CULTURAL DIFFERENCES IN PERCEPTIONS OF AND RESPONSES TO SEXUAL HARASSMENT

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INTRODUCTION

Globalization continues to fuel multiculturalism and diversity in the workplace, and few employers can afford to ignore the culturally-based experiences that their employees bring to their work lives.[1] In this context, sexual harassment must be understood in terms of cross-cultural perspectives. Even within a single culture, the definition of sexual harassment is often misunderstood and is the subject of considerable debate in legal, psychological, and human resource management literature, both domestically and abroad.[2] Defining the concept of sexual harassment becomes even "more complex and controversial in multicultural environments where culturally-derived values

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1. Greetje Timmerman & Cristien Bajema, *Sexual Harassment in Northwest Europe*, 6 EUR. J. WOMEN'S STUD. 419, 435 (Nov. 1999).

2. *See* Shu Li & Song Mei Lee-Wong, *A Study on Singaporeans' Perceptions of Sexual Harassment From a Cross-Cultural Perspective*, 35 J. APPLIED SOC. PSYCHOL. 699, 701–02 (Apr. 2005).

and beliefs serve as norms that determine when certain behaviors and feelings are appropriate and when they are not."[3] Whether employees perceive workplace conduct—particularly ambiguous conduct—to be sexually harassing will be influenced by their respective cultural backgrounds. Similarly, an employer's response to such conduct and the manner in which it deals with the resultant issues will be influenced by cultural determinants. In order to demonstrate the consequences of viewing sexual harassment from a cross-cultural perspective, these cultural factors must be evaluated in the context of at least three major areas related to sexual harassment law and policy: (1) education in diversity, for both managers and employees; (2) application of cultural psychology research to those court cases in which it is relevant; and (3) reconsideration of the policies and standards applied to individual recipients from differing cultural backgrounds who are alleged victims of sexual harassment.

I. HISTORY OF SEXUAL HARASSMENT LEGISLATION

Title VII of the Civil Rights Act of 1964 is the foundation for sexual harassment claims. Yet Title VII was written long before the concept of sexual harassment was clearly defined or recognized as worthy of the significant concern we afford the issue today.[4] Section 703(a)(2) of the Civil Rights Act provides:

> It shall be an unlawful employment practice for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .[5]

The framers of section 703 sought to "ensure . . . gender equality in hiring, firing, pay, promotion, and education opportunities."[6] Indeed, "[t]hey were not thinking of sexual harassment as a form of sex discrimination."[7]

While sexually exploitive and harassing behavior in the workplace clearly predates the Civil Rights Act, the notion that such behavior constituted actionable discrimination under Title VII did not develop until the 1970s—a decade marked by rising percentages of women in the workforce and strengthening of the women's movement.[8] Still, early cases arguing for relief from sexual harassment under a theory of sex discrimination were generally unsuccessful until 1977, when the Court of Appeals for the District of Columbia Circuit held in *Barnes v. Costle* that the retaliation for refusal of sexual favors

3. *Id.* at 702.

4. Jane Goodman-Delahunty, *Approaches to Gender and the Law: Research and Applications*, 22 LAW & HUM. BEHAV. 129, 132 (Feb. 1998).

5. 42 U.S.C. § 2000e-2(a) (2000).

6. MURRAY LEVINE & LEAH WALLACH, PSYCHOLOGICAL PROBLEMS, SOCIAL ISSUES, AND LAW 422 (Allyn & Bacon 2002).

7. *Id.*

8. Ann D. Duncan & Wells Hively, *Sexual Harassment: A Functional Analysis of Plaintiffs and Defendants, presented at* AP-LS Biennial Conference, Redondo Beach, Cal. (Mar. 5–7, 1998).

constituted discrimination "because of . . . sex" under Title VII.[9] In other words, as of 1977, sexual harassment could be found to violate laws against sexual discrimination.[10] Additionally, in 1980, the Equal Employment Opportunity Commission (EEOC) issued guidelines that characterized sexual harassment in the workplace as a form of sex discrimination, defining sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."[11] Sexual harassment had finally entered the realm of actionable acts of discrimination in employment.

Two forms of actionable sexual harassment were delineated by the EEOC guidelines: *quid pro quo* harassment and hostile environment harassment.[12] *Quid pro quo* harassment refers to threats or promises of job-related consequences resulting from the withholding or giving of sexual favors. The demands for such favors may be explicit or implicit, but the job benefits to be gained or lost must be tangible (e.g., promotion, job retention or loss, desired assignments, transfer). Even a single act of *quid pro quo* harassment is actionable.[13]

The hostile environment type of sexual harassment, by contrast, occurs where a work environment becomes so intimidating, hostile, or offensive—due, for example, to overt sexual language or physical conduct—that the victim becomes uncomfortable, embarrassed, or even impaired in his or her ability to perform work functions. For an employee to prevail in a hostile work environment claim, he or she must demonstrate that "the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create an abusive working environment."[14] To be considered pervasive, the conduct must be "repeated, continuous and concerted," and not merely an isolated incident or occasional occurrence.[15] Moreover, to sustain a hostile environment claim, the conduct must have been unwelcome—that is, the conduct was neither invited nor incited by the complaining party—and the complainant must have clearly indicated that the conduct was unwelcome.[16]

Hostile environment sexual harassment encompasses a wide range of behaviors including, *inter alia*, displays of sexually-explicit materials, sexually-charged or demeaning jokes, derogatory names or epithets, physical advances, repetitive requests for dates, repeated comments on physical appearance, and sexually-charged body language or facial expressions.[17] The terms and

9. 561 F.2d 983 (D.C. App. 1977).

10. *Id.* at 986.

11. *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1980); LEVINE & WALLACH, *supra* note 6, at 423.

12. 29 C.F.R. § 1604.11(a) (1990).

13. *Id.*

14. Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

15. Allan H. Weitzman, *Employer Defenses to Sexual Harassment Claims*, 6 DUKE J. GENDER L. & POL'Y 27, 36–37 (1999).

16. EEOC COMPLIANCE MANUAL (CCH) ¶ 3114 (1990).

17. Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 AM. PSYCHOL. 1070–76 (Oct. 1993); Michelle V. Gee & Sue M. Norton, *The Confluence of Gender and Culture: Sexual Harassment in the International Arena*, 37 MGMT. DECISION 417, 419 (1999); LEVINE & WALLACH,

conditions of employment need not have been *tangibly* affected, even if the offending conduct had the purpose of unreasonably interfering with the victim's work performance.[18] To be actionable, the conduct at issue must have been tinged with offensive sexual content and must have demonstrated discrimination based on sex.[19] The range of circumstances considered includes the frequency, severity, physical nature, associated humiliation, and job interference inherent in the harassing behaviors.[20] As a precondition to an actionable harassment claim, would-be plaintiffs must first utilize any procedures established by the employer for prevention and correction of sexual harassment.[21] The concept of hostile environment is both complicated and imprecise, leaving many issues for the courts to resolve. Among these are the difficult tasks of defining the boundaries of mere unpleasantness and actionable discrimination, as well as whether psychological harm must be demonstrated to establish a hostile environment.

The Supreme Court attempted to reconcile some of these issues in its 1986 decision *Meritor Savings Bank, FSB v. Vinson*, in which the Court defined an abusive work environment as being more than simply offensive but not necessarily causative of psychological damage.[22] In 1993, Justice O'Connor, writing for the majority in *Harris v. Forklift Systems,* established two requirements for harassing behavior to meet the standard for constituting a hostile environment: (1) the environment must have been such that a "reasonable person in the plaintiff's position," considering "all the circumstances" would find it hostile or abusive (now considered the objective standard); (2) and there must be some evidence—though not necessarily psychological injury—that the victim subjectively perceived the environment as abusive (now considered the subjective standard).[23] A claim of harassment must meet both the objective and subjective standards in order for it to be recognized by a court as actionable.[24] The American Psychological Association (APA) submitted an amicus curiae brief in *Harris* arguing that causation of psychological injury should *not* be the major criterion for determining the existence of a hostile environment, as this would penalize the psychologically hardier, discourage reporting, and reduce the possibility of recovery.[25] Moreover, the APA brief argued that a hostile environment could likely lead to serious effects on equal employment opportunities: forcing job changes, loss of reputation, working alliances, exclusion from certain work environments,

supra note 6, at 424; CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (Yale University Press 1979).

18. 29 C.F.R. § 1604.11(a) (1985).

19. 42 U.S.C. § 2000e (2000).

20. *See generally* Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001).

21. LEVINE & WALLACH, *supra* note 6, at 424, 436.

22. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

23. Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993).

24. Brooks v. City of San Mateo (Cal.), 229 F.3d 917 (9th Cir. 2000); *Harris*, 510 U.S. at 17; LEVINE & WALLACH, *supra* note 6, at 428–29.

25. Brief for American Psychological Association as Amicus Curiae Supporting Neither Party, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (No. 92-1168) [hereinafter APA Brief], *available at* http://www.apa.org/psyclaw/harris.pdf.

alteration of motivation and confidence, distraction, or lowered self esteem—without leading to objectifiable mental illness.[26] While avoiding the damage and confusion the APA predicted would occur if a psychological injury requirement had been adopted, *Harris*'s "reasonable person" standard remained controversial. To this day, the reasonable person standard continues to be questioned in court.

Two years prior to *Harris*, in *Ellison v. Brady*, the United States Court of Appeals for the Ninth Circuit adopted the "reasonable woman" standard (in lieu of a "reasonable person" standard), explaining that a comprehensive understanding of a woman's view was required, as men's and women's perspectives regarding objectionable conduct tended to vary.[27] Before *Ellison*, the "reasonable victim" standard had occasionally been used, although typically it had been utilized interchangeably with the "reasonable woman" standard.[28] Since *Ellison*, the "reasonable woman" standard has surfaced periodically (with divergent responses as to its appropriateness in different circuit courts), although it has never been adopted (nor has its legitimacy been commented upon) by the Supreme Court.[29] For instance, the plaintiff in *Harris* argued for the "reasonable woman" standard, but the Court continued to apply the standard of the "reasonable person in the position of the plaintiff." Yet the Court also encouraged judges to assess each victim's circumstances in reaching a determination.[30]

The EEOC itself in 1993 defined harassment as an experience that a *reasonable person* in the same or comparable circumstances would find to be "'intimidating, hostile, or abusive,'" although the EEOC added that gender needed to be considered as part of the circumstances considered.[31] In the 1998 case of *Oncale v. Sundowner Offshore Services*, the Supreme Court applied the *Harris* hostile environment standard to a male-male sexual harassment case, i.e., "the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"[32] Despite the Court's adherence to a "reasonable person" standard, social science research on gender differences in perceiving potentially harassing behaviors proliferated throughout the 1990s.[33]

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26. *Id.*; *Harris*, 510 U.S. at 17; LEVINE & WALLACH, *supra* note 6, at 428.

