

SEXUAL HARASSMENT: PROSCRIPTIVE POLICIES OF THE EUROPEAN COMMUNITY, IRELAND, AND NEW ZEALAND

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Although the international community is rich with diversity,¹ the blight of sexual harassment is one of its lasting commonalities.² Sexual harassment exists in all societies and in all social classes,³ pervading work environments in the United States and abroad.⁴ The international community, however, has made and continues to make legislative strides to eradicate sexual harassment in the workplace.⁵

Though sexual harassment has long existed, only in recent years has the international community begun to address it.⁶ "Fifteen years

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1. See, e.g., Keith L. Sellen, *The United Nations Security Council Veto in the New World Order*, 138 MIL. L. REV. 187 (1992), and Jeffrey L. Dunoff, *Institutional Misfits: the GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994).

2. See Victoria A. Carter, *Working on Dignity: EC Initiatives on Sexual Harassment in the Workplace*, 12 J. INT'L L. & BUS. 431, 434 (1992) (stating that "[s]urveys conducted throughout the EC substantiate what government agencies, academics, and women's organizations have contended for years: sexual harassment is a widespread and serious problem").

3. See *Europe: Council of Europe in Favour of Adding Equality Protocol to Human Rights Convention*, REUTER TEXTLINE, Oct. 26, 1993; Donna J. Sullivan, *Current Developments: Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152 (1994); *China: Address by Flynn - NGO Forum - European Women's Lobby Plenary - Huairou*, REUTER TEXTLINE, Sept. 5, 1995 (stating that "[g]ender-based violence exists in all societies and cultures throughout the world and is strongly interlinked with poverty. Legislation must be strengthened concerning violence, sexual harassment and the sexual exploitation of women").

4. Beverly H. Earle & Gerald A. Madek, *An International Perspective on Sexual Harassment Law*, 12 LAW & INEQ. J. 43, 44 (1993) (stating that the problem of sexual harassment in the workplace exists throughout the world).

5. *Id.* at 70.

6. *Id.* at 46. Moreover, "[u]ntil recently, domestic violence and rape within marriage were legally tolerated and rarely prosecuted. In this context of noninterference it is not surprising

ago sexual harassment did not [even] have a name. And [t]en years ago, the term was not used in Europe and the idea that sexual harassment could form the basis for a sex discrimination claim was merely an academic hypothesis."⁷ The European Community ("EC"), its individual member states, and New Zealand each show sensitivity to sexual harassment. Their policies aimed at preventing sexual harassment, however, are not equally effective.

The purpose of this paper is to demonstrate that the approach of the EC seems to be an effective method of preventing sexual harassment, although its member states are not bound to follow it. The paper discusses the reasons why the EC's policy appears effective. It also describes the policies of New Zealand and Ireland, demonstrating why the EC's policy seems to be effective. In short, the EC approach adopts the best aspects of the two systems described and filters the worst aspects.⁸ This paper will also illustrate that there is a more effective method of preventing the serious problem of sexual harassment⁹ than the method currently being used in the international community, specifically in the Member States and New Zealand.

Part I presents the definition of sexual harassment and its effects upon victims, employers and the economy as a whole. Part II details the components of an effective sexual harassment prevention policy. Finally, Part III discusses the different approaches to preventing sexual harassment. Specifically, the policies of the EC, Ireland and New Zealand are discussed. Other Member States are mentioned, demonstrating that the EC's policy regarding sexual harassment is an untapped resource.

I. SEXUAL HARASSMENT GENERALLY

To compare the varied legislative methods of addressing sexual harassment, it is necessary to define this type of harassment. This is a

that less than twenty years ago no court either in the United States or abroad considered sexual harassment actionable, let alone a form of discrimination." *Id.* See also Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1235-39 (1994).

7. *Sexual Harassment - European Commission Recommendation and Code of Practice*, 21 IND. L.J. 70, 70 (1992) [hereinafter *European Commission Recommendation*].

8. See O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

9. See J. Clay Smith, Jr., *Prologue to the EEOC Guidelines on Sexual Harassment*, 10 CAP. U. L. REV. 471, 478 (1981). The EEOC Sexual Harassment Guidelines were intended to help employees understand the nature of sexual harassment and to assist them in the development of training programs aimed at combating the problem. The prologue to the Guidelines contains general information about the prevalence of sexual harassment in the workplace. At the time of the writing of the Guidelines, there were 130 sexual harassment charges awaiting a decision by the EEOC at Headquarters. *Id.*

difficult task because there is a wide divergence as to what constitutes sexual harassment.¹⁰ There is agreement, however, regarding the type of victim who is most likely to be sexually harassed.¹¹

There is no one typical recipient of sexual harassment, but the likelihood of being sexually harassed is most closely associated with the perceived vulnerability of the recipient, not her physical appearance. Divorced and separated women, women working in predominantly male jobs and new entrants to the workforce are among the most likely women to be harassed.¹²

It is clear that sexual harassment is extremely offensive and de-meaning for those affected. Victims are vulnerable to devastating assaults on both their health and safety.¹³ In addition, sexual harassment's negative effects surpass the victim.

A. Employee's Perspective

Sexual harassment is a severe assault on the personhood of those harassed, causing a variety of negative effects.¹⁴ One author has listed the potential ill-effects of sexual harassment. They include "anxiety; tension; irritability; depression; deterioration of personal relationships; hostility; inability to concentrate; sleeplessness; fatigue; headaches; and other manifestations of stress at work."¹⁵ Those experiencing sexual harassment are loath to enter certain fields of employment because of an increased chance of harassment.¹⁶ Also, victims of sexual harassment are often fired from their jobs for filing claims.¹⁷ Harassment degrades the individual person, which harms the victim's psychological state.¹⁸ In addition, sexual harassment may

10. See generally MICHAEL RUBENSTEIN, PREVENTING AND REMEDYING SEXUAL HARASSMENT AT WORK: A RESOURCE MANUAL (1989).

11. *Id.*

12. See *id.* at 3; see also *Proposal for a Strategy of Social Security Convergence*, EUR. INFO. SERV., July 1, 1991.

13. See MICHAEL RUBENSTEIN & INEKE DE VRIES, HOW TO COMBAT SEXUAL HARASSMENT AT WORK: A GUIDE TO IMPLEMENTING THE EUROPEAN COMMISSION CODE OF PRACTICE 16 (1993). This guidebook presents the European Commission Code of Practice. Its purpose is to provide guidance to employers, unions, and employees on the prevention of sexual harassment in the workplace. It provides useful, practical information on the nature of sexual harassment and ways to combat it. *Id.*

14. *Id.*

15. RUBENSTEIN, *supra* note 10, at 9.

16. See Janet Dine & Bob Watt, *Sexual Harassment: Moving Away from Discrimination*, 58 MOD. L. REV. 343, 343 (1995) (discussing the fact that repeated sexual harassment often results in the victim resigning from his or her employment).

17. See *id.*

18. See CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); CATHERINE A. MACKINNON, ONLY WORDS (1993); Anne F. Bayefsky, *The Principle of Equality or*

negatively affect employees who witness such behavior against other employees.¹⁹

B. Employer's Perspective

Although the effect of sexual harassment on the individual employee should be at the forefront of the international community's concerns, its effect on the economy should be considered as well. If protecting employees' dignity and integrity is not a strong enough incentive for employers to construct policies to prevent harassment, then perhaps employers' cognizance of financial repercussions would be persuasive.

Those who become ill as a result of sexual harassment take time off of work, ... imposing costs on the employer through sick pay and medical insurance payments. While they are at work, the victims of sexual harassment are likely to be less productive and less motivated, thereby affecting both the quantity and quality of their work... So sexual harassment interferes with an employee's job performance and poses a risk to their [sic] health and safety.²⁰

Indeed, the costs incurred by businesses are exorbitant.²¹ Women in traditionally male occupations experience more harassment than women in traditionally female jobs. Women in such jobs may feel forced out because they receive discriminatory treatment.²² Economically, a lower supply of workers in a particular field will mean that the average cost to employ them will be higher. In effect, sexual harassment serves to elevate the wages some men receive in traditionally male occupations. This artificial wage inflation is added to the traditionally higher wages paid to men in response to sexist notions of men being *ex officio* breadwinners.²³ Moreover, the silence

Non-Discrimination in International Law, 11 HUM. RTS. L.J. 1, 15 (1990); Matthew C. Hesse & Lester J. Hubble, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 WASHBURN L.J. 574, 575 (1985).

