'Borderline' Sexual Harassment: A Study of Sex Based Discrimination in the United States and Argentina and the Problem of Extraterritorial Application of U.S. Law

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'BORDERLINE' SEXUAL HARASSMENT: A STUDY OF SEX BASED DISCRIMINATION IN THE UNITED STATES AND ARGENTINA AND THE PROBLEM OF EXTRATERRITORIAL APPLICATION OF U.S. LAW

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I. Introduction

During the 1997-98 United States Supreme Court term, the sexual harassment form of sexual discrimination has become a “frequent docketer,” with one case already decided\(^1\) and three more expected to be decided before the term comes to a close early this summer.\(^2\) The scope of these cases ranges from protecting against same-sex harassment to definitional issues and liability questions.\(^3\) The cases now being considered make it clear that the U.S. Supreme Court has recognized the need to define the contours of

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2. See Greenhouse, *Court to Examine Sex Harassment: Justices Embarking Upon an Amplification of Earlier Decisions*, supra note 1, at 22 (stating that four cases is a significant amount to decide, considering that, overall, approximately 90 cases will be decided this term).

3. See *infra* notes 259-63 and accompanying text.
the sexual harassment landscape. This Note will focus on sexual harassment of women in the U.S. and Argentina as well as the equally pervasive problem of subtle forms of sexual discrimination against women in the U.S., and the problems associated with the extraterritorial application of U.S. law in the global marketplace. In light of the Supreme Court’s recent and on-going attempt to refine the definition of U.S. sexual harassment, and the reality that subtle forms of sexual discrimination are an extensive problem affecting women in this country, the U.S. must confront these domestic concerns before taking economic action on the international stage.

Part I of the Note provides an overview of U.S. sexual discrimination law, including Title VII, its uses, and traditional employer defenses, and a general survey of the well developed terrain of U.S. sexual harassment law, both quid pro quo and hostile environment claims. Part I emphasizes subtle employer discrimination in the U.S., including sections on fundamental rights, and immutable and mutable characteristics. Part II focuses on the important economic role our Latin American neighbors play in the global marketplace, and the subsequent labor implications of U.S. corporate expansion south of the Tropic of Cancer. Part III provides a detailed examination of the developing Argentine perspective on sexual harassment, including its recent decree banning sexual harassment, as well as other Constitutional issues, labor law protections, pending legislation, current case law, and scholarly publication. Part IV discusses the shortcomings of extraterritorial application of U.S. sexual harassment law in the global marketplace, including the potential for neglecting real cultural idiosyncrasies and nuances. It is imperative to note that it is the authors’ aim to highlight the problems inherent in the extraterritorial application of U.S. law, centering upon, not gross violations, but ‘borderline’ cases of sexual harassment overseas. These instances of alleged harassment, while perhaps obviously in poor taste, may not fit clearly within the definition of sexual harassment in either the United States or Argentina.

4. See infra notes 259-63 and accompanying text.
5. See generally Tamar Lewin, Debate Centers On Definition Of Harassment, N.Y. Times, Mar. 22, 1998, at 1 (referring to the recent sexual accusations involving President Clinton and the difficulties in drawing the line between what is merely “uncouth” and what is legally actionable).
II. UNITED STATES SEXUAL DISCRIMINATION LAW

A. Title VII

The most important legislation dealing with sexual discrimination in the U.S. workplace is Title VII of the Civil Rights Act of 1964.\(^6\) Title VII was passed as an attempt to outlaw employer discrimination against employees based upon characteristics of "race, color, religion, sex, or national origin."\(^7\) The addition of sex as a protected category of employment, however, was not a part of the originally intended scope of employee protection.\(^8\) Rather, the inclusion of sex was an attempt to defeat the entire bill.\(^9\) Although Title VII did pass Congress with the sex characteristic intact, such reluctance to afford women full employment opportunities still exists.

While Title VII has allowed women to make great strides in employment equality, there still exists an employer tendency to exclude women.\(^10\) This tendency has taken the form of subtle employer policies which discriminate against women in a manner not explicitly forbidden by Title VII.\(^11\) Such policies weed women out of potential employment positions on the basis of general physical appearance as well as unique physical characteristics possessed by women as a gender. The most common of these employer practices discriminate against women on the basis of grooming, weight, age related appearance, physical stature, strength and pregnancy.

1. Establishing Traditional Title VII Claims

The courts have recognized that Title VII works to place men and women on "equal footing" in the employment context.\(^12\) As the United States Supreme Court emphasized in *McDonnell Douglas Corp. v. Green*,\(^13\) "[w]hat is required by Congress is the removal of

\(^10\) See discussion *infra* Parts II.A-II.D.
\(^11\) See discussion *infra* Parts II.A-II.B.
\(^13\) 411 U.S. 792 (1973).
artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Thus, Title VII has been read by the courts as a means by which such "barriers" are to be removed.

Section 703(a) of Title VII specifies employment practices which will violate the Act. Section 703(a) states that:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) 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 race, color, religion, sex, or national origin.