27. 924 F.2d 872 (9th Cir. 1991).

28. The "reasonable victim" standard was suggested initially in the APA's *Harris* amicus brief, emphasizing the importance of the exploitation rather than the gender, and taking the perspective of the alleged victim in evaluating if there was, indeed, a perception of sexual harassment. *See* APA Brief, *supra* note 25. This standard more readily allows for including cases of male victimization, as well as incorporating social sciences research on attitudes to women, homosexuals, and sex-role stereotyping to situations of alleged sexual harassment. Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 52 (Feb. 1998); LEVINE & WALLACH, *supra* note 6, at 432.

29. Elizabeth L. Shoenfelt, Allison E Maue, & Joann Nelson, *Reasonable Person Versus Reasonable Woman: Does it Matter?*, 6 AM. U. J. GENDER SOC. POL'Y & L. 633, 635–36 (2002).

30. *Harris*, 510 U.S. at 18.

31. LEVINE & WALLACH, *supra* note 6, at 430; Craig R. Waldo, Jennifer L. Berdahl & Louise F. Fitzgerald, *Are men sexually harassed? If so, by whom?*, 22 LAW & HUM. BEHAV. 59 (Feb. 1998).

32. 523 U.S. 75 (1998); LEVINE & WALLACH, *supra* note 6, at 430.

33. *See* Richard L. Wiener et al., *Perceptions of Sexual Harassment: The Effects of Gender, Legal Standard, and Ambivalent Sexism*, 21 LAW & HUM. BEHAV. 71 (Feb. 1997) [hereinafter Wiener et al.,

Extensive research has been done to investigate the gender differences in perception of sexual harassment; while a few researchers have found no difference, most of the research has indicated at least *some* gender difference, with women more likely than men to consider a given behavior harassing.[34] Prof. Jeremy Blumenthal undertook a meta-analysis of studies on gender differences in perception of harassment published between 1982 and 1996. He determined that only weak empirical evidence for gender differences existed (particularly in legal scenarios of harassment), thereby casting doubt upon the argument for a "reasonable woman" standard.[35] Moreover, studies demonstrated that there existed little difference in legally-relevant judgments made by mock jurors regardless of whether the "reasonable person" or "reasonable woman" standard was applied.[36] More recent research by Prof. Elizabeth Shoenfelt, Allison Maue, Esq., and Joann Nelson, Esq., found that while women were more likely than men to perceive flirtatious behaviors as sexually harassing, the argument over "reasonable person" versus "reasonable woman" was moot; the standard used made no difference in outcome.[37]

From the point of view of eliminating discrimination, some legal analysts have raised the concern that using the "reasonable woman" standard might actually perpetuate discrimination by: (1) reinforcing stereotypes of women as more delicate, less rational, or less capable of handling job pressures; (2) inviting judges and juries to impart biases about the thinking of women; (3) ignoring the shrinking differences between men and women, as work lives become increasingly more similar; and (4) failing to provide a standard for men harassed by women or other men.[38] Yet the "reasonable woman" standard has opened the door to further explorations regarding unique experiences that influence individuals—both men and women—in perceiving sexual harassment.[39]

A number of variables besides gender might prove influential in shaping perceptions of sexual harassment, particularly in regard to what constitutes the perception of a hostile environment. Gender differences in perceptions of sexual harassment (i.e., women identifying harassment to a greater degree than men) become most apparent when the reported occurrences contain observations that are vague, unclear, or ambiguous or when the parties are giving conflicting reports. Cultural differences may well alter perceptions of sexual harassment,

Perceptions]; Richard L. Wiener et al., *Social Analytic Investigation of Hostile Work Environments: A Test of the Reasonable Woman Standard*, 19 LAW & HUM. BEHAV. 263 (1995); LEVINE & WALLACH, *supra* note 6, at 431.

34. Barbara A. Gutek & Maureen O'Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. SOC. ISSUES 151 (Spring 1995); LEVINE & WALLACH, *supra* note 6, at 430–31; Shoenfelt, Maue & Nelson, *supra* note 29, at 648–51.

35. Blumenthal, *supra* note 28, at 33, 51–53 (Feb. 1998); LEVINE & WALLACH, *supra* note 6, at 431–32.

36. Barbara A. Gutek et al., *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCHOL. PUB. POL'Y & L. 596 (Sept. 1999); Wiener et al., *Perceptions*, *supra* note 33, at 76–77; LEVINE & WALLACH, *supra* note 6, at 431–32.

37. Shoenfelt, Maue & Nelson, *supra* note 29, at 648–51, 658–59.

38. Goodman-Delahunty, *supra* note 4; LEVINE, *supra* note 6, at 432; Shoenfelt, Maue & Nelson, *supra* note 29, at 656–57.

39. Shoenfelt, Maue & Nelson, *supra* note 29, at 669–70.

particularly in such unclear situations.[40] Shoenfelt, Maue, and Nelson suggest that one of the weaknesses of the "reasonable woman" standard has been its basis on values and beliefs of the middle-class Caucasian woman; they suggest that the perception of sexual harassment is altered by variables such as race, ethnicity, and religion.[41] Both Blumenthal and the APA brief in *Harris* suggested the use of a "reasonable victim" standard when evaluating the existence of a hostile environment, with an emphasis on perceptions of exploitation and victimization rather than specific gender-related experiences.[42] With several alternative standards already in existence, there still exists the need for incorporation into at least one of the standards for "the study of other variables such as attitudes to women, to homosexuals, to sex-role stereotyping, and to personal experiences of harassment."[43] Cultural beliefs and values comprise key foundational elements underlying what will or will not be perceived as sexual harassment.

Burlington Industries, Inc. v. Ellerth[44] and *Faragher v. City of Boca Raton*,[45] both decided by the Supreme Court in 1998, created an affirmative defense for employers based on a two-pronged test: (1) whether the employer took reasonable care to prevent and correct the sexually harassing behavior, and (2) whether the employee failed to take advantage of preventive or corrective measures provided by the employer.[46] Under these requirements, an employee is obligated to act reasonably by reporting instances of sexual harassment promptly to her employer and to utilize established grievance processes.[47] It is considered unreasonable if an employee fails to report sexual harassment to an employer due to fears of confrontation, unpleasantness or retaliation. If, however, there is some objective evidence that the employee would face retaliation or confrontation at the hands of the employer, then the employee may still be judged to have acted reasonably. In the latter case, the employer's affirmative defense may not apply, even if the employee did not avail herself of all of the available preventive or corrective procedures. The courts, however, have split as to whether the employee must take advantage of every possible preventive or corrective opportunity for a sexual harassment charge to be valid.[48]

Oncale recognized that the cultural context of the workplace in which the purported harassment occurred is a critical factor when making evaluations of sexual harassment.[49] Cultural context is also stressed in the Equal Treatment Directive of the EU, with the belief that "'cultural relativism' exerts considerable

40. Gutek & O'Connor, *supra* note 34.

41. Shoenfelt, Maue & Nelson, *supra* note 29, at 657.

42. Blumenthal, *supra* note 28, at 52–53; APA Brief, *supra* note 25.

43. LEVINE & WALLACH, *supra* note 6, at 432.

44. 524 U.S. 742 (1998).

45. 524 U.S. 775 (1998).

46. 524 U.S. at 765; 524 U.S. at 805.

47. James M. Owens, James F. Morgan & Glenn M. Gomes, *Implementing The E.U.'s New Sexual Harassment Directive: Are Employers Entitled to a Defense?*, 11 J. INDIVIDUAL EMP. RTS. 89, 100–02 (2003).

48. David Sherwyn et al., *The Perversity of Sexual Harassment Law: Effects of Recent Court Rulings*, 42 CORNELL HOTEL & REST. ADMIN. Q. 46 (June 2001).

49. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

influence over definitions, tolerance levels, and legislative solutions to workplace harassment."[50] Scholars James Owens, James Morgan, and Glenn Gomez believe that it is the responsibility of member states of the EU, based on these directives, to provide employers, employees, and courts with guidance on acceptable workplace conduct, given the realities of the cultural context existing within their respective boundaries.[51]

The major element in defining a behavior as sexually harassing is that the recipient finds the behavior unwelcome, a standard elucidated in both the EEOC Guidelines on Sexual Harassment[52] and in *Meritor*.[53] Cultural factors would clearly influence the degree of welcome response with which a recipient would view or respond to a sexually-tinged comment or action. Differential understandings and interpretations of the language (as studied in international graduate students and faculty) spoken in a particular work setting contribute to misunderstandings and misperceptions (both over-perceiving and under-perceiving) of sexual harassment.[54] Cultural differences will influence not only what kinds and intensities of conduct will be found unwelcome, but also the distinct means by which alleged victims of such conduct will demonstrate its unwelcomeness.

Even when sexual harassment is perceived as such, it may not be reported or may not be reported promptly; the tendency to report varies, as well, with culture.[55] In studies conducted in both the United States and Israel, women who experienced many of the behaviors examined by the Sexual Experiences Questionnaire still failed to label or report their experiences as sexual harassment.[56] Some groups of women (for example, Turkish and Hindi women in Europe) hardly ever file sexual harassment complaints for fear that their families would be humiliated and blame them for any approaches, claiming that the women had invited the harassment by behaving or dressing inappropriately.[57] In many South American and Asian nations, rates of reporting sexually harassing acts is low as compared to the rest of the world.[58]

While gender differences in the perception of sexual harassment have been investigated extensively, cultural differences have been far more sparsely researched.[59] Few studies have examined "the potential impact of cultural

50. Owens, Morgan & Gomes, *supra* note 47, at 94–95.

51. *Id.* at 94.

52. EEOC COMPLIANCE MANUAL, *supra* note 16.

53. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

54. Andrea Tyler & Diana Boxer, *Sexual Harassment? Cross-Cultural/Cross-Linguistic Perspectives*, 7 DISCOURSE & SOC'Y 107 (1996).