19. RUBENSTEIN & DE VRIES, *supra* note 13, at 17.

20. RUBENSTEIN & DE VRIES, *supra* note 13, at 17. In addition, businesses suffer losses of revenue due to sexual harassment since women are less productive in an environment that is psychologically and physically threatening. Audrey Magee, *Harassment at Work Dominate[s] Women's Seminar*, THE IRISH TIMES, March 22, 1993, at 4 (paraphrasing Ita Mangan, barrister with the European Commission).

21. See Catherine Corcoran, *Sexual Harassment Has Many Definitions*, THE IRISH TIMES, March 18, 1993, at 12. See also Dine & Watt, *supra* note 16, at 343 (stating that a recent study of American Fortune 500 companies estimated that the cost of harassment to these companies exceeded \$6.5 million per company. This cost includes expenses related to absenteeism and decreased efficiency in the victims of harassment as well as expenses related to recruitment and training of new employees once victims leave their positions.)

22. See Carter, *supra* note 2, at 434.

23. See Kathryn Branch, "Are Women Worth as Much as Men?" *Employment Inequities, Gender*

and under-reporting attendant to sexual harassment amplifies its negative effect upon the economy.

Research has shown that not only do people avoid seeking redress through the legal system but that, in the majority of cases, victims of sexual harassment do not even report the incident to management. An Alfred Marks Bureau study found that 53 percent of employees who had experienced harassment dealt with it by leaving the job, and 30 percent reported the harassment to the company, but no action was taken. These types of figures have frightening implications for organisations. Managers who blithely say that their organisations have no problem with sexual harassment must think again. They must realise that, far from being a trivial issue, sexual harassment has severe economic repercussions - not just for the victim but also for the organisation.²⁴

Sexual harassment's negative effects in the European Community are especially severe because women are such an important part of the European workforce.²⁵ Over the past decade, women have been seeking employment in increasing numbers.²⁶ A 1994 report stated that women represented forty percent of the workforce (as opposed to twenty-five percent a decade earlier), though they held the lowest paid and the least secure positions.²⁷

The importance of women in the growth of the economy, however, is not confined to Europe. "With the labour market being gradually stretched as a result of the ageing [sic] of the population, the female workforce will inevitably come more and more into its own."²⁸ Indeed, women are an essential component of the workforce,²⁹ and over time their services will be in greater demand.

At present, however, sexual harassment limits the number of workers who are able to secure gainful employment, and it increases the costs incurred by employers. "Sexual harassment is an obstacle to the proper integration of women into the labour market"³⁰ Serious

Roles, and Public Policy, 1 DUKE J. GENDER L. & POL'Y 119, 122 (1994) (noting that traditionally, and continuing today, women's salaries have remained consistently low because of the cultural belief that women's salaries "just help out" while men's salaries are meant to support the bulk of the family's expenses).

24. Corcoran, *supra* note 21, at 12.

25. See *Equal Opportunities for Women and Men in the European Community: A New Issue of Social Europe*, COMMISSION OF THE EUR. COMMUNITIES, Mar. 12, 1992, available in LEXIS, Intlaw library, Rapid file.

26. See RUBENSTEIN & DE VRIES, *supra* note 13, at 5.

27. See *EP Women's Rights Committee Hears German Presidency*, THE REUTER EUR. COMMUNITY REP., Dec. 6, 1994.

28. See COMMISSION OF THE EUR. COMMUNITIES, *supra* note 25.

29. See COMMISSION OF THE EUR. COMMUNITIES, *supra* note 25.

30. *Protection of the Dignity of Women and Men at Work: The Commission Adopts a Recommenda-*

consequences will befall the economy as people are dissuaded by the specter of sexual harassment from entering the very occupations for which they are needed. Specifically, industries may contract or just expand slowly if they cannot draw enough employees to satisfy their needs.³¹

II. COMPONENTS OF EFFECTIVE SEXUAL HARASSMENT PREVENTION

A. Workplace Requirements

A strong probability exists that even an effective policy against sexual harassment may not prevent all instances of such discrimination, but the benefit of eliminating most occurrences of sexual harassment cannot be over-emphasized.³² An organization committed to preventing sexual harassment must possess a genuine commitment to educating all employees as to what constitutes sexual harassment.³³ Michael Rubenstein, the chief architect of the EC's approach, states that a policy proscribing sexual harassment should contain, among other things, "training to sensitise employees as to what behaviour is

tion and Proposes a Code of Practice, COMMISSION OF THE EUR. COMMUNITIES, July 3, 1991 [hereinafter PROTECTION].. See also Elizabeth F. Defeis, *Essay: The Role of International Law in the Twenty-First Century: Women's Human Rights: The Twenty-First Century*, 18 FORDHAM INT'L L.J. 1748 (1995) (citing various European legislative initiatives to equalize women's status in the market and in society and arguing they have not achieved their stated goals) ([hereinafter "Protection"].

31. See *Protection*, *supra* note 30.

32. See Joe A. Simmons, *Sexual Harassment - Prophylactic Measures*, 19 OHIO N.U. L. REV. 661 (1993).

I will not be so bold as to use the word 'eliminate' since employers cannot eliminate all sexual harassment from the workplace. I am convinced, try as hard as they may, it just cannot be done when you are dealing with people ... I am aware of a company with a very comprehensive training program. The employer's lawyer spent four hours talking to an employee audience about sexual harassment; defining it, explaining it, talking about liability, and telling them their jobs were on the line. A few months later, a female supervisor, who sat through all four hours of the training, was found to be sexually harassing a male subordinate. She did not just verbally harass him, but she also sent him cards and letters. There was documented proof that she did it—just months after she was told never to do such a thing.

Id. at 663-64.

33. In the EC's recommendation on preventing sexual harassment, "the Commission asks Member States to accelerate awareness of sexual harassment, which is contrary to the rights of men and women." *Social Affairs*, COOPERS & LYBRAND EUR., Oct. 19, 1995, at 4. See also EVELYN MILLS, *EUROPEAN COMMUNITY SEX EQUALITY LAW* (1991). However, exposure to sexual harassment should be tempered by a certain level of reasonableness. "Lawyers, employers and policy makers should ... be aware that while appropriate and measured legal sanctions to combat harassment are vital, 'overexposure' of the issue of sexual harassment and growing numbers of 'high profile cases' may discourage women from reporting harassment and bringing claims." Tariq Mundiya, Book Review, *CONDITIONS OF WORK DIGEST: COMBATING SEXUAL HARASSMENT AT WORK*, 15 COMP. LAB. L.J. 119, 126 (1993) [hereinafter REVIEW]. "The Member States should step up their information campaigns ... to advise and assist female workers in availing themselves properly of the means of redress provided for in national legislation on equal treatment." RUBENSTEIN, *supra* note 10, at 19.

impermissible and the organisation's policies and procedures for dealing with sexual harassment."³⁴

Many commentators agree that an effective sexual harassment policy must include a written definition of sexual harassment, a procedure for filing complaints, provisions for confidentiality,³⁵ and widespread publication of such policies.³⁶ Rubenstein also cites the importance of voluntary action in the effort to curb sexual harassment.³⁷ If workers sense that an employer has implemented such policies begrudgingly, then the effectiveness of such policies will be negligible. The policies may be perceived as nothing more than nominal, which would dissuade victims from filing complaints. Also, perpetrators of sexual harassment would not feel any real threat of sanctions. Although some policies are more effective than others, there is no one perfect policy that illustrates an employer's dedication to fighting harassment. Effective policies "may take the form of policy statements, complaints procedures, disciplinary rules, adequate training and effective communication to employees of the employer's policy on sexual harassment."³⁸

B. Legal Requirements

Employers should be held liable for harassment that occurs on their premises. Employer liability should exist whether the harasser is a manager or a co-worker of the victim. Such liability is necessary to eliminate sexual harassment. If it does not exist, a work environment

34. RUBENSTEIN, *supra* note 10, at 19.

The single most important precaution employers can take to prevent sexual harassment is to train employees at all levels on what constitutes impermissible behaviour ... Training must do more than tell employees that sexual harassment is improper. It should aim to make those concerned more sensitive and aware of sexual harassment as a problem. It should also effectively communicate the organisation's policies and procedures for dealing with sexual harassment to employees. In this sense, the training can be characterised as both 'attitudinal' and 'behavioural': while aiming to change employees' attitudes about sexual harassment, it should make clear that unacceptable forms of behaviour will not [be] permitted and will lead to disciplinary sanctions. For training on this issue to be successful, it must recognise that some men are being asked to change their value system: that what they may have regarded as harmless teasing or inoffensive conduct is no longer acceptable.