A plaintiff who wishes to establish a violation under Title VII may do so by utilizing one of two discriminatory employer behaviors. These behaviors are termed "disparate treatment" and "disparate impact." They were both defined by the Supreme Court in *International Brotherhood of Teamsters v. United States.* In cases of disparate treatment, the employer treats a class protected under Title VII in a discriminatory manner. In cases of disparate impact, the employer enforces "employment practices that are facially neutral" but which "fall more harshly" on members of a class protected under Title VII. The most important distinction between the two is that disparate treatment is, of necessity, accom-
panied by "discriminatory motive." In a disparate treatment case, the plaintiff must establish the discriminatory motive of the employer. In a disparate impact case, statistical proof is needed to evidence the disparate effect caused by a seemingly neutral employer practice.

Once a plaintiff has chosen a Title VII theory under which to proceed (either disparate impact or disparate treatment), she must discharge a specified burden of proof so as to set forth a prima facie case of sex based discrimination. The Supreme Court set forth the burden of proof for disparate treatment violations of Title VII in McDonnell Douglas Corp. v. Green. Under the McDonnell Douglas structure, the plaintiff must first set forth a prima facie case of discrimination. After that burden is discharged, the employer must satisfy the burden of proving a "legitimate, nondiscriminatory reason" for its employment practice. If the employer satisfies its burden, the plaintiff bears the burden of proving that the employer's reason for its employment practice is a pretext, proffered to hide discrimination in violation of Title VII. In Texas Dept. of Community Affairs v. Burdine, the Supreme Court clarified the respective burdens by explaining that while the employer must carry the burden of showing a nondiscriminatory basis for its employment practices, the burden of proving a violation of Title VII always and ultimately rests upon the plaintiff, throughout each stage of the McDonnell Douglas framework.

The burden of proof to be satisfied by the plaintiff under a disparate impact theory is less arduous in that there is no need to prove a discriminatory motive. In order to prevail on a disparate impact claim, proof is required that a facially neutral employment practice

23. Id.
24. See Befort, supra note 8, at 8 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973)).
26. See Befort, supra note 8, at 8.
28. See id. at 802.
29. Id.
30. Id. at 804.
32. See Befort, supra note 8, at 8 n.33.
33. See Griggs, 401 U.S. at 432; Reed, supra note 9, at 284-85 (1992).
falls disproportionately harshly upon a group protected by Title VII. 34

2. Traditional Employer Defenses to Claims Brought under Title VII

After a plaintiff has established a prima facie case of sex based
discrimination under Title VII, the employer may assert a defense
to the discrimination. 35 There are two recognized employer
defenses to a violation of Title VII. 36 They are both affirmative
defenses 37 to be proved by the employer. 38

The first defense is codified in section 703(e) of Title VII and is
referred to as the Bona Fide Occupational Qualification (BFOQ)
exception to otherwise discriminatory conduct. 39 The BFOQ does
not apply as an exception to employer discrimination based upon
race. 40 However, the BFOQ exception does explicitly apply to
sex. 41 In fact, "the most frequently litigated application of the
BFOQ defense is with respect to distinctions based on gender." 42
The BFOQ defense is usually raised where disparate treatment
Title VII actions are brought. 43 It is a limited defense, construed
narrowly by most courts considering its application. 44 Indeed, the
legislative history of Title VII indicates that the BFOQ is to be nar-

34. See Griggs, 401 U.S. at 431; Reed, supra note 9, at 284-85.
35. See Stephen F. Befort, BFOQ Revisited: Johnson Controls Halts the Expansion
of the Defense to Intentional Sex Discrimination, 52 Ohio St. L.J. 5, 9-10 (1991); Buchman,
supra note 15, at 204.
36. See Buchman, supra note 15, at 204; see also Befort, supra note 35, at 10 (discussing
the distinction between the bona fide occupational qualification defense and the business
necessity defense).
37. See Buchman, supra note 15, at 204.
38. See Befort, supra note 35, at 10; Toni Scott Reed, Flight Attendant Furies: Is Title VII
discussing how the Civil Rights Act of 1991 (citation omitted) codified the business necessity
defense and clarified that the burden of proving the defense rested with the employer).
40. See Befort, supra note 35, at 6 n.10.
practice for an employer to hire and employ employees...on the basis of...sex...where
...sex...is a bona fide occupational qualification reasonably necessary to the normal
operation of that particular business or enterprise. ...")
42. Befort, supra note 35, at 6.
43. See Befort, supra note 35, at 10.
44. See Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (1969) ("The legislative
history indicates that this exception was intended to be narrowly construed."); see also
Befort, supra note 35, at 7 (discussing the scope of the BFOQ defense).
An employer will only be successful in asserting a valid BFOQ defense where the discriminatory employment practice in question is "reasonably necessary to the normal operation of that particular business or enterprise."\(^4\) The second employer defense, the business necessity defense, was traditionally a judicially created defense,\(^4\) used in cases of disparate impact discrimination.\(^5\) It was codified in subsection 703(k) (1) of Title VII as a result of the Civil Rights Act of 1991.\(^6\) In order to establish the defense of business necessity, the employer must articulate a legitimate business reason for policies that fall harshly upon a given group of employees.\(^6\)

The provisions of Title VII discussed above are specific employer protections and employer defenses under the statute. When a plaintiff can show an explicit violation of the statute, the Title VII analysis is much more straightforward and the ability to prove invidious sex discrimination is more likely. Even when the provided employer defenses are relied upon by the employer, the plaintiff is protected in that the employer is not resorting to unknown legal machinations but is forced to comply with the terms of the protective statute itself.