55. Duncan & Hively, *supra* note 8; LEVINE & WALLACH, *supra* note 6, at 436.

56. Michelle J. Gelfand, Louise F. Fitzgerald & Drasgow Fritz, *The Structure of Sexual Harassment: A Confirmatory Factor Analysis Across Cultures and Settings*, 47 J. VOCATIONAL BEHAV. 164, 167–68 (Oct. 1995). This study was a self-report inventory with the goal of assessing the presence of sexual harassment in work and educational settings.

57. Timmerman & Bajema, *supra* note 1, at 433.

58. Anne M. Fiedler & R. Ivan Blanco, *The Challenge of Varying Perceptions of Sexual Harassment: An International Study*, 7 J. BEHAV. & APPLIED MGMT. 274, 279 (May 2006).

59. Janet Sigal et al., *Cross-Cultural Reactions to Academic Sexual Harassment: Effects of Individualist vs. Collectivist Culture and Gender of Participants*, 52 SEX ROLES 201, 201 (Feb. 2005).

factors on interpretations of sexual harassment."[60] It is important to note that a cultural component of understanding is not merely related to the *subjective* standard for a hostile environment. *Harris* defined the *objective* standard for a hostile environment as the view of a "reasonable person in the plaintiff's position" considering "all the circumstances."[61] Ignoring cultural influences that define both the plaintiff's position and the consideration of all circumstances becomes particularly problematic in an age when both employers and employees must "deal effectively with global diversity" on a regular basis.[62] International organizations cannot ignore the potential for conflicts between employees or between managers and employees from cultural backgrounds with differing views on sexuality, sexual approaches, and reporting of such activities in varying contexts.[63] All individuals strongly internalize their cultures of origin. Employees from different cultures, even those who have lived in a country like the United States for some period of time, may define what constitutes a hostile environment (in relation to sexual harassment) differently than their peers; they may well possess varying motivations and thresholds that would allow or prevent their reporting of sexual harassment, even after acknowledging its existence.[64] The studies that *do* exist in this area often report or compare responses to written accounts of sexual harassment allegations.[65] While studies of individuals from different cultures within one country like the United States would be invaluable in understanding cultural determinants of perceiving harassment, such studies are not readily available. Nevertheless, the existing (and more available) studies comparing different cultures *within* their countries of origin may shed light on the cultural influences in defining sexual harassment issues.[66]

Many difficulties exist in comparing data from different countries and settings. Studies of university students may not be readily comparable with those of actual employees, even within the same culture. While many nations outside the United States claim they have fewer reported sexual harassment cases as compared to the U.S., this statistic may be based upon differences in the law, "accepted differences in the power structures between men and women in the work place,"[67] cultural views of male-female relationships, and cultural views in relation to reporting indiscretions. In patriarchal countries, far fewer women work in male-dominated occupations; research into sexual harassment is not welcomed and can jeopardize participants' careers.[68] The lack of standardized research instruments across studies of cross-cultural sexual

60. Eros R. DeSouza, John B. Pryor & Claudio S. Hutz, *Reactions to Sexual Harassment Charges between North Americans and Brazilians*, 39 SEX ROLES 913, 913 (1998).

61. Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993).

62. Fiedler & Blanco, *supra* note 58, at 274.

63. *Id.* at 287–88.

64. *Id.* at 275–77, 282–83; Timmerman & Bajema, *supra* note 1, at 424.

65. Timmerman & Bajema, *supra* note 1, at 435.

66. *Id.* at 422–23, 430–31.

67. Fiedler & Blanco, *supra* note 58, at 275.

68. Eros R. DeSouza et al., *Female Nurses and Educators' Reactions to Sexual Harassment Charges: A Cross-Cultural Perspective*, 38 INTERAMERICAN J. PSYCHOL. 33, 34, 38 (2004).

harassment has made generalization even more difficult.[69] The studies performed have employed "different definitions, different terminology, different survey methods and instruments, and different time frames"[70] over which incidents occurred, making comparison complicated. Some have included men, while others have been restricted to women only.[71] While some very limited research examines differences among different cultural groups within one nation, other studies compare nations or simply focus on one cultural group in a single nation.[72] Moreover, as researchers acknowledge, many of the studies have emerged from wealthy, industrialized, individualistic cultures, ignoring the poorer populations from non-industrialized, collectivist cultures.[73] A range of studies have reported statistical differences and qualitative depictions of work environments in different cultures, but definitive conclusions about the nature and etiologies of differences in the perception of sexual harassment in the workplace have been limited. Keeping in mind the problems associated with drawing conclusions from such reports, the rough comparisons can still provide some insight in the range of approaches to sexual harassment worldwide. A diverse sampling of studies from different areas of the world will be presented to demonstrate the broad range of cultural biases that affect perception and reporting of the hostile environment.

II. EXAMPLES OF DIFFERING CULTURAL VIEWPOINTS REGARDING SEXUAL HARASSMENT AND PERCEPTION OF THE HOSTILE ENVIRONMENT

The following examples are chosen to provide a sampling of selected culturally-determined viewpoints regarding the perception and handling of sexual harassment. They are in no way intended to be comprehensive—rather, they are illustrative of the range of views that exist in the world today. An understanding of such views is relevant in light of the following realities of modern business: (1) American companies with increasing numbers of offices and factories abroad will employ individuals from differing cultural backgrounds; (2) Americans will increasingly work abroad and encounter co-workers and managers from different cultural backgrounds; (3) the growing heterogeneity of workplaces in America will mean people from divergent cultures—including those who emigrated years before or those born in the United States but strongly tied to their respective cultures of origin—will come into contact daily. The most relevant research has been conducted outside the United States, with comparisons made to analogous factors within the United States. Research of reactions from different cultural groups *within* the United

69. Azy Barak, *Cross-Cultural Perspectives on Sexual Harassment*, in SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 263 (William O'Donohue ed., 1997); 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, 764–66 (Sept. 1999).

70. Timmerman & Bajema, *supra* note 1, at 421.

71. *Id*. at 428.

72. Madhabika B. Nayak, *Attitudes Toward Violence Against Women: A Cross-Nation Study*, 49 SEX ROLES 333 (Oct. 2003).

73. Harry C. Triandis et al., *An Etic-Emic Analysis of Individualism and Collectivism*, 24 J. CROSS-CULTURAL PSYCHOL. 366 (Sept. 1993).

States or a particular workplace to situations that might be considered harassing has been far less frequent. As a result, inferences are drawn about cultural groups within the United States from research done in their countries of origin. However, it is important to keep in mind that these findings may not fully reflect the current cultural reality, because over time, groups will assimilate and adopt more American values.

A. Brazil as an Example of South American Culture

Brazil is one of the most economically and educationally advanced South American countries, with a 1988 constitutional guarantee of gender equality and a 1991 law outlawing sexual harassment.[74] Recent cross-cultural research on sexual harassment has shown that while there is no difference between North American and Brazilian college students in the actual *incidence* of unwanted sexual behaviors experienced, Brazilians have a different concept of what actually constitutes sexual harassment.[75] This difference was further explored by a study that compared college students' responses to written scenarios which portrayed potential instances of sexual harassment and the creation of a potentially hostile environment. The study revealed that North American, Australian, and German students were much more likely to perceive the scenarios in terms of power abuse, gender discrimination, and harm—factors which, in their minds, lead to sexual harassment. By contrast, Brazilian students were more likely to perceive the scenarios in terms of innocuous sexual behavior aimed at procuring a romance or even sexual intimacy, but not constituting the abuse of power or gender discrimination harmfulness required to constitute sexual harassment.[76]

Subsequent researchers expanded upon this work with college students, and one replicated it with professional women, finding once again that Brazilians, more so than Americans, tended to view sexual advances as less harmful and more likely to reflect innocent romantic motives rather than as harassing, abusive, or discriminatory.[77] Furthermore, Ecuadorian study participants, responding to an ambiguous scenario of a woman bringing sexual harassment charges, similarly judged behaviors to be less offensive and sexually harassing than their American counterparts.[78] Several researchers tie this finding, in part, to the nature of South American culture, which, generalized as highly eroticized and open to displays of nudity and sexuality, is more accepting and even approving of sexual advances.[79]

At the same time, researchers entertain a less innocuous explanation for their culturally-based differential. They depict Brazilian society as patriarchal

74. Fiedler & Blanco, *supra* note 58, at 281.

75. Gelfand, Fitzgerald & Fritz, *supra* note 56, at 172–74.

76. John B. Pryor et al., *Gender Differences in the Interpretation of Social-Sexual Behavior: A Cross-Cultural Perspective on Sexual Harassment*, 28 J. CROSS CULTURAL PSYCHOL. 509 (1997).

77. DeSouza, Pryor & Hutz, *supra* note 60, at 920–21; DeSouza et al., *supra* note 68, at 37–38.

78. Sigal et al., *supra* note 59, at 207–11.

79. DeSouza et al., *supra* note 68, at 37; DeSouza, Pryor & Hutz, *supra* note 60, at 913; Ellen I. Shupe et al., *The Incidence and Outcomes of Sexual Harassment among Hispanics and Non-Hispanic White Women: A Comparison Across Levels of Cultural Affiliation*, 26 PSYCHOL. WOMEN Q. 298 (Winter 2002).

and hierarchical, in which women are subordinate to men and males are entitled to make sexual advances.[80] As a result, women in Brazil may perceive Brazilian men's sexual advances to be entirely normal.[81] Moreover, penal codes in Brazil have a far higher threshold for what actions constitute rape or sexual assault.[82] Generally, few laws against sexual harassment exist in many parts of South America, and public awareness of sexual harassment as a social or legal problem (even in Brazil) is far less pronounced than in America.[83] There are numerous Brazilian cases of women being dismissed from jobs for reporting sexual harassment. Interestingly, however, researchers found that, when they accentuated the *discriminatory* aspects of the behavior in their scenarios, many more Brazilian respondents identified the behaviors as sexually harassing and causative of a hostile environment.[84] Moreover, when these researchers introduced a strong *romantic* element to a perpetrator's motives, both American and Brazilian professional women viewed the behavior as less harassing and the environment as less hostile.[85] Finally, when Brazilian and American college students were presented with cases of woman-to woman sexual harassment, the Brazilian students tended to rate behaviors as far *more* likely to be sexually harassing, indicating culturally-based biases regarding potentially homosexual approaches.[86] Cultural factors, therefore, do not appear to be fixed in stone, but instead may be manipulated with the introduction of affect-laden material.