RUBENSTEIN, *supra* note 10, at 24.

35. "An employer must protect the victim to the greatest extent possible." Simmons, *supra* note 32, at 666. "It is not always appropriate to follow the normal company grievance procedure in the case of sexual harassment, because of embarrassment, fears of not being taken seriously, and fears of damage to the organization." Corcoran, *supra* note 21, at 12. Such protection, however, should not be construed to mean that the entire ordeal should be concealed, as is common in New Zealand. See *infra* notes 62-83 and accompanying text.

36. See Simmons, *supra* note 32, at 665-66; RUBENSTEIN, *supra* note 10, at 19-25.

37. See REVIEW, *supra* note 33, at 121.

38. See REVIEW, *supra* note 33, at 121.

that is protective of the dignity and respect of all employees will not be realized.

The alleged victim's viewpoint also should be adopted when investigating a harassment complaint.³⁹ "The essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive."⁴⁰ Obviously, there are competing concerns when such a determination is made. There may be a temptation to focus on the intent of the alleged harasser, to examine his motivation, and to treat the alleged harasser's attitude and motivation as the correct description of the incident.⁴¹ The benefit of such a view is that if an alleged harasser did not intend to harass, he or she will not be punished. Adopting such a view, however, is not consistent with the desire to protect the personhood and dignity of the individual who is harassed.

If the victim feels degraded or violated, the harasser's intent is inconsequential. A complainant whose claim is defined by his or her viewpoint "has the advantage of [her] perception[] not being measured against a universalizing external standard. If the decision-maker believes that the plaintiff found the environment hostile, sexual harassment is established. Some feminists find this standard attractive because it focuses entirely on the individual woman"⁴² who is sexually harassed.

The victim's view of the harassment should be adopted even though "[t]o adopt a rule [that] normally privileges the understanding of complainants rather than alleged harassers is not without its own problems."⁴³ The problems encountered by such a rule are far less serious than the problems confronted when adopting a different viewpoint. Victims' voices are muted by the adoption of either the

39. In the United States,

anti-discrimination laws fail to protect these individuals from workplace harassment that affects their unusual sensitivities because the current legal framework applied to most workplace harassment claims, hostile work environment[], includes an objective reasonableness standard ... The objective reasonableness standard is meant to preclude liability for conduct that would affect only a hypersensitive employee.

Frank S. Ravitch, *Hostile Work Environment and the Objective Reasonableness Conundrum: Deriving a Workable Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive Employees*, 36 B.C. L. REV. 257, 257-59, n.3 (1995).

40. RUBENSTEIN & DE VRIES, *supra* note 13, at 24.

41. See Leo Flynn, *Privileged Perceptions in Sexual Harassment Law*, IRISH L. TIMES 14, 15 (1993) (suggesting consideration of "a reasonable harasser test").

42. Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 801 (1994).

43. Flynn, *supra* note 41, at 16.

harasser's viewpoint or the reasonable person standard. The simple fact is that we are all unique, and people should not be deprived of their integrity simply because they are more sensitive than others. Furthermore, the notion of how a reasonable woman would perceive potentially harassing behavior rings of sexism.⁴⁴ The law against sexual harassment should "not inadvertently import into the law on sexual harassment the very assumptions it seeks to remove."⁴⁵ Finally, the argument that adopting an individual victim's viewpoint may result in the meticulous probing⁴⁶ of her life is without merit. Such probing is not necessary to determine what an alleged victim perceives as sexual harassment. If an effective system exists to resolve such disputes, most victims will have voiced their disapproval of the harasser's behavior.⁴⁷

The reasonable person standard induces more harm than it prevents because there are different ideas⁴⁸ about what constitutes sexual harassment. "The reasonable person standard is unjust when applied to hostile work environment sexual harassment because it represents a male perspective."⁴⁹ As stated before, the main trait of harassment is that the victim perceives it as offensive.⁵⁰ This is one of the main reasons that the Code of Practice, which is the implementation tool of the EC approach, provides that the complainant's perspective should be adopted when a sexual harassment charge is evaluated.

III. COUNTRIES' APPROACHES TO SEXUAL HARASSMENT PREVENTION

Although many countries ban sexual harassment, nations do not address the problem uniformly. Not all countries have adopted policies that evince serious commitments to ending sexual harassment.⁵¹ Moreover, many countries have not adopted legislation that explicitly prohibits sexual harassment.⁵² The EC has recommended such legis-

44. Flynn, *supra* note 41, at 17.

45. Flynn, *supra* note 41, at 17.

46. Flynn, *supra* note 41, at 17.

47. See *infra* notes 128-146 and accompanying text.

48. See RUBENSTEIN, *supra* note 10.

49. Forell, *supra* note 42, at 800.

50. See Earle & Madek, *supra* note 4, at 76.

51. See Carter, *supra* note 2, at 437. For example, Spanish and French legislation do not include compensation for victims. *Id.*

52. As an analysis of Ireland's policy against sexual harassment demonstrates, countries that attempt to prevent sexual harassment under the broad rubric of sex discrimination often encounter many difficulties. Specifically, the policies that are created to prevent sexual harassment are contingent upon judicial interpretations of sex discrimination, which often fail to offer the protection that victims of sexual harassment direly need. Carter, *supra* note 2, at 437-38.

lation,⁵³ but most of its Member States have not adopted it. There are some countries, however, such as New Zealand that specifically outlaw sexual harassment by statute. Such legislation better provides effective sexual harassment prevention; therefore, there is far less reliance upon the judicial branch to create the law.

The EC provides an illuminating lens with which to view the international community. It is a union of fifteen different countries: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, and the United Kingdom. "The European Community has played a crucial role in strengthening human rights, equality of opportunity and the gender dimension of development policy."⁵⁴ During its existence, the European Community has been cognizant of the unique obstacles faced by women, the majority gender of its population.⁵⁵ Ireland is particularly illuminating because it is typical of how most other Member States define sexual harassment as a form of sex discrimination.⁵⁶ It is also typical in not providing legislation to combat sexual harassment. New Zealand is similar to the EC in its approach to eliminating sexual harassment.⁵⁷ New Zealand is also interesting because of the protection of gender dignity and equality that exists outside of its sexual harassment laws.⁵⁸

The international community's strong commitment to preventing sexual harassment is shown by its policy considerations that entail more than just providing an avenue for lodging a harassment claim.⁵⁹ In fact, "[t]he thrust of the recommendations [of the EC] ... [has been] aimed at encouraging preventive measures designed to mini-

53. Sexual harassment is treated as a form of sex discrimination by the European Community. "That not all women are sexually harassed, or that the perpetrator may single out a particular woman for harassment, does not make the behaviour any less a sex discrimination issue. Equal treatment law focuses on whether a man was treated or would have been treated in the same way. Since the victim of sexual harassment would not be harassed were she a man, the unequal treatment is on grounds of her gender." RUBENSTEIN, *supra* note 10, at 10.

54. Mr. Padraig Flynn, "Look at the World through Women's Eyes" - *European Women's Lobby Plenary* - "Women Moving Towards the 21st Century Defining the Gender Contract," Address to the NGO Forum (Sept. 5, 1995), available in LEXIS, Inlaw Library, Rapid File [hereinafter *Address*].

55. COMMISSION OF THE EUR. COMMUNITIES, *supra* note 25.

56. See COMMISSION OF THE EUR. COMMUNITIES, *THE DIGNITY OF WOMEN AT WORK* 133-38 (1988).

57. See generally Virginia Grainer, *Refining the Regulation of Sexual Harassment*, 23 VICTORIA U. OF WELLINGTON L. REV. (1993); *Protection of the Dignity of Women and Men at Work: The Commission Adopts Recommendation and Proposes a Code of Practice*, COMMISSION OF THE EUR. COMMUNITIES, July 3, 1991.

