging in sexual harassment, and teaching employers about the legal and economic consequences of condoning sexual harassment. Employees must be convinced that the law has legitimacy in the workplace environment, so that victims will not fear making a claim and perpetrators can expect action to be taken against them. Even where a law prohibits behavior, a harassing
employee may continue to engage in the prescribed behavior if he gains the benefit of community tolerance and acceptance. Companies can control such a downward spiral by making it clear that sexual harassment is not condoned, and making it more likely that an employee will be criticized and even ostracized for engaging in such behavior. This, in turn, requires the company’s desire for larger community acceptance. The company itself must be convinced that the law has a broader cultural legitimacy, so it is encouraged to conform to social norms. The employer must realize that bad press on the issue of sexual harassment could have economic implications as societies come to recognize the wrong of sexual harassment.

Employer attention and respect, popular culture, and the media can all influence the perception of sexual harassment laws. Employers have influence over how employees react to a workplace policy, popular television shows and music can raise consciousness on relevant social issues, and the media, which generally has the power to popularize a correct attitude toward women, certainly can be used as a tool to promote gender equality. Yet employers or media alone (or together) cannot alter public perception about sexual harassment, if those sources do not have a clear understanding of its true physical, psychological, emotional, and economic harm. Ultimately, to effect real change, companies’ responses to the law must be based on more than a fear of liability—there must be actual disapproval of sexual harassment, and that disapproval must be communicated to employees.

While anti-discrimination laws have the power to provide remedies for discriminatory behavior and to signal the conduct that a society does not tolerate, they do not necessarily have the fundamental power to alter the underlying sexist attitudes that cause the discriminatory behavior. On a general level, social change will not occur without the abandonment of deep-rooted notions about what type of behavior is culturally acceptable. This demand calls for “moral education” as well as legal education.45 In order to eviscerate the sexism, society must be taught the basic principle that all people are created equal. Educational programs must teach those in power that “sexual harassment is morally wrong and why they have ethical responsibilities to eliminate it.”454

The manner in which different countries go about moral education will vary, depending on cultural attitudes about sex, gender relations, violence against women, and economic entitlement. However, through case studies of the United States and South Africa, two countries with radically different cultural and social histories, I hope to illustrate that almost any country will experience economic, political, and cultural

453 Parker, supra note 255, at 33 (noting that “it is better to teach people that they shouldn’t discriminate at all, than the ins and outs of the law”).
454 Feary, supra note 280, at 84.
limitations on the effective implementation of law. In the United States, for example, the hard fought victories won with the recent Supreme Court attention to sexual harassment have seen a substantial backlash. Similarly, for the short period of time since the promulgation of the Employment Equity Act in South Africa, the country continues to experience significant levels of violence against women in the workplace, and South African women continue to have little economic independence. Both countries fight racism and sexism on all levels, in all social contexts, and across all class levels. But to achieve the desired impact of sexual harassment law ultimately requires that deeply entrenched gendered power imbalances be eradicated. This calls for social education starting in the family: teaching young boys, for example, that men and women are of equal value. Education and awareness, the keys in changing belief systems, must also include educating and training police, prosecutors, court officials, and judges, as well as employers, about gender sensitivity and the immorality of sexual harassment.

Additionally, if sexual harassment does occur, women must have greater access to redress in the courts, and sexual harassment litigation must become an acceptable means for women to speak out. To accomplish this, women need a greater understanding of their rights and status in the workplace, and women's experiences need to be more visible to judges. The most progressive laws will have no effect if victims are not able to take advantage of them.

Countries must also look beyond consciousness raising to other more concrete mechanisms of enforcement. Women with the same career expectations as men still face many obstacles to equality in the workplace. In many countries, though, legal barriers are no longer the main cause of these inequalities. Women around the world still bear a large majority of the homemaking and child rearing responsibilities, and em-

\[455\] Not all women aspire to "increased participation ... in the public world of careers and political power." Denise Meyerson, Sexual Equality and the Law, 9 S. Afr. J. on Hum. Rts. 237, 252 (1993). In South Africa, for example, some feminists argue,

[It not only implies that women who want recognition and security must behave like men, but also that it leaves the meritocratic structure of society intact, merely holding out the hope to white middle class women that they may come to enjoy the same opportunities, status and privileges as white middle class men. Since the vast majority of women have no chance of making it into the boardroom, these feminists would prefer to see the traditionally feminine pursuits rewarded with dignity and financial security.]