The more troubling and complex question is posed when the employer attempts to either evade Title VII entirely or to assert an employer defense to a form of discrimination against women which is not explicitly proscribed by the terms of the statute. Such discrimination is often so subtle as not to appear discriminatory at all. We now turn to a discussion of employer practices which subtly discriminate against women based upon physical characteristics.

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\(^{45}\) See Dothard v. Rawlinson, 433 U.S. 321, 334 n.19 (citing 29 C.F.R. § 1604.2(a)); see also Weeks, 408 F.2d at 232 (citing legislative history).


\(^{47}\) Patti Buchman, Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age - Related Appearance, 85 Colum. L. Rev. 190, 204 (1985).

\(^{48}\) See Befort, supra note 35, at 10.


\(^{50}\) See Reed, supra note 38, at 335-37.
B. Subtle Employer Discrimination Against Women

1. Sex Plus Discrimination

It is a violation of Title VII for an employer to discriminate against women because of their status as women.\(^5\) That is apparent from the language of the statute.\(^5\) However, while not immediately apparent from the language of the statute, an employer may also violate Title VII by discriminating against a class of certain women. In *Phillips v. Martin Marietta Corp.*,\(^5\) the Supreme Court addressed such an issue. In that case, the employer instituted a hiring policy that called for the exclusion of women with pre-school aged children.\(^5\) Although women were hired by the employer,\(^5\) Mrs. Phillips brought suit under Title VII, claiming sex discrimination because there was no like policy excluding men who had pre-school aged children from employment.\(^5\) In a per curiam opinion, the Court held that "[t]he Court of Appeals... erred in reading... [section 703(a) of the Civil Rights Act of 1964] as permitting one hiring policy for women and another for men... ."\(^5\) With that statement, the Court emphasized that Title VII is not restricted to employment discrimination "based solely on sex."\(^5\) In so doing, the Court also articulated the theory of sex plus discrimination and found it to be a violation of Title VII.\(^5\)

Sex plus discrimination is "a more subtle form of discrimination,"\(^5\) whereby employees are discriminated against based upon sex and a facially neutral characteristic. As the Fifth Circuit pointed out in *Willingham v. Macon Telegraph Publishing Co.*,\(^5\) the recognition of sex plus discrimination as a violation of Title VII is

\(^{52}\) See id.
\(^{53}\) 400 U.S. 542 (1971).
\(^{54}\) See id.
\(^{55}\) See id. at 543 (citing statistics that 75-80% of those hired were women).
\(^{56}\) See id.
\(^{57}\) Id. at 544.
\(^{58}\) See Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971); Buchman, *supra* note 47, at 195.
\(^{60}\) Willingham, 507 F.2d at 1088-89.
\(^{61}\) 507 F.2d 1084 (5th Cir. 1975).
"necessary . . . to counter some rather imaginative efforts by employers to circumvent Sec. 703."\(^{62}\)

However, despite the recognition of sex plus discrimination as a violation of Title VII, the courts have limited the instances where it may be asserted by a plaintiff to establish the Title VII liability of an employer. In the area of physical appearance, employers are still allowed to subtly weed out those women who don't "look" appropriate for employment.

a. Fundamental Rights

Sex plus discrimination is only a violation of Title VII if the "plus," or facially neutral characteristic, is either a fundamental right or an immutable characteristic.\(^{63}\) Under that formulation, the courts have found that when a woman is discriminated against with respect to a fundamental right, a Title VII violation has occurred. This was the case in Phillips \emph{v. Martin Marietta},\(^{64}\) where having children was the fundamental right protected. It was also the case in Sprogis \emph{v. United Airlines, Inc.},\(^{65}\) where the court found that the right to marry was not a sufficient basis by which employers could discriminate against women employees.\(^{66}\)

b. Immutable and Mutable Characteristics

The courts have not been so apt to find that sex plus discrimination violates Title VII where the "plus" factor involves subjective employee physical appearance.\(^ {67}\) In those cases, the courts have often found physical characteristics to be "mutable" and have deferred to the business prerogative of the employer.\(^ {68}\) This trend is most plainly evidenced in the "grooming" cases.\(^ {69}\)

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\(^{62}\) Id. at 1089.

\(^{63}\) See id. at 1091; see also Mapes-Riordan, \emph{supra} note 59, at 496 (discussing Willingham, 507 F.2d 1084); Reed, \emph{supra} note 38, at 283 (discussing sex plus discrimination in the context of the airline industry).

\(^{64}\) 400 U.S. 542 (1971).