58. See Charlotte L. Bynum, *Feminism and Pornography: A New Zealand Perspective*, 65 TUL. L. REV. 1131 (1991).

59. See *European Commission Recommendation*, *supra* note 7, at 72.

mize the risk of sexual harassment at work."⁶⁰ Moreover, "[a] Code of Practice giving practical guidance steps to prevent and deal with sexual harassment was also suggested[]" in one of the most recent pieces of legislation of the EC.⁶¹ The strength of the EC's recommendation will become clear upon analyses of the policies of New Zealand, Ireland, other Member States, and the EC.

A. New Zealand

Considering its stringent stance against pornography relative to other nations, one would expect that New Zealand would have more exacting laws prohibiting sexual harassment than most countries.⁶² The legislation that exists to prevent sexual harassment, however, is not as effective as it could be. Unlike most countries, New Zealand proscribes sexual harassment outside of the rubric of sex discrimination. Although its approach is unique⁶³ and different from those adopted by other countries like the United States and the United Kingdom,⁶⁴ New Zealand's policy demonstrates a strict requirement for eliminating workplace harassment, but it does not sufficiently address it.

A lack of education and openness about sexual harassment in New Zealand hinders the nation's attempts to combat perpetrators of sexual harassment.⁶⁵ This lack of openness results from the often

60. *European Commission Recommendation*, *supra* note 7, at 70.

61. *European Commission Recommendation*, *supra* note 7, at 70.

62. See, e.g., Bynum, *supra* note 58; James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153 (1993) (explaining that New Zealand has adopted the MacKinnon-Dworkin definition of pornography, which was developed to allow women to sue purveyors of pornography, and which was adopted for that purpose in Minnesota. Its three elements are graphic sexual explicitness, the subordination of women, and a depiction of one of a long list of sexual acts. Hence, it can be applied broadly and powerfully.)

63. "[T]he New Zealand approach is unique because the legislation attacks pernicious conduct at the level of the employment contract and complements the protection afforded by the New Zealand anti-discrimination laws." Martin Vranken, *Demise of the Australian Model of Labour Law in the 1990's*, 16 COMP. LAB. L. 1 (1994) (describing the background of the Employment Contracts Act of 1991).

64. See REVIEW, *supra* note 33, at 123-24.

Both United Kingdom and United States case law show a tendency to move away from the core concepts of discrimination law, raising questions as to whether this is the correct basis for any action. The fundamental concern of discrimination law has been to provide redress where less favourable treatment has been meted out to a person on the grounds of the gender of the victim ... This means that such behaviour should more properly be dealt with by acknowledging that sexual harassment is unacceptable, regardless of whether the victim has been treated differently from a member of the opposite gender ... In the employment context this would mean that sexual harassment would remain an employment offence ...

Dine & Watt, *supra* note 16, at 343; see also Vranken, *supra* note 63 (discussing the model of labor law in New Zealand).

65. A major problem resulting from lack of education and openness is that many people

mistaken identification of sexual harassment with sexual activity, which, in turn, is typically treated as a private family matter. Thus, harassment cases involve only a minimal amount of public disclosure.⁶⁶ As a result, harassers have been given the same sacrosanct privacy⁶⁷ that has surrounded legitimate sexual activity.⁶⁸ This is self-defeating, however, since sexual harassment flourishes in private. Hence, exposing the problem becomes part of the cure.⁶⁹

are ignorant about sexual harassment. See Grainer, *supra* note 57, at 128 (stating that "[p]art of the problem is that behaviour that is considered objectionable by one person may be considered to be socially acceptable 'normal banter' or 'just lighthearted fun' by another. Alleged harassers have frequently claimed to be surprised that complainants have found their behaviour offensive."); see also RUBENSTEIN, *supra* note 10, at 8 (explaining that "[b]ecause men are rarely sexually harassed, it is often difficult for a man to understand the feelings of revulsion and violation unwanted sexual attention can produce. This can lead to men trivialising sexual harassment and effectively condoning it by others, even if they are not harassers themselves.")

66. Such disputes are not private. See RUBENSTEIN, *supra* note 10, at 4.

Sexual harassment at work is not a 'private' dispute between employees. Employers have a legal responsibility to provide a safe and healthy working environment. Employers are potentially legally liable for any sexual harassment in the workplace, whether or not it is done with the employers' knowledge or approval. All harassment in the workplace, by definition, makes use of facilities and opportunities granted by the employment relationship. Where the harassment is by a supervisor or manager, it exploits the authority granted by the employer.

RUBENSTEIN, *supra* note 10, at 4.

67. Resolution of these sexual harassment cases often requires the harasser to stop the offensive behavior in exchange for the victim's silence. Grainer, *supra* note 57, at 135. Of course, the notion of confidentiality is not confined to New Zealand's approach. In fact,

[t]he Commission keeps a close watch on the problem of sexual harassment in the general context of maintaining a working environment that respects the dignity of its staff and is conducive to the smooth running of its departments ... [However], the Commission is ... not at liberty to disclose further details on [charges of sexual harassment against members of the Commission]; to do so would be contrary to the rules, especially the rules on confidentiality which protect the members of staff.

1994 O.J. (C 300) 4.

68. See Grainer, *supra* note 57, at 133. There are some people who would contend that such privacy is necessary, especially given the nature of inquiry directed at the victims of sexual harassment. Complete privacy, however, is not necessary to limit the scope of questioning a victim must endure. In fact, Michael Rubenstein, who fervently believes that sexual harassment is not a private concern, thinks very little of a system that would take into account the appearance and behavior of the person harassed, and then ask that person to "air all this in public so that virtually everyone in the company [knows] what happened and made their own assessment as to whether [he or she was] the type of [person] who really welcomed that sort of attention[.]" RUBENSTEIN, *supra* note 10, at 8. Moreover,

[a]lthough formal procedures are necessary, in practice many women will prefer to first attempt to resolve sexual harassment by informal means, such as by simply asking or telling the offender to stop. This may be particularly appropriate where the harasser is a co-worker or subordinate and where the behaviour is of a comparatively low level of severity.

RUBENSTEIN, *supra* note 10, at 21.

69. Exposing the problem facilitates both the victim and the harasser to get the help they require. See Grainer, *supra* note 57, at 134.

Under the New Zealand Employment Contracts Act of 1991, a series of remedies are available to a successful complainant. The victim can be reimbursed for lost wages resulting from the grievance; can be reinstated if he or she loses the job as a result of the grievance; and can be compensated for embarrassment, loss of dignity, and injury to the victim's feelings.⁷⁰ Additionally, recommendations are issued to "the employer concerning the action the employer should take [with] respect [to] the person who made the request or was guilty of the behaviour..."⁷¹ Furthermore, employers are held vicariously liable for co-worker harassment.⁷² The Act, however, only recognizes conduct amounting to sexual harassment if it has had a detrimental effect on the employment or the performance of the complainant.⁷³ This standard is often very difficult to demonstrate.⁷⁴

The New Zealand Crimes Act of 1961 also penalizes sexual harassers.⁷⁵ The Act specifically prohibits one from using workplace authority as an inducement for sexual favors, either by explicit or implicit threats.⁷⁶ The Act protects those people whose jobs are threatened by their bosses if they do not comply with their sexual requests.⁷⁷ It outlines violations such as pressing, urging, forcing, or inducing action through the improper use of the accused's workplace authority.⁷⁸ Again, an employee must be denied a job-related benefit in order to prove a violation.

Harassed employees may seek legal redress in New Zealand by claiming unfair dismissal. This is a remedy generally available to those who suffer retaliatory discharge.⁷⁹ "[T]he 1991 [Employment Contracts] Act does not purport to abolish the common law action for wrongful dismissal or breach of an employment contract, nor does it contain anything obliging an employee to forgo such common law rights and remedies as he or she may possess."⁸⁰

70. Employment Contracts Act, 22 N.Z. Stat. § 40 (1991).

71. Actions may include transferring, disciplining, or rehabilitating the perpetrator. *See id.*

72. *Id.*

73. *See New Zealand: Behaviour Short of Sexual Harassment*, NEW ZEALAND HERALD, June 2, 1992, at 4 (explaining that the determination of whether there was a detrimental effect on the employee's productivity is to be determined by the adjudicator of the case).