Less-developed countries in South America—even ones with sexual harassment statutes on the books—demonstrate more widespread sexual harassment than Brazil. Factors that contribute to non-reporting include a lack of awareness of what constitutes sexual harassment, the absence of women's advocacy organizations, and the inconsistency of legislative enforcement (if the legislation exists at all). Fears of humiliation, retaliation, and blacklisting for *all* jobs can prevent women from being open about incidents of harassment.[87] Those who do come forward often find themselves with an onerous burden of proof and nearly impossible criteria in order to meet this burden; as a result, sexual harassment is nearly impossible to establish in court.[88] Laws in such cultures are clearly interpreted through the lenses of societal norms that individuals have internalized.

80. DeSouza, Pryor & Hutz, *supra* note 60, at 913–14, 921–23; DeSouza et al., *supra* note 68, at 34–35.

81. DeSouza et al., *supra* note 68, at 34–35.

82. Sigal et al., *supra* note 59, at 209–10.

83. *Id.*; DeSouza, Pryor & Hutz, *supra* note 60, at 921–23.

84. DeSouza, Pryor & Hutz, *supra* note 60, at 920–21; DeSouza et al., *supra* note 68, at 38.

85. DeSouza et al., *supra* note 68, at 37–38.

86. Eros R. DeSouza & Joseph Solberg, *A Cross Cultural Perspective on Judgments of Woman-To-Woman Sexual Harassment: Does Sexual Orientation Matter?*, Presentation at the Association for Psychological Sciences, 18th Annual Meeting (May 25–28, 2006).

87. Fiedler & Blanco, *supra* note 58, at 280–81.

88. *Id.*

B. Europe

Sexual harassment incidence studies in European countries are conducted so differently from South American studies that they present difficulties in comparison; nevertheless, the results tend to be similar to those in the United States.[89] There is more frequent reporting in the northern European countries than the southern European ones, explained by some researchers as indicative of the wider recognition and understanding of this discriminatory offense in the north. Other researchers found the northern European countries to apply more legalistic standards to issues regarding sexual harassment, while ethical behaviors in southern European countries are more heavily influenced by family and church traditions.[90] Russia presents a unique European example in which laws regarding sexual harassment—even the *quid pro quo* form, which is defined as a criminal offense—are rarely enforced and often completely ignored. Russian women are routinely referred to in sexually-categorizing terms.[91] Even in those countries in which there is *overall* similarity in *response* to sexual harassment situations as compared to that of Americans, Europeans appear to apply different shades of meaning in *conceptualizing* of sexual harassment.

The European Union's Equal Treatment Directive, aimed at prohibiting sexual harassment throughout the E.U., demonstrates some interesting similarities and differences between the language used in the directive and definitions applied in the United States. While the United States seems to focus on rules and their associated sanctions, Europeans seem to refer to ethical traditions to a greater degree.[92] The E.U.'s definition of sexual harassment mimics that of the United States in its key elements: unwanted approaches and work environments that are "individuating, hostile, degrading, humiliating, or offensive."[93] The directive's use of the word "dignity" represents "a uniquely European contribution to conceptualizing workplace behavior."[94] Dignity encompasses the routine treatment of employees with respect, not always so clearly incorporated in U.S. law. It is so critical a concept to the Europeans that harassment is viewed as more odious because of its violation of individual dignity than because of its discriminatory nature.[95]

C. Asia

In a study of Asian college students (i.e., Chinese, Korean, Japanese or individuals from Hong Kong) versus non-Asian (primarily Canadian) descent, respondents were asked to provide their reactions to given scenarios on the Sexual Harassment Attitude Scale (SHAS) with the goal of measuring

89. Sigal et al., *supra* note 59, at 201–02.

90. Fiedler & Blanco, *supra* note 58, at 278.

91. Michele V. Gee & Sue M. Norton, *The Confluence of Gender and Culture: Sexual Harassment in the International Arena*, 37 MGMT. DECISION 417, 422 (1999).

92. Fiedler & Blanco, *supra* note 58, at 278.

93. EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR EMPLOYMENT, INDUSTRIAL RELATIONS AND SOCIAL AFFAIRS, SEXUAL HARASSMENT IN THE WORKPLACE IN THE EUROPEAN UNION 150 (1998), *available at* http://www.un.org/womenwatch/osagi/pdf/shworkpl.pdf.

94. Owens, Morgan & Gomes, *supra* note 47, at 93.

95. *Id.*

perception of harassment in a variety of situations. On a number of items, Asian students were significantly more tolerant of actions deemed to constitute sexual harassment than were non-Asian respondents. Interestingly, in those cases where respondents of Asian descent moved or lived in Canada, as the length of residency in Canada increased, the less tolerant they were of sexual harassment.[96]

In one study of Hong Kong working women, researchers determined that reported rates of sexual harassment in student and secretary samples were significantly lower than comparable U.S. figures; reported rates for women in less traditional, more male-dominated roles were somewhat higher (yet still below the U.S. rates).[97] Even in the hospitality industry, where sexual harassment is known to be a problem worldwide, Hong Kong reports a lower percentage of harassment cases than reported in many other locations.[98] The researchers were struck by the Hong Kong working womens' coping strategies in relation to sexual harassment, which tended to be less assertive and more indirect than those of U.S. counterparts. While sharing of experiences of harassment with friends and co-workers to gain support was common, formal reporting of sexual harassment was very low. This failure to report has proven to be a complex phenomenon. Women in Hong Kong are often unaware of their basic rights to protection from harassment in their jobs and academic institutions, but there are also concerns with the possibilities for retaliation and loss of privacy.[99] Yet it is likely that cultural values related to "interdependence, harmony, and cooperation" also result in the avoidance of acknowledging or complaining to an authority about sexual harassment.[100]

In Japan there is no clear definition of, nor even a formal term for, sexual harassment.[101] The fact that the laws regulating workplace discrimination against women are routinely ignored implies that a clearer definition of sexual harassment will not guarantee enforcement. The situation becomes especially alarming when considering that half of all women work outside the home and constitute a significant portion of the work force.[102] The Japanese experience demonstrates that merely moving away from traditional roles may not itself assure mitigation of sexual harassment.

* * * *

The above examples are in no way meant to provide a comprehensive overview of the myriad cultural responses to sexual harassment. Rather, they

96. M. Alexis Kennedy & Boris B. Gonzalka, *Asian and Non-Asian Attitudes Toward Rape, Sexual Harassment, and Sexuality*, 46 SEX ROLES 227, 227–30 (Apr. 2002).

97. Darius K.-S. Chan, Catherine So-Kum Tang & Wai Chan, *Sexual Harassment: A Preliminary Analysis of Its Effects on Hong Kong Chinese Women in the Workplace and Academia*, 23 PSYCHOL. WOMEN Q. 661, 669 (1999).

98. WENDY COATS, JEROME AGRUSA, & JOHN TANNER, SEXUAL HARASSMENT FROM AN ASIAN PERSPECTIVE: PERCEPTIONS OF HONG KONG HOSPITALITY EMPLOYEES (2006), *available at* http://www.hicbusiness.org/biz2003proceedings/Wendy%20Coats.pdf.

99. Chan, Tang & Chan, *supra* note 97, at 669–70.

100. *Id.* at 669.

101. Gee & Norton, *supra* note 91, at 420.

102. *Id.*

are meant to illustrate that a range of responses does indeed exist—a range that results in a variety of perceptions regarding the existence and handling of sexually harassing exposures. Certain patterns of perception do seem to emerge. Hopefully, these examples reinforce the view that "cultural relativism (the conceptualization that values, ethics, beliefs, and behaviors are a function of culture) exerts a powerful influence on the perception, definition, tolerance, and legislative remedies surrounding sexual harassment in the workplace," with "considerable divergence" found around the world in terms of what constitutes a hostile environment.[103]

Superimposed upon this reality is the ever-expanding global marketplace in which members of different cultures will be forced to interact.[104] Cultural heterogeneity *within* nations, even among natives or naturalized citizens, will similarly require individuals with divergent cultural backgrounds to interact more and more. A disproportionate number of sexual harassment complaints in companies with cross-cultural employment pools involve alleged perpetrators and victims from different cultural backgrounds as "what's acceptable in one culture may be disrespectful and confusing in another."[105] More women will continue to enter the work force, many in positions traditionally limited to men. Further understanding of the specific factors underlying cross-cultural differences in perception and reporting of sexual harassment will be invaluable in preventing a range of problems, including uncomfortable misunderstanding, diminished ability of workers to fulfill their responsibilities, and costly litigation.

III. MAJOR MODELS OF CROSS-CULTURAL UNDERSTANDING APPLIED TO SEXUAL HARASSMENT

In research and application, the term "cross-cultural" can take on a variety of meanings. Much of the legal and cultural psychology literature, particularly in relation to sexual harassment, equates "cross-cultural" with the concept of comparing national norms. Other norms seem to utilize "cross-cultural" as equivalent to "cross-ethnic."[106] In this Note, one researcher's rather simple definition of "culture" will be adopted to achieve a more universal meaning:

> Culture is to society what memory is to individuals . . . culture includes traditions that tell "what has worked" in the past. It also encompasses the way people have learned to look at their environment and themselves, and their unstated assumptions about the way the world is and the way people should act.[107]

103. *Id.* at 422.

104. *Id.* at 417.

105. Wendy Hardman & Jacqueline Heidelberg, *When Sexual Harassment Is a Foreign Affair*, 75 PERSONNEL J. 91, 94 (Apr. 1996).