\(^{65}\) 444 F.2d 1194 (7th Cir. 1971).

\(^{66}\) Id. at 1197-98.

\(^{67}\) See discussion \textit{infra} Part II.B.1.

\(^{68}\) See discussion \textit{infra} Part II.B.1.b.

\(^{69}\) See discussion \textit{infra} Part II.B.1.b.1.
(1) The “Grooming” Cases

Grooming has been held by most courts to be outside the protection of Title VII. This is so because the courts have been loathe to overturn the right of the employer to set general standards of appearance in the work place. "Congress sought only to give all persons equal access to the job market, not to limit an employer’s right to exercise his informed judgment as to how best to run his shop." When employers have enforced grooming standards and codes, the courts have routinely found them to be permissible bases of discrimination and not violations of Title VII. Thus, when an employer enacts different grooming standards for women than for men, there is not a violation of Title VII as long as those grooming standards are “in accordance with generally accepted community standards of dress and appearance.” The courts have found “accepted” community grooming standards to be those that are regulations of mutable characteristics which fall on employees in an evenhanded manner.

The most oft cited example of an employer grooming code is that which requires men to wear their hair short. This was the situation presented in both Willingham v. Macon Telegraph Publishing Co. and Fagan v. National Cash Register Co. In both cases, the employer grooming code was upheld as not a violation of Title VII, despite the fact that only men and not women were required to wear their hair short. The courts rationalized their decisions by holding that hair length was a mutable characteristic and that it
was neither unreasonable nor discriminatory to differentiate between men and women on the basis of hair length.\textsuperscript{81}

Further, the court in Willingham stated that the employer practice was reasonable and evenhanded because both men and women were subject to grooming standards that accorded with "community standards of dress and appearance."\textsuperscript{82} Community standards seemingly dictated that men be curtailed in wearing their hair longer than women. Both courts agreed that the employee suffered no great employment disadvantage in being forced to adopt a short hair style.\textsuperscript{83}

While the courts in Willingham and Fagan\textsuperscript{84} declared that an employer possesses the right to enact grooming codes regulating mutable characteristics based upon community standards, that rule arguably is more problematic than it first appears. First, one commentator has suggested that grooming standards are something distinct from general appearance standards\textsuperscript{85} and that while grooming standards are mutable, appearance standards are not.\textsuperscript{86} However, it is virtually impossible to judge an employee's manner of grooming without judging her appearance and employers generally fail to make a distinction between the two.\textsuperscript{87} The aforementioned commentator concedes that "grooming can certainly influence appearance."\textsuperscript{88}

Second, the concept of community standards may arguably lead to employers enacting grooming codes and appearance standards which rely upon community and cultural sexual stereotypes. Both issues seem to have surfaced when the courts have considered grooming codes which have blurred the concepts of appearance and

\begin{footnotesize}
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\item \textsuperscript{81} See Willingham, 507 F.2d at 1092; Fagan, 481 F.2d at 1124.
\item \textsuperscript{82} Willingham, 507 F.2d at 1092.
\item \textsuperscript{83} See id. (quoting Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973)); Fagan, 481 F.2d at 1125.
\item \textsuperscript{84} For another case dealing with employee hairstyles as permissibly regulated by the employer via grooming codes, see Rogers v. American Airlines, Inc., 527 F. Supp. 229, 233 (S.D.N.Y. 1981) (accepting the "defendant's assertion that the policy was adopted in order to help . . . [the defendant] project a conservative and business-like image, a consideration recognized as a bona fide business purpose").
\item \textsuperscript{85} See Reed, supra note 70, at 325 (arguing that appearance relates to an "intrinsic" aspect of the individual while "grooming" is easily "mutable").
\item \textsuperscript{86} See Reed, supra note 70, at 325-26.
\item \textsuperscript{87} See Reed, supra note 70, at 326-27 (discussing employer confusion between appearance and grooming).
\item \textsuperscript{88} Reed, supra note 70, at 325.
\end{itemize}
\end{footnotesize}
grooming and have found women employees not physically appealing enough to perform their employment duties.89

In *Craft v. Metromedia, Inc.*, an employer grooming code was referred to synonymously with standards of appearance.90 Christine Craft was a news anchor who sued her employer for unlawful employment discrimination under Title VII.91 She alleged that she was fired because she was “too old, too unattractive, and not deferential enough to men.”93

The Eighth Circuit upheld the decision of the district court that Craft, in arguing that the grooming code did not treat men and women equally, failed to make out a claim of sex based discrimination under Title VII.94 In so doing, the court of appeals also upheld the determination of the lower court that the employer, in regulating general employee appearance, had enacted a reasonable grooming code.95 This, despite the code’s somewhat “emphasiz[ing]... the feminine stereotype of ‘softness’ and bows and ruffles and... the fashionableness of female anchors...”96

There was no Title VII violation found, but instead the standards were held to be acceptable and geared primarily and evenhandedly towards presenting “a professional businesslike image appropriate” to the community.97 Both courts utilized the community standards test.98 However, while the court of appeals stated that the appearance standards used by the employer were permissible because these standards “focus[ed] on consistency of appearance,” the court also admitted that those standards were somewhat infected with a measure of feminine stereotype.99