74. *See id.*

75. Crimes Act, 43 N.Z. Stat. § 129A (1985).

76. *Id.*

77. *See Brewer v. R.*, 2 N.Z.L.R. 229 (1994) (holding for a female employee whose job was threatened by her boss because she did not perform oral sex on him).

78. *See id.* at 237.

79. *See Ogilvy & Mather, Ltd. v. Turner*, 1 N.Z.L.R. 641 (1994) (holding for a wrongfully terminated employee who sued under the New Zealand Employment Contracts Act of 1991).

80. *Id.*

Although there are explicit legislative proscriptions of sexual harassment in New Zealand, the proceedings by which grievances are resolved are not conducive to the elimination of the problem. A lack of public awareness and relevant legislation⁸¹ are only compounded by the fact that many women who are victims of sexual harassment are not in a position to tell their harassers to stop.⁸² Furthermore, the legal structure is perceived as too heavily weighted against complainants,⁸³ making successful suits difficult at best.

B. Ireland

Like most EC member states, Ireland recognizes sexual harassment as a form of sex discrimination.⁸⁴ Although Ireland prohibits sexual harassment in the workplace, no legislative edict expressly states this. The judiciary, however, implied that sexual harassment is outlawed by the Employment Act of 1977,⁸⁵ which prohibits sex discrimination, generally.

Ireland places sexual harassment under the broad rubric of sex discrimination. As such, Ireland's system is much like that of the United States⁸⁶ and the United Kingdom.⁸⁷ Unlike these countries,

81. See Grainer, *supra* note 57, at 136.

To increase public awareness and contribute to the prevention of the problem of sexual harassment in the workplace, the EC's Economic and Social Committee believes that it must first be shown that this problem has been a taboo subject for many years, as well as having been underestimated, for the sake both of the people concerned and the nature of the behaviour.

EC: *ESC Calls for More Binding Instrument to Deal with Sexual Harassment in the Workplace*, REUTER TEXTLINE, Oct. 31, 1991.

82. See *New Zealand: Sexual Harassment Incidents at Work on the Increase*, NEW ZEALAND HERALD, March 11, 1991, at 5.

83. See *id.*

84. "Sexual harassment amounts to gender discrimination because it adversely affects persons of one sex in a manner which persons of the other sex would not be affected." Flynn, *supra* note 41, at 14.

85. Leo Flynn, *The Limits of Sexual Harassment Liability*, 12 IRISH L. TIMES & SOLICITORS' J. 215, 215 (1994). Flynn explains

[i]n 1985 the Labour Court made it clear that sexual harassment will be treated as coming within the scope of the 1977 Act. It held ... that: 'freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect[] ... within the terms of the Employment Equality Act of 1977.'

Id.

86. The United States proscribes sexual harassment based upon Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000(e) (1988). See Nicolle R. Lipper, *Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States*, 13 COMP. LAB. L.J. 293 (1992) (explaining that the United Kingdom adopted the Sex Discrimination Act of 1985, which closely resembles the United States Title VII laws).

87. The United Kingdom prohibits sexual harassment under its Sex Discrimination Act of 1985. See generally Lipper, *supra* note 86.

however, Ireland has a narrow definition of vicarious liability for employers when workplace harassment occurs.⁸⁸ "Since sexual harassment is a form of employee misconduct ... [and since] sexual harassment is a risk to health and safety, employers have a responsibility to take steps to minimize the risk as they do with other hazards."⁸⁹ For Ireland to successfully combat sexual harassment, the employer's responsibility to prevent it must be broadened.

Another problem confronted by alleged victims in Ireland is that the Irish Labour Court investigates the complaint using the accused's perspective.⁹⁰ In *A Company v. A Worker*, the Irish Labour Court "chose to privilege the perception of the male director[]" against whom the claim of sexual harassment was filed.⁹¹ The Labour Court accepted the fact that the woman was harassed and others may very well have been disturbed by the alleged harasser's comments.⁹² How-

88. See *The Health Board v. BC and the Labour Court*, No. 92-685, slip op. at 8 (Ir. H. Ct. Jan. 19, 1994). The court explains,

[i]n the absence of [an] express statutory provision the law in this country in relation to the liability of an employee for the tortious acts (including statutory torts) of his employee is perfectly clear - an employer is vicariously liable where the act is committed by his employee within the scope of his employment...

Id.

The most disturbing aspect of the decision is that the court stated that it could not "envisage any employment in which [the defendants] were engaged in respect of which a sexual assault could be regarded as so connected with it as to amount to an act within its scope." *Id.* It seems that Irish courts would inevitably have the same problem with sexual harassment not being inexorably wed to a person's job description.

89. MICHAEL RUBENSTEIN, *THE DIGNITY OF WOMEN AT WORK* 65 (1988). "Sexual harassment at work is a problem for women but it is not a 'women's problem.' Sexual harassment at work is an employer's problem." *Id.* at 65.

In addition, [e]ven if the act of sexual harassment is unknown to the employer or is outside the scope of the supervisor's authority, in such circumstances the supervisor, in order to accomplish his purpose is using the means given to him by the employer. On this reasoning, by giving a manager or supervisor authority to make employment decisions affecting employees, the employer accepts the responsibility to remedy any harm caused by the unlawful exercise of that authority ... A supervisor is also the employer's agent for the purpose of the day-to-day supervision of the working environment and to ensure a safe workplace.

Id.

90. See generally RUBENSTEIN, *supra* note 10.

By its nature, acts of sexual harassment are often perpetrated where there are no witnesses, so that a case may turn on whose word is to be preferred. In addition, defendants will often argue that the conduct was welcome or provoked, that the complainant imagined it or distorted it because she suffers from emotional problems or that she suffered no real injury because she is sexually promiscuous.

RUBENSTEIN, *supra* note 10, at 26-27.

91. See Flynn, *supra* note 41, at 15.

92. See Flynn, *supra* note 41, at 14.

ever, after adopting the harasser's perspective, the Court "did not find any element of sexual connotation in the exchanges."⁹³

Like some of its sister states in the EC, Ireland does provide redress for victims through laws prohibiting unfair dismissals. Unfair dismissal laws provide an effective means of redress⁹⁴ and aid in the prevention of sexual harassment. As a result, employees are more inclined to file charges of sexual harassment because they are protected from retaliatory discharge. The Ireland Unfair Dismissal Act of 1977 provides a vehicle by which sexually harassed employees can seek remedies.⁹⁵ "In Ireland ... the law on unfair dismissal provides that the employer must prove that the dismissal was fair. Totally unjustified litigation is discouraged by legal provisions which allow costs to be awarded against applicants who bring 'frivolous or vexatious' applications."⁹⁶ On the other hand, the assessment of costs against those filing frivolous applications may discourage people from filing legitimate claims. Because of the perceived difficulty of proving their cases, victims may not want to risk the legal costs associated with bringing the complaint.

Moreover, part-time employees, the majority of whom are female,⁹⁷ do not enjoy the same protections afforded to full-time employees. In 1991, the Worker Protection (Regular Part-Time Employees) Act narrowed the difference between the two classes of workers, part-time and full-time,⁹⁸ but the difference is still pronounced. The 1991 Act diminished the number of hours that an employee had to work to be covered by discrimination laws.⁹⁹ Maintaining an hourly threshold,¹⁰⁰

93. See Flynn, *supra* note 41, at 16.

94. See Carter, *supra* note 2, at 438. Carter states,

[u]nfair dismissal laws provide victims of sexual harassment effective means of redress in some Member States, but their application is limited to victims who leave their jobs ... It is possible, for example in Belgium, to quit one's job voluntarily due to sexual harassment, then claim compensation under unfair dismissal laws.

Id.

95. See Unfair Dismissals Act, No. 10 (1977). The Act does not include sexual harassment charges. In fact, "the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal if it results wholly or mainly from one or more of the following: ... *the employee's actual or threatened civil or criminal charges against the employer ...*" *Id.* at § 6 (emphasis added).