106. Timmerman & Bajema, *supra* note 1, at 422–23.

107. HARRY C. TRIANDIS, CULTURE AND SOCIAL BEHAVIOR 1 (1994).

To complete and elucidate Triandis's definition, the Hofstede simile can be employed: "Culture is to human collectivity what personality is to the individual."[108]

Major constructs have been set forth by both Profs. Hofstede and Triandis to characterize cultures in somewhat quantifiable fashions for use in cross-cultural research and applications. According to these constructs, individualism and collectivism are conceptualized as divergent or opposite ends (Hofstede), but not inherently opposing poles (Triandis), of a continuum of characteristics defining cultures. "Individualism was defined basically as a concern about rights over duties and individual accomplishment over group well-being, whereas collectivism stresses the importance of belonging and places the group's needs above the individual's needs."[109] Individualists, typically, emphasize the values of "independence, personal achievement, and competitiveness," while collectivists emphasize "interdependence, harmony, and cooperation."[110]

Hofstede has constructed the most comprehensive study of how organizational values and workplace culture are influenced by characteristics of the culture with which one identifies. Hofstede analyzed a worldwide data base of employee values, starting in 1967 (with IBM workers) and extending over the next four decades. He established five major cultural dimensions, each one quantifiable on a scale of zero to one hundred, which can be correlated with other cultural paradigms, including the individualism-collectivism continuum (one of his five major dimensions). Each of the seventy-four countries has been rated by Hofstede on each of the five dimensions (although Hofstede ignores possible cultural differences *within* countries).

The five dimensions include: the power distance index; individualism, masculinity; uncertainty avoidance index; and long-term orientation. The Power Distance Index (PDI) measures the extent to which both the more and the less powerful people in a society expect and accept power differentials; low scores reflect a value of equality among groups. Individualism (IDV) reflects the above-described orientations with regard to self and personal goals, with low scores indicating a collectivist orientation reflecting strong group identification and adherence to group norms. Masculinity (MAS) measures the strength of the esteem with which the culture holds traditional male values of assertiveness, competitiveness, ambition, and wealth. A low masculinity score reflects a culture's valuing of more traditionally feminine, caring values like quality of life and relationships. The Uncertainty Avoidance Index (UCI) reflects a society's need to minimize uncertainty and ambiguity with rules and structure; societies with low UCI values have fewer rules, accept relativism, and exhibit tolerance of a range of views and beliefs.[111] Finally, the Long-Term Orientation (LTO)

108. GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS 21 (2d ed. 2001) [hereinafter HOFSTEDE, CULTURE'S CONSEQUENCES].

109. Sigal et al., *supra* note 59, at 202.

110. Chan, Tang & Chan, *supra* note 97, at 669.

111. GEERT HOFSTEDE ET AL., CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND (2005); Geert Hofstede's Cultural Dimension Scores, http://www.geert-hofstede.com/geert_hofstede_dimensions.htm (last visited Mar. 25, 2006). *See also* Geert Hofstede™ Cultural Dimensions,

dimension, developed from Confucian philosophy, associates high values with thrift and perseverance and low values with respect for tradition, social obligation, and saving face.[112] Several researchers have attempted to explain the differences in cross-cultural perceptions of sexual harassment and in cross-cultural tendencies to report it through application of Hofstede's cultural dimensions, particularly as these dimensions focus on value patterns.

Triandis's work, although far less quantifiable, organizes elements of subjective culture into four cultural syndromes, with a cultural syndrome defined as "a pattern of beliefs, attitudes, self-definitions, norms, and values that are organized around some theme that can be identified . . ."[113] These syndromes are individualism, collectivism, complexity, and tightness. The first two syndromes are defined above, while the third is self-explanatory. The fourth, the tightness syndrome, reflects the degree and impact of norms, rules, and constraints on social behavior.[114] Triandis acknowledges that the individualism and collectivism dimensions of culture define the most important differentiating factors between groups or societies, and most of his work focuses on these categorizations.

More complex and multi-layered than Hoftstede's dimensions, Triandis's work recognizes that: cultures are relatively heterogeneous; most cultures include a mixture of individualistic and collectivist elements (though one aspect tends to predominate); there are variants of collectivism and individualism;[115] and some of Hofstede's cultural dimensions (even beyond the obviously transferable Individualism dimension) can be delineated as attributes of individualism or collectivism. For instance, high Hofstede Power Distance Index scores correlate with the social behavior attributes Triandis ascribes to collectivists. Hofstede describes such traits as valuing vertical relationships more than horizontal ones and feeling comfortable with "status-asymmetric relations". In contrast, Triandis depicts individualists as people who find horizontal relations important and accept "status-symmetric relationships" more readily,[116] attributes which would translate to low scores on a Hofstede Power Distance Index. Beyond this category, high scores on the Hofstede Masculinity dimension would be consistent with attributes Triandis associates with individualism ("distinct from others, better than others, competitive, exhibitionistic," and desirous of power), while low scores on this dimension would be consistent with attributes Triandis associates with collectivism (success and self-definition in terms of in-group relationships).[117] Hofstede's Uncertainty Avoidance Index possesses some degree of overlap with Triandis's tightness syndrome: High uncertainty avoidance is analogous to greater degrees of tightness. The Hofstede UAI, moreover, also corresponds to Triandis's

http://www.geert-hofstede.com/hofstede_united_states.shtml (presenting information from the United States) (last visited Mar. 25, 2006).

112. Geert Hofstede™ Cultural Dimensions, *supra* note 111.

113. TRIANDIS, *supra* note 107, at 2.

114. *Id.* at 156–64.

115. *Id.* at 164–74.

116. *Id.* at 172.

117. *Id.* at 167, 171.

measure of adherence to group norms. While collectivists define proper action as strongly preset by in-group norms and aimed at harmony, individualists rely upon personal attitudes to dictate behavior (leading to heterogeneity of views and beliefs) and tolerate being different or even in conflict with others. Although they are differently organized and categorized, the Triandis and Hofstede constructs provide mutually translatable tools for understanding and comparing culturally-determined behavior systems, beliefs about the world, value systems, goals, and modes of relating to others, both in and outside the respective cultures of identification.[118]

The application of the Triandis or Hofstede construct to the understanding of differential perceptions of sexual harassment has been sparse and inconsistent. However, one well-founded set of speculations emerges from the study of Hong Kong's Chinese women in the workplace and in academia who exhibit low reporting rates of sexual harassment. The authors suggest that the collectivist nature of Chinese society leads individuals to value harmonious relationships and group cooperation. Harassment victims, these researchers propose, might well believe that reporting offensive incidents to an authority would be perceived as an unacceptable breach of work group harmoniousness, and the victim would be labeled as a troublemaker.[119] The study found that, in lieu of reporting, victims commonly dealt with harassment by privately telling friends and family in order to elicit social and emotional support. The researchers refer to Triandis's work to conclude that this is the key coping strategy for collectivists who find themselves in crisis. They make a broader generalization regarding cultural understanding as applied to perceptual and behavioral responses:

> Noting the potential effect of collectivism on coping has important implications for research on coping with sexual harassment. Individuals of different cultural backgrounds may tend to adopt different types of coping strategies. That is, collectivists may prefer strategies that are less confrontational (e.g., avoid the harasser) or that can allow them to elicit support from their in-group members (e.g., tell friends about the incident), whereas individualist may be more likely to choose strategies that are more confrontational in nature (e.g., assertion, seeking institutional remedies).[120]

While arguably simplistic, such attempts to reconcile cross-cultural perceptual and behavioral tendencies with perceptions and modes of coping with sexual harassment help to build a foundation for future enhanced understanding and intervention.

A more recent study in Hong Kong, consisting of restaurant employees, demonstrated rather low levels of perceiving and reporting sexual harassment as compared to the hospitality industry worldwide, an industry with burgeoning sexual harassment lawsuits. The researchers attribute this finding partially to Chinese cultural values as applied to interpersonal behavior.[121]

118. *Id.* at 164–79; HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 106, at 1–4.

119. Chan, Tang & Chan, *supra* note 97, at 669–70.

120. *Id.*

121. COATS, AGRUSA & TANNER, *supra* note 98, at 3–4.

Triandis attributes the motivating factors of shame avoidance, adherence to in-group norms, modesty, and drawing minimal attention to oneself as determinants of social behavior in collectivist cultures.[122] Without referring directly to the Triandis construct, the researchers explain the results of their study in terms of the cultural value of "saving face" as the most significant determinant of interpersonal interactions. Achieving harmony in relationships—even in relationships in conflict—the researchers believe, is a principal component of saving face.[123] Although the researchers do not make this leap in attribution, the behavior could also be explained in terms of in-group harmony, cohesiveness, homogeneity, and self-sacrifice that Triandis conceptualizes as "in-group" characteristics related to the "interdependent self" of collectivists.[124]

Other research on perceptions of sexual harassment within the hospitality management industry attributed the lower likelihood of Asian respondents to feel (or report) that they had been sexually harassed to power distance characteristics of Asian countries.[125] Based on the Hofstede construct of countries, an Asian culture's high rating on the Power Distance Index (implying acceptance of unequal power distributions) would predispose that group toward acceptance of sexual harassment as part of the power differential. (The PDI of Hong Kong is relatively high, at sixty-eight, although not as high as scores in some other Asian countries or in the Arab world). Here again, the two sets of researchers conclude that perceptions of and responses to sexual harassment must take cultural values into account.[126]

Yet another cross-cultural study of sexual harassment cautiously applying cultural constructs attempted to explain its findings through application of Hofstede's classification system, while simultaneously acknowledging its failures to capture some complexities of conceptualized dimensions.[127] The researchers applied the Hofstede construct to label countries as encompassing primarily individualistic or collectivist cultures.[128] The countries of Ecuador, Pakistan, the Philippines, Taiwan, and Turkey (all low on the Hofstede Individualism dimension) were included in the collectivist category, and the countries of the United States, Canada, Germany, and the Netherlands (all high on the Hofstede Individualism dimension) were considered to be in the individualist category. University students in each of these countries were

122. TRIANDIS, *supra* note 107, at 167–72.

123. COATS, AGRUSA & TANNER, *supra* note 98, at 3–4.

124. TRIANDIS, *supra* note 107, at 169.

125. Angela Farrar, Christian E. Hardigree & Gail Sammons, Demographic Differences in Perception of Sexual Harassment Among Hospitality Management Students 14 (May 2003) (unpublished manuscript) (available at http://hotel.unlv.edu/pdf/sexHarass.pdf).

126. COATS, AGRUSA & TANNER, *supra* note 98, at 2–4; Farrar, Hardigree & Simmons, *supra* note 125, at 14; HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 111, at 1–3.