89. See infra notes 90-102 and accompanying text.
90. 766 F.2d 1205 (8th Cir. 1985).
91. See id. at 1215 (discussing the particular emphasis upon appearance in the television industry).
92. See id. at 1208-09.
93. Id. at 1209.
94. See id. at 1217.
95. See id.
96. 766 F.2d at 1215.
97. Id. at 1217.
98. See id. at 1214 n.11.
99. See id. at 1215; see also Mary Thornton, Judge Rules Anchorwoman was not Sex-Discrimination Victim, Wash. Post, Nov. 1, 1983, at A3 (reporting that District Judge Stevens, after entering judgment against Craft, stated that “her affinity for the beach life and her apparent indifference to matters of appearance required the defendant to formulate and implement corrective measures appropriate to her unique circumstances”).

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Thus, it is not an impossible leap to argue that an employer may attempt to enact a grooming code by which the arguably immutable appearance of an employee is regulated based upon stereotypical community standards. There is a strong possibility that the sex plus discrimination that would ensue would be upheld as permissible because, as seen in Craft, the courts have not always recognized a distinction between grooming and appearance standards\(^{100}\) and they might not always recognize the potential sexual bias underlying the concept of community standards.\(^{101}\) One instance where the courts are aware of demeaning female stereotypes that are used to discriminate against women under the guise of permissible grooming codes is that presented in Carroll v. Talman Federal Savings & Loan Association of Chicago.\(^{102}\)

(2) Demeaning Sexual Stereotypes

In Carroll, the Seventh Circuit held that an employer policy requiring only women to wear uniforms was an impermissible violation of Title VII.\(^{103}\) The court rationalized that requiring uniforms only of female employees was a perpetuation of a demeaning and offensive stereotype, and hence contrary to the very purpose of Title VII.\(^{104}\) Following Carroll, the courts have found that where a mutable characteristic is regulated by an employer to discriminate against women employees on the basis of an offensive sexual stereotype, the mutable characteristic loses its protected status as a permissible aspect of employer regulation and a valid claim of sex plus

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\(^{101}\) See generally Patti Buchman, Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance, 85 Colum. L. Rev. 190, 212-13 (1985) (discussing Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985), and arguing that the Eighth Circuit should have addressed Craft's argument that an employer should not be permitted to consider ratings and customer survey statistics in affecting personnel changes because those are measures of popularity with the audience and not measures of newscasting ability).

\(^{102}\) 604 F.2d 1028 (7th Cir. 1979).

\(^{103}\) See id. at 1033.

\(^{104}\) See id. 1032-33; Craft, 766 F.2d at 1215 n.12 (citing Carroll v. Talman for the proposition that employer dress codes violate Title VII if they involve demeaning female stereotypes); see also Reed, supra note 100, at 295 (discussing the decision of the Seventh Circuit).
discrimination is found.\textsuperscript{105} The employer will then face Title VII liability.

In the grooming cases, the courts have, for the most part, deferred to the employer's right to impose reasonable and even-handed appearance standards that accord with community standards.\textsuperscript{106} While appearance is difficult to define,\textsuperscript{107} the courts have upheld employer grooming codes which have regulated traits as specific as hair length\textsuperscript{108} and as general as professional appearance.\textsuperscript{109} The courts have seemingly found general appearance to be a mutable characteristic that does not fall within the Title VII prohibition against sex plus discrimination—a prohibition which only proscribes those employer practices excluding women based upon a fundamental right or immutable characteristic.\textsuperscript{110}

Despite this deference to the employer, the courts have limited the employer's choice of appearance standards where they have worked to enforce offensive stereotypes against women.\textsuperscript{111} As a result, questions arise which make sex plus discrimination analysis problematic. These questions might include, for instance, whether or not acceptable community standards themselves further offensive female stereotypes and which facets of appearance really are mutable characteristics permissibly regulated by the employer. These two issues have surfaced in cases where women have complained that they were discriminated against under an unfair employer weight policy.\textsuperscript{112}

(3) Weight

(a) Is it Mutable?

If an employer discriminates against a woman, not because she is a woman but because she is a woman who has not adhered to a weight policy that applies equally to men and women employees, the employer may have survived a sex plus discrimination analy-
sis. The key inquiry will be whether or not weight is a mutable characteristic so that the employer may lawfully regulate it. The courts have addressed this issue primarily in the context of the airline industry. While the airline cases have been less than definitive on the matter, the consensus appears to be that weight is a mutable physical characteristic for purposes of employment opportunity.

The early airline cases litigating the validity of employer weight policies met with employer success. In Jarrell v. Eastern Airlines, Inc., the Fourth Circuit affirmed the district court’s finding that the weight policy imposed by Eastern was valid. The court further upheld the district court’s determination that weight is a mutable characteristic, fully within the individual’s control. The court disregarded evidence showing that the percentage of men able to meet the weight requirements was greater than the percentage of women who were able to meet those requirements. Thus, the plaintiff was unable to establish a violation of Title VII under either disparate impact or sex plus discrimination analysis.