96. COMMISSION OF THE EUR. COMMUNITIES, IMPLEMENTATION OF THE EQUALITY DIRECTIVES 42-43 (1987).

97. See Brian Wilkinson, *Part-time Workers in Ireland*, 20 IND. L.J. 224, 224 (1991).

98. *Id.* at 224.

99. *Id.*

100. Ireland seems to maintain this threshold for economic reasons, refusing to "burden" employers with the state's regulations that could possibly dissuade them from hiring part-time workers. Similarly, in the United States,

however, still creates a problem since "the majority of part-time workers ... in Ireland are women."¹⁰¹ Aside from this Act, there are seven other acts that protect employees.¹⁰² However, part-time employees are not covered under any of them. Thus, part-time workers lack full protection in the workplace under the law.

Even the workers who are included under protective policies rarely file sexual harassment claims.¹⁰³ The low rate of sexual harassment suits may be a result of the unawareness of Irish employees as to what constitutes sexual harassment.¹⁰⁴ Employees at all levels must be educated about the legal protections that exist, in order to adequately protect their rights.¹⁰⁵

[n]ot all employers are subject to Title VII regulation. For purposes of the act, an employer must have fifteen or more employees and be engaged in industry affecting commerce. While the legal concepts of 'commerce' and 'industry affecting commerce' are quite broad and reach many so-called 'Mom and Pop' operations; nevertheless, such operations will escape employment discrimination regulation under the Act if the numerical threshold is not met.

JOSEPH M. PELLICOTTI, TITLE VII LIABILITY FOR SEXUAL HARASSMENT IN THE WORKPLACE 10 (1988).

101. See Wilkinson, *supra* note 97, at 226.

102. See Wilkinson, *supra* note 97, at 226.

103. This is despite the fact that many of the violations are prominent. See Corcoran, *supra* note 21, at 12 (stating that there are few cases brought in Ireland despite judicial recognition that sexual harassment is unlawful).

104. Corcoran explains that

[a]n Irish study done by the Civil and Public Service Union (CPSU) in 1990 found that 12 percent of their workforce had experienced sexual harassment The low[] rate produced by the CPSU study may reflect the fact that respondents were not given examples of sexually harassing behaviour in their questionnaire[s].

Corcoran, *supra* note 21, at 12. Furthermore, "[i]t is difficult to say how extensive a problem sexual harassment in the workplace is in Ireland because the precise prevalence of this form of sex discrimination is not clearly documented." Flynn, *supra* note 41, at 14. Unfortunately, "the term 'sexual harassment' itself is not always understood. Therefore, fewer women will say that they have experienced 'sexual harassment' than will say that they have experienced 'unwanted sexual advances.'" RUBENSTEIN & DE VRIES, *supra* note 13, at 12.

105. See Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L. J. 1177, 1199, n.81 (1990) (stating "[s]exual harassment is often characterized as harmless joking, but this is not how it feels to women Several studies confirm that most women find sexual harassment whether in the form of physical touchings or verbal abuse an unpleasant, intimidating, and humiliating experience."). See also Forell, *supra* note 42 (arguing for a reasonable woman standard and perspective in certain sexual harassment cases).

In fact, the shortcomings of Ireland's system are manifest in its recent deliberations on reforming its harassment policy. See, e.g., *EC News in the European Press on Monday, March 22*, THE REUTER EUR. COMMUNITY REPORT, Mar. 22, 1993 (stating that Ireland's "Minister for Equality and Law Reform Mervyn Taylor [considered] the best means of adopting the EC Code of Practice on Sexual Harassment in the workplace[]" in 1993). The Employment Equality Agency and the Council for the Status of Women have urged Ireland to implement the EC Code of Conduct on Sexual Harassment. *EC News in the European Press on Friday, March 19*, THE REUTER EUR. COMMUNITY REPORT, Mar. 19, 1993.

C. Other Member States

Surveys show that sexual harassment is a problem in almost all the Member States.¹⁰⁶ Yet few have laws prohibiting sexual harassment.¹⁰⁷ The fact that sexual harassment is an unavoidable and unpleasant part of employment for millions of women in the EC¹⁰⁸ should necessitate the passage of binding regulations.

Member States, however, evidence a concern about eliminating sexual harassment by providing for safe and healthy working environments.¹⁰⁹ This safe and healthy work environment should not be tainted by sexually harassing behavior since sexual harassment is neither "safe" nor "healthy" for its employees.¹¹⁰ The Member States' policy is faulty, however, since health and safety laws do not offer a practical solution to the problem of sexual harassment in the workplace.¹¹¹ In addition, the domestic laws of the Member States that exist often do not offer victims adequate legal redress.¹¹² Moreover, the legal mechanisms in most of the countries are different with respect to the treatment of EC legislation.¹¹³ Therefore, there will not be a consistent application of laws in the Member States unless the EC passes binding legislation.¹¹⁴

Levels of consciousness about the problem of sexual harassment vary greatly in the Member States. This contributes to the ineffectiveness of policies designed to prevent sexual harassment.¹¹⁵ The gravity of the problem is just as severe in other Member States as it is in Ireland and the rest of the world.¹¹⁶ The seriousness of sexual harassment further exacerbates these countries' ineffectiveness in

106. See RUBENSTEIN & DE VRIES, *supra* note 13, at 11.

107. See CARTER, *supra* note 2, at 431.

108. See RUBENSTEIN & DE VRIES, *supra* note 13, at 11.

109. See RUBENSTEIN & DE VRIES, *supra* note 13, at 28 (stating, in fact, "[m]ost Member States impose a legal duty upon employers to provide a safe and healthy working environment").

110. See RUBENSTEIN & DE VRIES, *supra* note 13, at 28.

111. See RUBENSTEIN & DE VRIES, *supra* note 13, at 28 (arguing that "health and safety law remains a theoretical rather than a practical remedy"). As such, laws that practically address the problem must be adopted by the Member States.

112. See Carter, *supra* note 2, at 431.

113. See Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 536, n.150 (1993). For example, "[t]he Constitution of the Netherlands gives EC law (and other international law) precedence over all other domestic laws. West Germany and Italy, on the other hand, do not give EC law precedence over municipal law." *Id.* at 536, n.150.

114. See *infra* notes 147-154 and accompanying text.

115. See RUBENSTEIN & DE VRIES, *supra* note 13, at 11-12.

116. See Carter, *supra* note 2, at 431.

addressing sexual harassment prevention.¹¹⁷ Because a sovereign's commitment to equality between the sexes and a commitment to fostering work environments free from sexual harassment are inextricably linked, the absence of one implies the absence of the other. Without a foundation of equality in the workplace,¹¹⁸ the attendant existence of rampant sexual harassment¹¹⁹ is not astonishing.

With the addition of Sweden and Finland to the European Community, the EC has begun to make equality a priority.¹²⁰ As a result of this increased commitment, more powerful efforts to prevent sexual harassment are being utilized. These efforts include the establishment of complaint procedures and disciplinary sanctions for harassers.¹²¹

D. The EC (Model)

1. The EC's Commitment to Ending Gender Inequality

The EC's effort to eliminate sexual harassment is pre-dated by its goal of ending gender inequality.¹²² Cases arising under the Equal Treatment Directive, which demands equality between the sexes, have been decided by the European Court of Justice.¹²³ The EC has

117. See *Spain: Minister for Employment, Sr. Manuel Chaves, Has Announced Measures to Improve the Status of Women at Work*, LA VANGUARDIA (Spain), Ma. 12, 1988, at 59. For example, "[t]he number of working women has risen in Spain by [at least] 32% since 1985, [and]... S[enior] Chaves said that considerable inequality still existed between men and women in the workplace." *Id.*

118. To eliminate sexual harassment in the workplace, programs must be implemented with the goal of eradicating the "general attitudes which perpetuate the view of women as sexual objects rather than equal members of the workforce." RUBENSTEIN & DE VRIES, *supra* note 13, at 34.

119. See *Some 84% of Women at Work in Spain Suffer From Sexual Harassment and 30% are Subject to Serious Harassment, According to a Study Undertaken by the Trade Union UGT. It is the First Such Study to be Carried out in Spain*, EL PAIS, July 28, 1987.

120. Both Sweden and Finland have an impressive equality record and their addition has made a positive impact on equality within the EC. See *Address*, *supra* note 54, at *2.