Prof. Maria Ontiveros applies similar concepts to the cultural sub-grouping of women of color in the United States. She believes that women of color do not aggressively report sexual harassment because of confusion about their legal rights, cultural values, tendencies toward self-blame, and discomfort with portraying their community in any bad light. Maria L. Ontiveros, *Fictionalizing Harassment: Disclosing the Truth*, 93 MICH. L. REV. 1373, 1397 n.94 (1995).

127. Sigal et al., *supra* note 59, at 206–09.

128. *Id.*

presented with an academic scenario of a woman bringing sexual harassment charges against a male professor who made frequent inappropriate personal comments about her appearance, continually asked her on dates, and engaged in nonsexual touching.[129] They were then asked questions to assess the professor's guilt as related to sexual harassment, finding that "participants from individualist countries judged the accused professor as guilty of sexual harassment significantly more often than did participants from collectivist countries. In addition, participants from individualist countries attributed less responsibility to the victim and more responsibility to the harasser than did participants from collectivist countries."[130] The researchers acknowledge that it is far too simplistic to rely on the individualism-collectivism parameter to explain these disparate response patterns. These authors believe that other culturally-based phenomena like public discussion of and reaction to sexual harassment, precedents in each country's legal venues, predominant religious affiliations, and traditional gender roles (the latter being relatable, in part, to the Hofstede Masculinity index) contribute to patterns of response to sexual harassment.[131] The researchers suggest a division of the concepts of collectivism and individualism into specific components that can be more readily related to normative cultural definitions of and responses to sexual harassment.[132]

In an earlier study, researchers analyzed certain cultural responses to sexual harassment phenomena on the basis of the Hofstede construct. They posited that Japanese women's low percentage of reporting victimization due to sexual harassment resulted from the collectivist view that the reputation of their employer was more important than their own discomfort. In addition, reporting women could be labeled as troublemakers or be perceived as acting in an inappropriately assertive and disruptive manner. In the same study, German participants, while part of a culture actually deemed less individualistic on the Hofstede Individualism scale than the United States, presented less tolerance toward sexual harassment than American participants. The authors hypothesized that this response was based on a German cultural preoccupation with rights and freedoms, as well as well-defined boundaries.[133] While these cultural attributes are not precisely translatable to Hofstede indices, they nevertheless provide explanatory possibilities from a cross-cultural perspective.

Additional research applies Hofstede's cultural dimensions to predict certain dominant organizational behaviors in terms of sexual harassment, but the authors warn that no single cultural dimension has predictive value; rather, they urge analysis of the interplay of dimensions to fully comprehend the cultural influences on harassment perception. Hypothesizing beyond the data from their own study of perceptions of sexual harassment among MBA students from the United States, Mexico, and Jamaica, these researchers developed predictions concerning application of several dimensions of Hofstede's cultural

129. *Id.*

130. *Id.*

131. *Id.* at 208–10.

132. *Id.*; HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 111, at 1–4.

133. 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, 772–74 (Sept. 1999).

typology to ethical decision making such as that involved in sexual harassment scenarios. Cultures with high Hofstede Power Distance Index scores—the authors used Japan as an example—would accept inequalities in power and authority; in addiction, employees would likely take cues from supervisors as to the interpretation of sexual harassment. The researchers predicted that this conduct would result in under-identification and under reporting. Employees from cultures with low Hofstede Individualism scores (exemplified, according to the authors, by collectivist cultures in Mexico and Japan) would attempt to promote group harmony, group cohesiveness, and group norms, making them less likely to perceive and report sexual harassment. Cultures with higher Hofstede Masculinity index scores (such as Mexico and other Latin-American cultures) would be more likely to condone sexual harassment than cultures with low or middle-range (the latter as demonstrated in the United States or Canada) Hofstede Masculinity index scores. Finally, cultures with high levels of Uncertainty Avoidance (like Mexico) would support the structure and rules already in existence; thus, a structure discouraging recognition of perceiving and reporting of sexual harassment would not be challenged. Cultures low in Uncertainty Avoidance (such as the United States and Jamaica) would encourage women to take initiative in imposing views and actions to protect against unwanted behavior, even if such views and actions challenged existing structure. Encouraging this type of theorization and subsequent validation through research, the authors believe that the unique interaction of cultural dimensions in each country or grouping will, ultimately, help to determine views about sexual harassment.[134]

Within any one country, different ethnic groupings may present vastly differing cultural identifications. This was strongly illustrated in a 2005 study of responses to sexual harassment in the four major ethnic groups within Singaporean society: Chinese, Malays, Indians, and Caucasians. The researchers stressed that the perception of sexual harassment often resulted from a breakdown of communication and a distortion of cues (by either perpetrator or victim, or both) that was attributable to socially-derived values.[135] Students and staff members from four universities rated a variety of verbal and non-verbal cues as sexually harassing or not. The researchers found interesting differences among the four major ethnic groupings. All instructions and ratings were executed in English, as this is the major medium of instruction at the university level and the main common language in Singapore.[136] Assuming a generally adequate level of understanding (given the educational level of the participants), the researchers still considered language to be a potential artifact influencing results. Each given cue resulted in differences in response by each ethnic group, with Malays and Chinese tending to rate sexual harassment more frequently.[137] For instance, Malays, strongly influenced by Islamic teachings, were significantly more likely to rate a touch on the shoulder as harassing than any of

134. Fiedler & Blanco, *supra* note 58, at 276–79, 286–88.

135. Li & Lee-Wong, *supra* note 2, at 701–02.

136. *Id.* at 702.

137. *Id.* at 703–04.

the other groups.[138] Caucasians were the only group to rate a touch on the shoulder as less harassing than a comment about someone looking sexy.[139] The researchers stressed the importance of investigating cross-cultural perceptions of sexual harassment in order to improve cultural sensitivity in the diverse, international communities in which more and more citizens of the world will be employed.[140]

In a second part of this study, responses to invasions of personal space (addressed with a command of "Go away!") were studied; each participant determined the distance that he or she required a personal space violator to move back in order for comfort distance to be re-established.[141] Responses depended on the ethnicities of the violator and the rater alike. Validating an earlier study, this research established that distance amounts deemed comfortable and appropriate by various groups ranged from Indian-Chinese dyads (most distant) through Malay-Chinese, Caucasian-Chinese, and Chinese-Chinese, in decreasing order of distance required for comfort.[142] Going on to compare responses presented in differentially verbalized forms of rejecting sexual approaches (including dialects that insert lexemes conveying meaning and attitude), the researchers demonstrated that culturally-determined language, manners, and modes of presenting rejection of sexual harassment contributed to the seriousness with which the rejection was perceived.[143] These Singaporean results appear to have meaning for any country in which diverse cultures and ethnicities work together.

IV. THE DOCTRINE OF ORDERED LIBERTY AS APPLICABLE TO THE PERCEPTION OF SEXUAL HARASSMENT

As globalism spreads and affects more lives, an ever-growing number of social, political, and legal issues will have to be addressed in terms of multicultural sensitivity. Prof. Doriane Coleman addresses the issue of multicultural sensitivity in applications of the law in the following manner:

As the United States seeks to accommodate a large number of non-European and thus culturally distinct immigrants for the first time in its history, it is increasingly faced with significant cultural collisions which challenge both its legal and civic tradition of tolerance and its ability to resolve these collisions in a manner that does not destroy what the majority believes are important aspects of American culture. Reconciling these two predominant values is both a classic legal and philosophical dilemma for American democracy, and an urgent contemporary problem.[144]

Coleman goes on to explain that American law has typically attempted to resolve "the tension between tolerance and a unified culture by applying the

138. *Id.*

139. *Id.* at 703.

140. *Id.* at 714.

141. *Id.* at 705–06.

142. *Id.* at 706–07.

143. *Id.* at 714–15.

144. Doriane L. Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 717–18 (1998).

doctrine of ordered liberty."[145] This doctrine advocates cultural pluralism, but only within the bounds tolerated by the majority; in other words, there is personal (sometimes culturally-based) liberty allowed, but only within the boundaries of social order, stability, and the traditions and values held by the majority. These majority traditions and values are fluid, however, over time and with societal change.[146]

Left-wing multiculturalists have challenged the doctrine of ordered liberty, disclaiming the melting-pot conceptualization of assimilated America and arguing that cultural groups should maintain their uniqueness and participate in culturally-significant practices, even if these fall outside the large society's goals and values.[147] The cultural defense doctrine was the result of this left-wing multi-culturalist viewpoint. In the extreme, cultural defense advocates believe in culturally subjective legal determinations by which "the moral culpability of an immigrant defendant should be judged according to his or her own cultural standards, rather than those of the relevant jurisdiction."[148] In a more moderate form, the culture defense promotes sensitivity to defendants coming from or identified with significantly different cultures.[149] Some authors believe a defendant's cultural circumstances should be allowed only as a mitigating factor in sentencing.[150] As the name implies, the cultural defense typically refers to the presentation of cultural evidence in *defense* of criminal conduct; it has not been applied to justifying the validity of a legal claim (i.e., to bolster a plaintiff's position) based on cultural evidence. Nevertheless, some of the issues raised in consideration of both the cultural defense and the doctrine of ordered liberty are also applicable in the realm of culturally-influenced perceptions and reporting tendencies regarding sexual harassment.

In their respective writings, Coleman and Prof. Damian Sikora delineate several major problems inherent in the use of the cultural defense. According to these scholars, the defense: (1) sets up disparate standards of justice for those from different cultures; (2) promotes stereotypes of minority cultures; (3) potentially reinforces cultural norms that depreciate or limit the rights of women and children; (4) robs victims of justice when a defendant of another

145. *Id.* at 718.

146. *Id.* at 718–20.

147. *Id.* at 720–21.

148. Doriane L. Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1094 (1996).

149. *Maine v. Kargar* presents an oft-cited example of a culture defense. *See* 679 A.2d 81 (Me. 1996). Afghani immigrant Kargar was convicted of two counts of gross sexual assault for kissing his fifteen-month-old's son on the penis, an act considered neither sexually inappropriate nor criminal in Afghanistan under Islamic law. In Kargar's culture of origin the act was actually considered a demonstration of love and kindness. On appeal, the Maine Supreme Court found that the trial court erred in failing to allow Kargar's culture, his innocent state of mind, and the lack of harm done—criteria that would have allowed for the flexibility of a *de minimus* consideration. "The fact that a defendant's culture can be relevant under multiple factors examined in a *de minimis* analysis demonstrates that culture has a profound connection with our sense of justice in general." *Id.* at 82–86. *See also* Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 843 (1999).