In In re National Airlines, Inc., the Southern District of Florida held that the weight policy instituted by National Airlines was lawful. The court found that the plaintiff, a woman who had failed to lose weight after returning from maternity leave, had not produced enough evidence to make out a claim under Title VII. In addition, the court emphasized that weight is a mutable characteris-

113. See discussion infra Part II.B.1.b.3.
114. See discussion infra Part II.B.1.b.3.
115. See Reed, supra note 100, at 288.
116. See Reed, supra note 100, at 288, 299.
117. See Reed, supra note 100, at 291; see also Jarrell v. Eastern Airlines, Inc., 577 F.2d 869 (4th Cir. 1978) (affirming the district court’s finding that weight is mutable); In re National Airlines, Inc., 434 F. Supp. 269, 275 (S.D. Fla. 1977) (stating that, in contrast to height, weight is mutable).
118. See Reed, supra note 100, at 291.
119. 577 F.2d 869 (4th Cir. 1978).
120. See id.
122. See Jarrell, 430 F. Supp. at 888-90; see also Reed, supra note 100, at 292-93 (citing the statistics found by the court).
123. See Reed, supra note 100, at 292-93.
125. See id. at 275.
126. See id. at 272, 275.
tic and held the airline's "weight program . . . to be neither artificial, arbitrary, nor unnecessary." Judge Roettger went so far as to credit the testimony of the airline's expert, Dr. Whaley, that ""tubbies' on airlines are less agile and agility is an important factor in flight attendants discharging the primary duty of providing safety for passengers." Later airline industry cases did not countenance the weight policies challenged by women employees. In *Gerdom v. Continental Airlines, Inc.*, Continental sought to portray "the public image of an airline which offered passengers service by thin, attractive women, whom executives referred to as Continental's 'girls'." To do so, Continental implemented a weight policy applicable only to women. The Ninth Circuit responded by finding them guilty of unlawful employment discrimination. In reaching its conclusions, the court cited *Carroll v. Talman Federal Savings & Loan Association of Chicago* as support for the proposition that Continental's weight policy was analogous to a demeaning stereotype, not a permissible employer grooming code.

In *Association of Flight Attendants v. Ozark Airlines*, the airline imposed different weight standards for men and women. The United States District Court for the Northern District of Illinois held that the plaintiff's proof withstood a summary judgment motion by the airline and set forth a valid Title VII claim. The court also found that it was possible for the plaintiff to prove that weight falls outside the purview of employer grooming standards because it is an immutable facet of appearance.

Despite the courts' apparent movement towards invalidating employer weight policies, the airlines have not been forced to aban-

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127. See *id.* at 275.
128. *Id.*
129. *Id.* at 274.
130. See discussion *infra* notes 131-48 and accompanying text.
131. 692 F.2d 602 (9th Cir. 1982).
132. *Id.* at 604.
133. See *id.* at 610.
134. See *id.*
135. 604 F.2d 1028 (7th Cir. 1979).
136. See *Gerdom*, 692 F.2d at 606.
138. See *id.* at 1135.
139. See *id.* at 1135-36.
140. See *id.* at 1135.
American Airlines applied weight policies which were criticized for being particularly burdensome for female employees. Their weight requirements were stricter than the acceptable weight standards set forth in 1983 by the Metropolitan Life Insurance Company. Yet, these policies were the result of a settlement between American and a former employee who sued the airline. They were the result of a lawsuit brought by an employee who felt that American's weight policies were discriminatory. Settlements have been the most recent trend in the area of airline weight policies. While this has led to more lenient weight requirements, weight requirements still exist.

(b) Are Community Standards Concerning Weight Evenhanded?

Employers who seek to uphold a weight policy as applied equally to both men and women will need to do so by arguing that their standards are reasonable grooming standards generally accepted by the community. This would appear problematic when societal stereotypes concerning women and weight are considered.

Esther Rothblum, who teaches psychology at the University of Vermont, states that the world of employment is biased against overweight people, in general. The bias seems to increase, however, when the employee is a woman, as studies have revealed that women tend to be more susceptible to discrimination based upon their weight than men. "Often referred to as the last acceptable, even fashionable, form of prejudice, weight discrimination on the

142. See id. at 289-90.
143. See id. at 289.
144. See id. at 290.
145. See id. at 289-90.
146. See id. at 303.
147. See Reed, supra note 141, at 303.
148. See Reed, supra note 141, at 288, 341.
149. See Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975).
151. See Sue Morem, How Common is Weight-Based Discrimination?, STAR TRIB., Jan. 9, 1996, at 2D.
job tends to be a female problem.\textsuperscript{152} Rothblum conducted a study that found that sixty percent of those women considered “fat” and thirty percent of those women considered “moderately fat” had been refused a job based upon their weight.\textsuperscript{153} Only forty two percent of men considered “fat” and none of the men considered “moderately fat” reported like discrimination.\textsuperscript{154}