121. "In Belgium ... a Royal Decree of 18 September 1992 target[ed] the prohibition of sexual harassment at the workplace. Briefly, employers [had to] ensure that their workers kn[e]w that sexual harassment [was] forbidden, provide support for victims, establish a complaints procedure, and introduce disciplinary sanctions for offenders." *Legislation on Sexual Harassment*, 12 EUR. INDUS. REL. REV. 227, 227 (1992).

122. See Sandra J. Libeson, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L.J. 358 (1995); Ian Forbes & Geoffrey Mead, *Comparative Racial Discrimination Law: Measures to Combat Racial Discrimination in Employment in the Member States of the European Community*, 14 COMP. LAB. L.J. 403 (discussing the EC's focus on racial equality).

123. See SACHA PRECHAL & NOREEN BURROWS, *GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY* 2 (1990) (stating that "concepts relating to discrimination and equality, and in particular the principle of non-discrimination, are central to European Community law").

fought inequality between men and women in three different stages. Currently the EC is recommending legislation in its third phase, the "Third Action Programme on Equal Opportunities for Women and Men (1991-1995)."¹²⁴

As mentioned in the discussion on New Zealand's strategy against harassment,¹²⁵ a sovereign's commitment to ending sexual harassment is linked to its efforts of ensuring legal equality for the sexes. Laws preventing sexual harassment

and the apparatus by which [they are] administered ... play a vital part in sustaining the notion of equality as between the sexes; [however,] the law cannot do the whole job, since people's attitudes¹²⁶ and cultural influences will always overlay it, but it is highly instrumental in shaping behaviour and expectations.¹²⁷

Thus, the EC should continue to increase its efforts to adopt a uniform code of laws aimed at eliminating sexual harassment.

2. *The Nature of the EC Code Preventing Sexual Harassment*

With a commitment to equality between the sexes buttressing its efforts, the EC passed a non-binding code proscribing sexual harassment in 1991 as an annex to a Council of Ministers' resolution providing for the protection of women and men at work.¹²⁸ The Code defines what constitutes sexual harassment with great specificity.¹²⁹ In addition, the Code encourages employers to inform all of their employees as to their rights and the meaning of sexual harassment.¹³⁰ Moreover, the Code encourages tribunals to adopt a position of impartiality and objectivity in investigating the harassment charge.¹³¹ A handbook is attached to the Code. Its purpose is to assist employers in identifying and eliminating harassment in the workplace.¹³² The

124. See *Protection of the Dignity of Women and Men at Work: The Commission Adopts a Recommendation and Proposes a Code of Practice*, COMMISSION OF THE EUR. COMMUNITIES, July 12, 1991.

125. See *supra* notes 62-83 and accompanying text.

126. "Despite the publicity it has received, many employees do not know what sexual harassment is. And even if that employee knows, ... that knowledge must be accompanied by a sensitivity as to how others might perceive behaviour." RUBENSTEIN, *supra* note 10, at 24. Furthermore, it is often the case that "sexual harassment is in the eye of the beholder[.]" which means that people may have very different ideas as to when it has been perpetrated. Thus, people's differing attitudes shape and define what sexual harassment is. Corcoran, *supra* note 21, at 12.

127. EVELYN ELLIS, EUROPEAN COMMUNITY SEX EQUALITY LAW 1 (1991).

128. 1992 O.J. (L 49) at 3.

129. See ELLIS, *supra* note 127.

130. 1992 O.J. (L 49) at 5-6.

131. *Id.* at 7.

132. See *EC News in the European Press on Monday*, THE REUTER EUR. COMMUNITY REP., July 19, 1993, at 7. The Commission adopted a recommendation on the protection of the dignity of

EC has recommended laws that specifically proscribe sexual harassment. Those laws clearly describe what constitutes harassment, as opposed to relying on judicial interpretation of the law. This proposed EC law is not forthcoming.

There seems little doubt that most forms of sexual harassment in the workplace are forbidden by Article 5 of the Equal Treatment Directive: to subject a woman employee to sexual harassment is *not* to grant her equal working conditions to those enjoyed by her male colleagues, without discrimination on grounds of sex. Rubenstein found, however, that at present in the majority of Member States of the EC, even though they have passed national legislation which ostensibly carries out their obligations under the Equal Treatment Directive, the principle that sexual harassment constitutes unlawful discrimination has yet to receive recognition by the courts.¹³³

The EC treats sexual harassment as a form of sex discrimination, which seems problematic, given that Member States' courts are not embracing the concept. This problem could be corrected if the legislature would define sexual harassment, in accordance with EC recommendations. The Code of Practice against harassment states that the reason for treating sexual harassment as a form of sex discrimination is "because the gender of the recipient is the determining factor in who is harassed."¹³⁴ There is much criticism, however, of this method of requiring "disparate treatment of the sexes where an action is based on sexual harassment."¹³⁵ Some commentators believe that discrimination laws do not provide adequate protection against sexual harassment, since

[h]arassment may occur in situations which are non-discriminatory and non-sexual ... [This] distorts the real problem ... [S]exually explicit behaviour may be offensive and damaging even if no discrimination occurs ... [This policy is thus] inappropriate and the tendency of the courts to outgrow the original base in their decisions points to its inadequacy.¹³⁶

women and men at work on November 27, 1991. 1992 O.J. (L 49).

133. ELLIS, *supra* note 127, at 149 (emphasis added).

134. 1992 O.J. (L 49) at 4.

135. Dine & Watt, *supra* note 16, at 349, stating that

different but equivalent behaviour towards the sexes has customarily not been held to amount to discrimination ... This is not a satisfactory approach where sexual harassment is concerned, because no claim would arise where both sexes were oppressed equally. If this approach were to be rigidly adhered to in sexual harassment cases, it would amount to a denial of justice.

Dine & Watt, *supra* note 16, at 350.

136. Dine & Watt, *supra* note 16, at 352.

The argument, however, as it relates to the EC's recommendation, is premised upon a weak foundation. Although sexual harassment is subsumed under the broad rubric of sex discrimination by the EC, such a description does not limit the reach of the Code. This criticism of the Code's approach might have merit if the Code did not specifically state what constitutes sexual harassment; however, it does.¹³⁷ Some of those who criticize the Code's approach mistakenly believe that harassment cannot be found unless a harasser treats a person differently because he or she is a member of the opposite sex. A plain reading of the Code negates this interpretation, because a person could theoretically sexually harass a man and a woman simultaneously, or even harass someone of the same sex.

Another positive aspect of the Code is that it encompasses an expansive notion of respondeat superior,¹³⁸ unlike the Code in Ireland.¹³⁹ This feature of the Code is much like the code in New Zealand.¹⁴⁰ For the employer to be held responsible, it does not matter who actually perpetrates the sexual harassment.¹⁴¹ Such a mechanism encourages an employer to actively attempt to prevent sexual harassment. Employers, primarily motivated by profit-maximization, will not take preventive action unless their own business interests are threatened. Therefore, stringent laws must be enacted to force employers to act in order to prevent the further victimization of employees.

Another very appealing attribute of the EC's approach is that it safeguards against the filing of frivolous charges. Although the system is weighted heavily in favor of alleged victims, the complainant

137. The Code states:

[A] range of behaviour may be considered to constitute sexual harassment. It is unacceptable if such conduct is unwanted, unreasonable and offensive to the recipient; a person's rejection of or submission to such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training or to employment, continued employment, promotion, salary or any other employment decisions; and/or such conduct creates an intimidating, hostile or humiliating working environment for the recipient ... The essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive.

1992 O.J. (L 49) at 4 (footnote omitted).

138. 1992 O.J. (L 49) at 5 (stating that "[s]ince sexual harassment is a form of employee misconduct, employers have a responsibility to deal with it as they do with any other form of employee misconduct ...").

139. See *supra* notes 84-105 and accompanying text.

140. See *supra* notes 62-83 and accompanying text.

141. 1992 O.J. (L 49) at 5 (stating that "all employees have a right to be treated with dignity ...").

shoulder the major burden of proof.¹⁴² "The initial burden is generally on the complainant. This implies that the applicant must collect evidence to establish her or his case. In this respect two major [hurdles] exist: knowing what evidence will be necessary to prove discrimination and actually obtaining it."¹⁴³ Thus, the burden of proof functions as a major impediment to people filing frivolous charges of sex discrimination.