150. Damian W. Sikora, *Differing Cultures, Differing Culpabilities: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1706 (2001).

culture is involved; (5) limits the deterrent value of punishments through mitigation by cultural arguments; and (6) ignores the fact that the criminal justice system already allows the admission of cultural background evidence to establish mitigating circumstances or argue for a reduced sentence.[151] Nevertheless, proponents of the cultural defense continue to argue that it promotes fairness, individualized justice, cultural pluralism, and greater accuracy in ascertaining the states of mind of defendants whose actions would have been accepted or even promoted in the defendants' cultures of origin.[152] Here, we are interested in the arguments for and against the cultural defense to determine their relevance, by analogy, to those presented for and against the cultural defense.

Coleman argues that, despite outspoken proponents of the cultural defense, it is the doctrine of *ordered liberty* that is "alive and well as the paradigm that governs, and, more importantly, should govern the way we resolve cultural collisions and other conflicts between individual freedoms [often culturally-based] and the necessary social order."[153] Once again, this doctrine of ordered liberty has been applied, primarily, in the service of legal defense, to justify culturally-determined freedom of action *within* the framework of the society's order, stability, traditions, and values. Yet, as will be elaborated below, this doctrine can be used to support the position that sexual harassment should be defined in terms of culturally-established values and perceptions, as long as these do not exceed the bounds of societal norms.

Extrapolating from these models, the acceptance of differential, culturally determined perceptions of sexual harassment and the existence of a hostile work environment would remain consistent with the cultural pluralism arm of the doctrine of ordered liberty. "Allowing sensitivity to a defendant's culture to inform the application of laws to that individual is good multiculturalism."[154] Such cultural pluralism must, however, satisfy the other doctrine of ordered liberty requirement of existing within the bounds established by the values and traditions of the majority and the need for social order and stability. The belief that a work environment should not be offensive, uncomfortable, or embarrassing, even to the culturally-based sensibilities of an employee (to the point of impairing his/her work) would not violate the boundaries established by majority values and traditions; it would certainly not undermine the order and stability of the society. One could certainly argue that a respect for the diversity that enriches the work environment has become a core twenty-first century social value. Protection of the work environment such that it promotes creativity and productivity for all cultures—rather than fear, humiliation, and self-doubt—would definitely be consistent with current American societal norms.

151. Coleman, *supra* note 148, at 1096–99; Sikora, *supra* note 150, at 1701–05.

152. Sikora, *supra* note 150, at 1706–09.

153. Coleman, *supra* note 144, at 722.

154. Coleman, *supra* note 148, at 1094.

V. THE LEGAL RELEVANCE OF CULTURAL PSYCHOLOGY RESEARCH IN SEXUAL HARASSMENT PERCEPTION AND REPORTING: EDUCATION, LITIGATION, AND POLICY

A. Education

As businesses become more diverse and international, educational programs for managers and employees at all levels will have to incorporate cultural relativism. According to Prof. Weitzman, "Training programs serve the dual purpose of fostering a workplace environment that is free of harassment and providing a legal basis to defend a sexual harassment claim."[155] Obviously, all scenarios of potentially offensive conduct (e.g., a person from cultural background X exhibits behavior in relation to a person from cultural background Y) could not possibly be predicted, for the variables would be infinite. However, with even a *basic* knowledge of patterns—put in lay person's terms such as those delineated by Triandis or Hofstede—one can develop further awareness about conduct that might be perceived as creating a hostile environment in those situations where individuals from different cultures must interact. While employees would not be expected to become cultural psychologists, employees *would* be expected to anticipate the potential for the perception of gender-based disrespect, humiliation, or offensiveness by others—even in comments or actions that would seem harmless or tolerable to them or individuals of *their* own culture. It has been readily accepted that executives from different cultures who engage and expect to succeed in complex business transactions must either learn each other's styles of communication and interaction or risk misunderstandings, misinterpretation, or unclear and offensive responses. This mentality regarding the need for examining other systems "not through the lenses of our own understanding, but through those of the insiders themselves" must be applied to the workplace environment with its ever-growing multicultural nature.[156]

B. Litigation

Social science studies, when based on empirically-sound and legally relevant methodology, can help ascertain which "patterns of social-sexual conduct [will] be perceived as intimidating, hostile or offensive by a reasonable person . . . ."[157] While this statement was made in relation to studies of *gender*-based perceptions of sexual harassment, it is nevertheless relevant to research regarding *culturally-determined* perceptions of sexual harassment. Studies of sexual harassment perception are not intended to answer the question of whether any one specific plaintiff's circumstances satisfy the legal criteria for sexual harassment. Rather, they serve to demonstrate the potential differences with which victims, alleged perpetrators, judges, and juries perceive and consider appropriate handling of unwelcome sexualized approaches. These studies go beyond influencing any one particular case, instead having relevance for legislators in policy-making and for the judiciary in defining the standards to

155. Weitzman, *supra* note 15, at 28.

156. HARU YAMADA, DIFFERENT GAMES, DIFFERENT RULES viii (1997).

157. Wiener et al., *supra* note 33, at 278–79.

be applied in sexual harassment cases. Moreover, such studies may demonstrate how the cultural affiliations of different judges and jurors will influence their perceptions of whether sexual harassment occurred and, if so, was responded to appropriately.[158] Even as applied in particular cases, determined patterns of interaction may have relevance in defining a victim's responses as part of a normal pattern rather than as idiosyncratic behaviors. Of course, contrived legal scenarios and student study populations do not always adequately represent the actual situations of workers,[159] but this is correctable with the study of more realistic populations of employers and employees in actual work environments. Social science research will have to be conducted with the deliberate intention of advising the legal system.[160] While still in a rudimentary stage, continuing to refine cross-cultural psychology research regarding perceptions of and responses to sexual harassment will provide invaluable information in the gray areas where litigation often finds itself when litigants are attempting to define what constitutes a hostile environment.

One key area of applicability of social science (specifically cultural psychology) research is demonstrated by the use of expert testimony in sexual harassment trials. Federal courts (at the discretion of the presiding judges) often disallow expert testimony in this particular area because they assume that what constitutes sexual harassment is "common knowledge," with that related disputes are "discrete and self-contained," and not sufficiently complex, technical, or specialized so as to require expert testimony.[161] It is assumed the men and women of the jury, being of ordinary intelligence, education, and range of life experiences, can make an accurate judgment without the opinion of an expert in social or cultural psychology.[162] In fact, a sometimes-expressed fear is that expert testimony will undermine a sense of jury competence and intrude upon the jury's sphere of operation.[163] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court determined that, under Rule 702 of the Federal Rules of Evidence, expert testimony will be admitted if it is (1) reliable and (2) relevant to the particular trial. To be reliable, the expert testimony or evidence provided must prove itself to be "'scientific knowledge.'"[164] In sexual harassment cases, the expert scientific evidence is not "hard" physical science, but instead lies in the behavioral and psychological fields—areas about which judges often possess skepticism.[165]

Prof. Donna Shestowsky argues that many sexual harassment determinations cannot be determined on the basis of common knowledge alone.[166] To demonstrate this contention, she uses several examples of behavior patterns substantiated by empirical social science research that are not areas of

158. Blumenthal, *supra* note 28, at 52–53.

159. *Id.* at 35–36, 49.

160. Shoenfelt, Maue & Nelson, *supra* note 29, at 658.

161. Donna Shestowsky, *Where is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials*, 51 STAN. L. REV. 357, 365–66 (Jan. 1999).

162. *Id.* at 366.

163. *Id.* at 363, 384.

164. FED. R. EVID. 702; Daubert v. Merrell Dow Pharm., 509 U.S. 579, 589–90 (1993).

165. Shestowsky, *supra* note 161, at 365–67.

166. *Id.* at 366–67.

common knowledge.[167] For example, the common perception is that sexual harassment is instigated, most often, by superiors with power over the alleged victim; research has demonstrated that, in actuality, most harassment occurs between peers or co-workers.[168] Another example involves the empirically-derived observation that those who have never themselves been sexually harassed previously are more likely to place blame for the harassment on the alleged victim[169]—the realm of common knowledge may not take this into account.[170] One further critical, empirically-based, finding impacting sexual harassment reports involves the length and degree to which victims will tolerate sexual advances rather than file formal complaints; some studies place this as high as ninety-five percent.[171] Such empirically-reproducible concepts as "solo status," "priming," "rarity," and "unprofessional ambiance" were explained by expert witness Dr. Susan Fiske in *Robinson v. Jacksonville Shipyards, Inc.*[172] to demonstrate to the jury why material inoffensive to most men might be injurious to women.[173] These concepts cannot be considered inherently common knowledge to judges and juries who question why a woman might reasonably be a victim of harassment in an environment in which a man might not feel the same. In addition, experts can help a judge or jury understand why a woman claiming harassment did not come forward sooner with her charges.[174] Clearly expert testimony and the social psychology research have a role in correcting biases and misperceptions of judges and juries, in educating judges and juries about patterns and perceptions of sexual harassment and hesitance to report, as well as in accepting that different groups and individuals may possess genuinely differing belief systems about what constitutes harassment.

Much of the expert testimony in sexual harassment cases has been directed toward gender-based perceptions and misperceptions. The testimony has been two-pronged: on the one hand, explaining women's unique perceptions and hesitancies about sexual harassment complaints, and on the other hand, educating jurors about how women's experiences in their work environments are frequently different from men's.[175] Experts have been able to evaluate

167. *Id.* at 367–69.

168. Shestowsky, *supra* note 161, at 372 n.105 (citing OFFICE OF MERIT SYS. REV. & STUD., U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 26 (1981)).

169. Inger W. Jensen & Barbara Gutek, *Attributions and Assignment of Responsibility in Sexual Harassment*, 38 J. SOC. ISSUES 121, 121, 126 (1982).

170. Shestowsky, *supra* note 161, at 369.

171. Stockett v. Tolin, 791 F. Supp. 1536 (S.D. Fla. 1992); Snider v. Consolidation Coal Co., 973 F.3d 555 (7th Cir. 1992).

172. 760 F. Supp. 1486, 1502–05 (M.D. Fla. 1991).