In light of such studies as Rothblum’s, it is arguable that when employers use community standards to regulate employee weight, they are really perpetuating societal stereotypes which are ultimately demeaning to women. Such a result is what Title VII is intended to prevent.\textsuperscript{155}

(4) Age Related Appearance

Christine Craft, in \textit{Craft v. Metromedia, Inc.},\textsuperscript{156} argued that she was fired because, in addition to being unattractive, she looked too old.\textsuperscript{157} Craft did not base her Title VII claim on sex plus discrimination.\textsuperscript{158} However, she might have attempted a Title VII claim based on impermissible sex discrimination as a result of both sex and age related appearance. Mary Arnett did just that in \textit{Arnett v. Aspin}.\textsuperscript{159}

In \textit{Arnett v. Aspin}, Arnett claimed that she was denied an employment position at the Defense Industrial Supply Center because she was a woman over forty years old.\textsuperscript{160} The court held that age is an immutable characteristic and that it was possible for a plaintiff to bring a “sex - plus - age” discrimination suit under Title VII.\textsuperscript{161}

\textsuperscript{152} Laura Muha, “Don’t Call Us . . . We’ll Call You”: Weight Discrimination on the Job, 28 \textit{WEIGHT WATCHERS MAGAZINE}, Nov. 1, 1995.
\textsuperscript{153} See \textit{id}.
\textsuperscript{154} See \textit{id}.
\textsuperscript{155} See Patti Buchman, \textit{Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age - Related Appearance}, 85 \textit{COLUM. L. REV.} 190, 201-02 (1985) (quoting Phillips v. Martin Marietta Corp. for the proposition that Title VII was enacted to combat discrimination “based on stereotyped characterizations of the sexes” (citations omitted)).
\textsuperscript{156} 766 F.2d 1205 (8th Cir. 1985).
\textsuperscript{157} See \textit{id} at 1209.
\textsuperscript{158} See Buchman, supra note 155, at 212.
\textsuperscript{159} 846 F. Supp. 1234 (E.D. Pa. 1994).
\textsuperscript{160} See \textit{id} at 1236.
\textsuperscript{161} See \textit{id} at 1241.
Discrimination against women based upon age related appearance has especially been discussed in the context of television news. An issue that arises in this area is one that is somewhat analogous to the community standards test utilized to gauge what employer grooming codes are permissible. That is, the value of television ratings in determining the qualifications of female newscasters.

In Craft, the court of appeals did not find clear error in the lower court's refusal to find anything impermissible about an employer's reliance upon market surveys. In Haines v. Knight-Ridderr Broadcasting, Inc., it was likewise held that an employer could look to ratings to make employment decisions. However, what television ratings and market surveys measure is the popularity of a given newscast or newscaster. Such surveys cannot be said to determine actual job performance ability since the audience is qualified only to judge its own personal viewing preferences.

If age related appearance were found to be a mutable characteristic and an employer were allowed to regulate age related appearance based upon ratings and surveys, there is again the potential for allowing discrimination based upon female stereotypes to prevail. Under that analysis, if the audience disliked newswomen who appeared older than forty, the employer would discriminate against them. That result is akin to allowing demeaning stereotypes to regulate employer grooming codes and is averse to the mandate of Title VII.

If, however, age related appearance is immutable (and there is a convincing argument that it is), there is presented another problem with using ratings in employment practices. If age related appearance is immutable, the employer cannot argue that regulating that appearance is a permissible grooming code and valid
The employer must then rebut a Title VII claim using one of the statutory defenses—the BFOQ or the business necessity defense. As will be discussed, the courts have held that customer preference is not sufficient to provide the employer a defense to Title VII liability. Arguably, ratings and market surveys represent customer preference. As such, they could not be used by an employer asserting a proper defense to unlawful discrimination.

(5) Use of the BFOQ as an Employer Defense

When an employer has been found to have discriminated against women in violation of Title VII, in order to avoid liability, he must assert a defense to that discrimination. The BFOQ defense is a defense to intentional discrimination under the Act. A BFOQ validates a discriminatory employment practice where it is "reasonably necessary to the normal operation of that particular business. . . ." The courts have interpreted the BFOQ very narrowly. The Equal Employment Opportunity Commission (EEOC), the administrative agency set up by the Civil Rights Act of 1964, also invokes a narrow interpretation. In Phillips v. Martin Marietta Corp., Justice Marshall, concurring, warned that "[t]he exception for a 'bona fide occupational qualification' was not intended to swallow the rule." He further stated that "ancient canards about the proper role of women" should not be allowed to serve as a BFOQ. Indeed, he pointed out that the only BFOQ recognized by the EEOC was that "applicable only to job situations that require specific physical characteristics necessarily possessed by

170. See supra note 63 and accompanying text.
171. See supra notes 35-50 and accompanying text.
172. See Buchman, supra note 155, at 213.
173. See Buchman, supra note 155, at 212-13.
174. See Buchman, supra note 155, at 212-13.
177. See Befort, supra note 175, at 5.
178. See Befort, supra note 175, at 5 (discussing the provisions set out in 42 U.S.C. § 2000(e) (1994)).
180. Id.
181. See id.
only one sex."182 That is, the BFOQ exception would only apply where necessary to preserve "authenticity" or "genuineness" in the instance of actresses and actors or models.183 Thus, actors and models may be discriminated against based upon sex because they fall under the Authenticity BFOQ recognized by both the courts and the EEOC.184

Despite these narrow parameters set by the EEOC and recognized by the courts, employers have attempted to broaden the BFOQ exception so as to discriminate against women based upon their unique physical characteristics.185 One area in which this has been seen is in the area of appearance and grooming standards set by employers.