Note, however, that the EC's approach has valid criticisms. Because the investigation of a harassment charge is conducted from the recipient's viewpoint, it is said to be a detriment.¹⁴⁴ If the victim fails to inform the harasser that he or she has been offended, he or she might be dissuaded from filing a charge.¹⁴⁵ This article does not contend that the EC approach is perfect; it merely demonstrates why it is better than other policies that currently exist. Therefore, the question is not whether adopting the victim's viewpoint is imperfect. Instead, the question is how much more protective and responsive a system of prevention becomes when such a viewpoint is adopted. The answer is that the system becomes more conducive and responsive to the needs of those who are harassed.¹⁴⁶

3. *The Non-binding Nature of the EC Code on the Member States*

The EC passes binding and non-binding legislation in different forms such as directives, regulations, decisions, and recommendations.¹⁴⁷ Only the regulations and directives are binding; the former have to be adopted in their entirety, while the latter allow Member States to adopt their own legislation.¹⁴⁸ In addition, the EC's Commission litigates violations of both regulations and directives committed

142. See, e.g., ELLIS, *supra* note 127, at 156-59 (describing the burdens of proof required before and after a *prima facie* case has been made by the plaintiff).

143. PRECHAL & BURROWS, *supra* note 123, at 296 (footnotes omitted).

144. See Dine & Watt, *supra* note 16, at 358.

145. See Dine & Watt, *supra* note 16, at 357-58, stating that

[t]he concept of unwanted behaviour adopted in the European Commission's Code of Practice appears to place a duty on the recipient of sexual attentions to indicate whether such attentions are unwelcome. Failure to so indicate may prevent such attention from being classified as harassment ... [T]he burden of indicating the unwantedness of the behaviour is placed on the victim. This may leave open the problem of intimidation of a victim who is frightened to indicate that the attentions are unwelcome. [Also,] [t]here are practical problems; for example, what signals must the victim send in order to make 'clear' that the attentions are unwelcome? Must an official complaint be made?

Dine & Watt, *supra* note 16, at 357-58.

146. See generally RUBENSTEIN & DE VRIES, *supra* note 13.

147. See IAN THOMSON, *THE DOCUMENTATION OF THE EUROPEAN COMMUNITIES: A GUIDE* 18 (1989).

148. See *id.*

by a country. There is much criticism, however, directed toward EC policy that is effected through directives. Although "the European Court has held [Case 322/88] that National Courts are bound to take the Recommendation into consideration in order to decide disputes submitted to them, in particular ... where they are designed to supplement binding Community measures[.]"¹⁴⁹ the EC should force the Member States to adopt regulations that proscribe harassment via legislation similar to the EC Code of Practice.

There is much criticism of the Council for failing to create binding regulations regarding sexual harassment.¹⁵⁰ Some contend that the only goal of the Commission's proposal is to change men's attitudes, which is insufficient.¹⁵¹ Also, since most of the Member States do not consider harassment to be covered by sex discrimination law, no directive mandates that they adopt legislation proscribing it. Furthermore, "[o]nly in a few cases can the questionable behaviour be qualified as sexual harassment as described in EEC Directive 76/207 on equality between the sexes."¹⁵²

The EC needs to pass regulations that will automatically bind its Member States since "[d]irectives are a relatively weak form of Community legislation ... [D]irectives are binding 'as to the result to be achieved' but it is left to the national authorities to choose the 'form and methods'..."¹⁵³ In fact, it has been argued there are major shortcomings "in the institutional arrangements for enforcing the existing equality Directives."¹⁵⁴

4. *The Possibility of an EC Sexual Harassment Directive*

Even though a directive is not as powerful as a regulation,¹⁵⁵ the EC is currently contemplating the enactment of a directive that would

149. RUBENSTEIN & DE VRIES, *supra* note 13, at 9.

150. See *European Parliament Backs Commission on Sexual Harassment*, EUR. SOCIAL POLICY, no. 13, Nov. 16, 1991.

Sexual harassment is the most frequent and least publicised occupational hazard, according to Christine Crawley [sic], Labour MEP ... Although a Directive would have had more teeth with which to fight sexual harassment, Christine Crawley expressed support of the Commission's initiative to promote dialogue in companies and to introduce procedures to settle disputes involving sexual harassment.

Id.

151. See *id.*

152. *Proposal for a Strategy of Social Security Convergence*, EUR. INFO. SERV., July 1, 1991.

153. Christopher McCrudden, *The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements*, 13 OXFORD J. OF LEGAL STUD. 320, 323 (1993) (citing Article 189(3) of the EEC Treaty).

154. *Id.* at 363 (citing RUBENSTEIN, *supra* note 10).

155. Although the directive is not as effective as the regulation, it remains a very powerful

proscribe sexual harassment.¹⁵⁶ This further proves that the Member States' current policies are ineffective, because when the EC contemplates enacting a directive, the "Commission decide[s] that it [is] necessary to test the adequacy of existing national remedies in the courts before a new [d]irective c[an] be considered[.]"¹⁵⁷ The EC's commitment to enacting a directive prohibiting sexual harassment coincides with its recognition that current legislative policies proscribing sexual harassment can be much more effective.¹⁵⁸

IV. CONCLUSION

Horace Mann, an nineteenth century educator, said that education is society's great equalizer, and educating people about sexual harassment is integral to creating and preserving gender equality. One of the major problems in the international community regarding the prevention of sexual harassment is the fact that people are not fully cognizant of its definition. In addition, many of the systems designed

device, as demonstrated by the Council Directive of February 9, 1976, on the implementation of the principle of equal treatment for men and women regarding access to employment, vocational training and promotion, and working conditions. 1976 O.J. (L 39) 1. In addition, the Member States were given four years to examine which of their laws conflicted with this directive. *Id.* art. IX, § 1.

Most of the Member States promptly complied with the terms of the 1976 Directive. Belgium's constitution, decrees, and laws, all of which pre-date 1981, functioned to effect the directive. Denmark passed laws in 1978 to comply with the directive. The Federal Republic of Germany passed a law in 1949 which functioned as part of the foundation of sex equality and passed other laws between 1969 and 1980 that effected the EU 1976 directive. France's 1946 Constitution and various laws passed between 1975 and 1982 helped to effect the 1976 Directive. Ireland's Employment Equality Act of 1977 was passed to effect the 1976 Directive, while Italy in 1977 and Luxembourg in 1981 did the same. The Netherlands did so in 1981, the UK in 1975-76, and Greece after 1981 (it joined the EU in 1981). FRANCOISE REMUET-ALEXANDROU, *COMMUNITY LAW AND WOMEN* 34-35 (1983).

However, all of these states had formal complaints issued to them for their failure to comply fully with the 1976 Directive. Many of the violations were in reference to Member States limiting the protection meant to be afforded by the 1976 Directive. For example, Belgium restricted equality of training to apprenticeship programs. Denmark restricted equality protection to workplaces where men and women worked together. The Federal Republic of Germany failed to expand protection to certain work environments, did not provide for paternity leave, and did not require equality with respect to vacancy notices. Ireland was cited for excluding certain occupations from the ambit of its equality laws' protection. Italy was cited for not having more expansive protection. Luxembourg was cited for failing to implement the directive. The Netherlands, the United Kingdom and France were cited for not fully implementing the directive. *Id.* at 61-63.

156. See *EU News in the English Language Press on July 20*, THE REUTER EUR. COMMUNITY REP., July 20, 1995; see also Michael Dynes, *EU Moves to Outlaw Sex Pests; Sexual Harassment in the Workplace*, THE TIMES, July 20, 1995 (stating that "[a] sexual harassment directive, which will seek to draw a line between the protection of women's rights and political correctness, will be drafted by Brussels officials and could become law within two to three years ...").

157. McCrudden, *supra* note 153, at 364.

158. See *Address*, *supra* note 54, at *2; *Commission Adopts Paper on World Women's Conferences*, THE REUTER EUR. COMMUNITY REPORT, June 1, 1995.

to prevent sexual harassment are fraught with legislative or procedural deficiencies. New Zealand, Ireland, and the Member States have policies aimed at preventing sexual harassment; however, their policies would be much more effective if they adopted the EC's Code of Practice.