\[456\] See, e.g., Rebecca Sultana, Womenomics' Might Be Best for Moving Up in the Changing World, INDEPENDENT (London), Apr. 16, 1999, available at 1999 WL 11578182 (noting that "from New York to Tokyo, women still bear most of the burden of housework and childcare"); Equal Opportunity in the Workplace, CHINA NEWS, Nov. 4, 1999 (on file with author) (noting that in Taiwan, "women are also frequently saddled with the extra burden of child-rearing, housework, and caring for elderly relatives"); Elizabeth Brainerd,
payers still expect that employees should have no family commitments that interfere with full-time work. These expectations and traditions, of course, make it vastly more difficult for women to compete with men for jobs. As Justice Goldstone of the South Africa Constitutional Court noted, "The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment. . . . It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared." As more women enter the workplace, working conditions must also be improved for women. Labor markets that are geared to workers without children or child-care responsibilities (typically male workers) must be changed. This means institutional changes such as "more flexible work schedules, increased status for part-time work, job-sharing, adequate leave for reasons of child-care," and an improved level of social assistance for child support. Women in the United States and around the world still face marginalization and wage discrimination. There must be improvement in women's access to education, and women must be trained in skilled professional and managerial work.

While litigation plays an important role in eradicating workplace harassment, it does not necessarily occupy the main foci. A shift away from litigation to the involvement of public bodies such as unions and other employee organizations might be more empowering to victims, who tend to lack power in the criminal justice system. While laws may serve

Women in Transition: Changes in Gender Wage Differentials in Eastern Europe and the Former Soviet Union, 54 INDUS. & LAB. REL. REV. 138, 140 (2000) (noting that women do the "bulk of the housework" in Eastern Europe and the former Soviet Union); Australian General News, AAP Newsfeed (ABC Radio broadcast (AM program), Oct. 28, 1999) (noting that in Australia women do "more than twice the housework" as men); M. Brockerhoff & P. Hewett, Inequality of Child Mortality Among Ethnic Groups in Sub-Saharan Africa, BULL. WORLD HEALTH ORG., Jan. 2000, at 30 (noting that generally in Africa women carry the heavy responsibility of childrearing); Marcela Valente, Rights-Argentina: An Eight Hour Day, But No Wages or Benefits, INTER PRESS SERV., Feb. 9, 2000, available at 2000 WL 4089786 (noting that in Argentina "many women work nearly eight hours a day, seven days a week" as homemakers, and even women who work outside the home often "dedicate an average of four hours and 17 minutes a day to domestic responsibilities"); With AM Family Report Stress, CAN. PRESS NEWSWIRE, May 19, 2000, available at 2000 WL 22517595 (reporting on a study released on Canadian families showing that Canadian women still do more "housekeeping, child and elder care [than men] whether they were single or married, mothers or childless"); Cherry Norton, Forget the Gadgets: Housework Today Is as Tough as It Was 60 Years Ago, INDEPENDENT (London), May 5, 2000, at 11 (noting that in London, women do an average of thirty-five hours a week of housework, while men do an average of five hours a week).

See, e.g., Meyerson, supra note 455, at 251–52.


For example, there are still largely inadequate child-care facilities in South Africa. Meyerson, supra note 455, at 251.

Id. at 253.

See generally AMIEN & PALEKER, supra note 326, at 9.
as a deterrent and litigation may provide an important avenue of recourse for some people, working communities need to get involved at a more fundamental level. In South Africa, for example, black industrial labor is highly organized and the trade union movement has more clout and public influence than here in the United States. However, agricultural and domestic workers, and others engaged in casual forms of employment, have only recently organized. These workers need to organize to accomplish real change, such as improved social security benefits and job security. And of course, women themselves must take responsibility to "organize and develop their own skills." Such empowerment will help lead to equality in the workplace, which is necessary for women to be able to realize economic independence and free themselves from the cycle of workplace violence.

For sexual harassment law to be effective, reform efforts must be aimed at all three modes of altering social behavior, so that factors like education, media, cultural attitudes, and workplace policies reinforce, rather than undercut, enforcement of sexual harassment legislation. The experiences of the United States and South Africa demonstrate the need for advocates to focus on the perceived legitimacy behind change. Only with widespread support can society realize the impact promised by sexual harassment law.

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463 See, e.g., GENDER AND POST-APARTEID SOUTH AFRICA: DOMESTIC WORKERS, at http://www.pressroom.com/~hbhamilton/sa-gender.htm (last updated Mar. 3, 1998) (noting that "although domestic workers' labor unions have formed in South Africa as a means of activism and redress of past apartheid inequities, their cause has not yet reached the daily life experiences of most black women today").

464 Goldblatt, supra note 325, at 400.