173. Shestowsky, *supra* note 161, at 370–71. *See also* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1502–05 (M.D. Fla. 1991). "Priming" is defined as "a process in which specific stimuli in the work environment prime certain categories for the application of stereotypical thinking." *Id.* at 1503. "Rarity" exists when "an individual's group is small in number in relation to its contrasting group, so that each individual member is seen as one of a kind—a solo or near solo." *Id.* "Unprofessional ambiance" occurs when "tolerance of nonprofessional conduct promotes the stereotyping of women in terms of their sex object status." *Id.* at 1504.

174. Shestowsky, *supra* note 161, at 359, 380–84.

175. *Id.* at 359, 384–86.

primary research for non-professional jurors and explain how such research applies to the case in question.[176] In a variety of cases, expert testimony has bolstered the creditability of women who may have been injured by environments that men would not have found harmful by explaining the varying tendencies of individuals to endure a staggering amount of sexual harassment before filing a formal complaint.[177] Juries have benefited from expert opinions about sex stereotyping, organizational decision-making, the handling of unwelcome advances, and the myriad ways in which victims "'deny, ignore, or cope with the sexually harassing conduct" before confronting it.'"[178] Similar gains could be expected from research findings presented by cultural psychology experts in the realm of culturally-based perceptions and ways of coping with sexual harassment.

It would be a false assumption to believe that all social psychology or cultural psychology research will promote plaintiff-friendly verdicts. Concepts like sex stereotyping can go both ways; victims may perceive hostility in an environment where it simply does not exist. It may be shown that others from the same culture would *not* have perceived a hostile environment, and that cultural attribution is not relevant in that situation. Another related question that has not been adequately researched involves the issue of whether collectivist cultures exist in which cultural attributes actually *diminish* the likelihood of sexual harassment occurring. In other words, in some of the cultures in which sexual harassment reporting is low, it may be possible that low reporting indicates mutual respect or social harmony dictating limits on harassment behaviors, rather than the alternative of fear of violating group cultural norms, as typically suggested.[179] Finally, as a mitigating circumstance, defendants might utilize a culture defense to explain why, coming from a different culture than the plaintiff, behaviors judged ultimately to constitute harassment were not conceptualized as harassing in the defendant's culture of origin. In fact such culture defenses have been successfully applied, even in cases as serious as murder.[180] While an in-depth assessment of the culture defense is beyond the scope of this Note, this example is put forward to demonstrate that not all cultural relativism arguments need mitigate on the side of the plaintiff in sexual harassment cases.

C. Policy and Standards

Researchers have argued for the relevance and potential of cultural and social psychology research for legal and social policy implications. Psychological constructs, they explain, are not the *same* as legal standards, but a relationship should exist between the two.[181] The implication is that cultural and social

176. *Id*. at 384–85.

177. Snider v. Consolidation Coal Co., 973 F.2d 555 (7th Cir. 1992); Stockett v. Tolin, 791 F. Supp. 1536 (S.D. Fla. 1992); Shrout v. Black Clawson Co., 689 F. Supp. 774 (S.D. Ohio 1988); Shestowsky, *supra* note 161, at 380–84.

178. Shestowsky, *supra* note 161, at 383.

179. Sigal & Jacobsen, *supra* note 133, at 776.

180. Coleman, *supra* note 148, at 1093–94.

181. Gelfand, Fitzgerald & Fritz, *supra* note 56, at 174–76.

psychology research plays a role in adopting or altering policy, and in determining or adjusting standards, as well as in actual trial situations.

Policies defining the hostile work environment may have to be altered to take cultural sensitivities into account. This will likely generate further attempts to utilize First Amendment defenses to sexual harassment claims.[182] Employers may also attempt to defend against cross-cultural broadening of the boundaries of a hostile environment by claiming ordinary socializing in the workplace through "male-on-male horseplay or intersexual flirtation," which are deemed to be outside the scope of Title VII.[183] While each policy alteration may, indeed, engender a slew of new and old defenses, these changes may be needed as the employment landscape expands to encompass a multicultural workforce.

For social and cultural psychological research to be utilized for policy change, it must be methodologically sound. Meta-analyses (which refer to statistical techniques by which to pool data to create cross-study analyses) can also provide valid, comparative evidence. Only if sound, reliable, research techniques are employed, can policy makers make "substantive inferences" from the resultant experimental findings.[184]

Policy arguments related to replacement of the "reasonable person" standard with a "reasonable woman" standard have been previously mentioned in this Note. Cross-cultural research further bolsters the need for a more culturally sensitive standard. Blumenthal, as well as the APA amicus brief in *Harris*, have suggested a "reasonable victim" standard, focusing on the state of victimization and allowance for the inclusion of other variables.[185] This standard, according to Blumenthal, takes "the alleged victim's perspective in evaluating whether sexual harassment was perceived." It "subsumes other potential differences . . . [and] reflects the foundation of both the legal argument for a clearer standard and social scientists' discussion and empirical testing of that argument."[186] This work does not intend to advocate adoption of a "reasonable victim" standard, although such a standard might well be amenable to input from an alleged victim's cultural background. Rather, it is intended to show that the question of standard as a policy consideration may still be in flux.[187] Viable

182. The first time such a defense was introduced and ruled upon was the 1991 case of *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534–37 (M.D. Fla. 1991). Weitzman clarifies that such a defense can be introduced by a private sector employer because such an employer is being considered to act as a government agent in restricting workers' speech to comply with such governmental regulations as Title VII and EEOC Guidelines. Weitzman, *supra* note 15, at 31–34. This defense has been utilized a number of times since 1991, but the Supreme Court has not yet come out with a definitive stance on the validity of this defense or on the guidelines within which it may be utilized. *Id.*

183. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–82 (1998).

184. Blumenthal, *supra* note 28, at 51; LEVINE & WALLACH, *supra* note 6, at 431.

185. Blumenthal, *supra* note 28, at 52–53; APA Brief, *supra* note 25.

186. Blumenthal, *supra* note 28, at 52–53; Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). This idea was also suggested in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

187. Ontiveros suggests that in order to understand the true nature of sexual harassment, one must understand how issues of class, race, ethnicity, sexual orientation, and disability affect it. "Scholars must continue to develop the notions of flexible categories and multiple consciousness before they, and the legal system, can truly understand the nature of sexual harassment." Ontiveros, *supra* note 126, at 1400.

research may indicate the need for a "reasonable, culturally-sensitive person" standard utilized in determining whether sexual harassment has occurred. More important than simply re-naming the standard is the fluidity and flexibility of the standard in its ability to adapt to a multicultural world.

While the Supreme Court has generally disavowed the transformation of "Title VII into a general code of civility in the workplace,"[188] the question of limiting the standard for workplace behaviors and verbalizations will need to be re-evaluated, in light of an increasingly diverse workforce and a range of new multicultural perceptions. "By absorbing cultural elements from a broad spectrum of ethnic groups, American culture has remained dynamic and creative, continually evolving as it weaves threads of various immigrant cultures into its fabric."[189] To sustain this creative influx, the standards for American jurisprudence must respect the differences and conflicts between the cultural values of the majority (as reflected in the existing law) and those of cultural minorities. Such respect for cultural differences can be seen where the courts consider cultural factors in extenuating circumstances, plea bargaining, sentencing processes (resulting in mitigated punishments), the use of the cultural defense, and with the doctrine of ordered liberty. Objections to judiciary considerations of cultural differences exist primarily when such considerations seem to permit differential standards for different cultural groups to: (1) promote stereotyping; (2) limit the deterrent effect of punishment; (3) deny justice to victims; or (4) undermine the implementation of clear guidelines for determination of guilt. However, these arguments are far less powerful when applied to the cultural values shaping the mental states of *victims*, rather than those of defendants. Particularly when establishing the existence of hostile environment sexual harassment—a determination that is highly dependent on the victim's mental state—the standard must reflect the cultural influences and values that have shaped the reasonableness of the victim's perception and response.

Whether the reasonable person or reasonable woman standard is ultimately chosen, that standard will have to make allowances for the cultural influences that determine reasonableness and the recognition that an individual of a particular culture would reasonably assess a work environment as intimidating, hostile, or abusive. Critics of this point of view will question the concept of culture altogether, claiming that there are inherent difficulties in defining it precisely: As one scholar phrased this argument, "[c]ulture is, by its very nature, constantly in a state of flux, constantly evolving . . . prone to varying interpretations regarding the existence and prevalence of any given practice."[190] While there is truth in this, it speaks not to the *exclusion* of cultural consideration as a part of sexual harassment determination, but rather to the role of further cultural psychology research into cultural tendencies that influence women's recognizing and reporting harassing conduct by which they are victimized. While it may be impossible to dissect each and every cultural

188. Weitzman, *supra* note 15, at 40; *Oncale*, 523 U.S. at 75.

189. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1293 (1986).

190. Nancy S. Kim, *Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 122 (Winter 1997).

bias, certain trends (e.g., collectivist trends that lead to strong group identifications and failures to act in ways conflicting with authority or group norms) can be identified and applied to development of fair yet culturally-sensitive standards. Such research will contribute to both policy considerations (i.e., the creation of precise, culturally-sensitive standards that maintain the principles of equal justice, etc.) and appropriate use of expert witnesses in sexual harassment trials involving victims from other cultures.

CONCLUSION

Most working individuals spend fifty percent or more of their waking lives in the workplace; they deserve a work "home" that is safe, supportive, stable, and free of discrimination, humiliation, and gross discomfort. Rules exist in all places of employment concerning dress, language, grooming, and demeanor; there are few work environments that allow ultimate freedom. Regulations that monitor conduct appropriateness can be adjusted or expanded to incorporate sensitivity to individuals from other cultures, particularly as exposure to other cultures is increasing exponentially in American business. Since an employee would not be allowed to speak or behave in a manner that would degrade, insult, or embarrass a customer from our own or another culture, the CEO of another company from our own or another culture, or a regulatory official from our own or another culture, why should he or she be able to degrade, insult, or embarrass a fellow employee from another culture? Except in unique environments (where creativity and verbal freedom are required), discriminatorily harassing words and actions have no role in the workplace. "I didn't realize it was offensive" should not be an excuse in today's world, where information about what is offensive to those from other cultures can be obtained and made available through social sciences research. A cross-cultural world is upon us, and awareness of its mandates cannot be avoided. Sexual harassment policy and jurisprudence must catch up with this reality.