(a) Grooming and Appearance

In Wilson v. Southwest Airlines Co.,186 Southwest Airlines set forth an employment policy whereby only women were eligible for the position of flight attendant.187 The employer advertised itself as the "love" airline, replete with an image of "sexy," feminine services.188 Passengers, most of whom were businessmen,189 were promised "tender loving care"190 and were served "love bites" and "love potions" by female attendants.191 The Southwest flight attendant was required to be "young and vital... she is charming and goes through life with great flair and exuberance... you notice first her exciting smile, friendly air, her wit... yet she is quite efficient and approaches all her tasks with care and attention...."192

Southwest argued that its refusal to hire men as flight attendants was permissible because its feminine image fell under the BFOQ exception to Title VII.193 The court disagreed, emphasizing that the BFOQ exception is to be interpreted narrowly.194 The court also

182. Id. at 545-46.
183. See id. at 546-47.
184. See supra notes 182-83 and accompanying text.
185. See discussion infra Part II.B.1.b.5.
187. See id. at 293.
188. See id.
189. See id. at 294.
190. Id.
191. Id. at 294 n.4.
193. See id. at 293.
194. See id. at 298.
stated that customer preference was not a valid basis upon which to assert a BFOQ, and that there was no business necessity present in the airline’s marketing campaign. "The few cases on point support the conclusion that sex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool, or to better insure profitability." 

The court’s business necessity analysis to determine what constitutes a valid BFOQ under Title VII was based upon the decisions set forth in Weeks v. Southern Bell Telephone & Telegraph Co. and Diaz v. Pan American World Airways, Inc. In Weeks, the Fifth Circuit first set forth the “all or substantially all” standard to determine what constitutes business necessity.


In Diaz, the Fifth Circuit added another step to the BFOQ analysis, requiring that the asserted BFOQ be necessary to the “essence of the business.” “[D]iscrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.” The test was one of business necessity, not “business convenience.” Diaz presented a situation similar to that in Wilson. In Diaz, the court concluded that the policy of Pan American Airways of hiring only females as flight attendants was an invalid policy and unjustifiable as a BFOQ. A BFOQ would only be established based upon considerations “necessary to the business” and not those pre-

195. See id. at 304.
196. See id. at 303.
197. Id. at 303.
198. 408 F.2d 228 (5th Cir. 1969).
199. 442 F.2d 385 (5th Cir. 1971).
200. See Weeks, 408 F.2d at 235.
201. Id.
202. See Diaz, 442 F.2d at 388.
203. Id.
204. See id.
205. See id. at 388-89.
206. See id. at 389.
ferred by customers—unless customer preference was related to the essence of the employer’s business.207

In Wilson, Southwest Airlines sought to distinguish Diaz208 by arguing that it was the essence of its business to serve its passengers with love, as distributed by female flight attendants.209 The court disagreed. "‘Love’ is the manner of job performance, not the job performed."210 The court applied the business essence test narrowly,211 holding that the essence of the airline’s business was “the transportation of passengers.”212 It was not necessary to hire only females to successfully perform that business purpose.213 All that Southwest was accomplishing with its policy, the court held, was “to exploit female sexuality as a marketing tool . . . to better insure profitability."214 That was enough to violate Title VII and not enough to establish a successful BFOQ.

In Fernandez v. Wynn Oil Co.,215 the Ninth Circuit used the BFOQ analysis to invalidate an employer policy which denied women employment based upon the feminine stereotypes of a foreign nation.216 The employer refused to promote a woman because he felt that “Latin American clients would react negatively to a woman Vice-President of International Operations.”217 The court stated that "stereotyped customer preference"218 does not “justify a sexually discriminatory practice,”219 even when those customer preferences are those of a foreign nation. “No foreign nation can compel the non-enforcement of Title VII here.”220 The court found no BFOQ because the essence of the employer’s business would

207. See id.
210. Id. at 302.
211. See Befort, supra note 208, at 15.
212. See Wilson, 517 F. Supp. at 302.
213. See id. at 302.
214. Id. at 303.
215. 653 F.2d 1273 (9th Cir. 1981).
216. See id. at 1277.
217. Id. at 1274.
218. Id. at 1276-77.
219. Id.
220. Id. at 1277.
not be disturbed if its discrimination against women were to be held unlawful.\(^{221}\)

The above cases appear to illustrate that the courts will interpret the BFOQ exception to Title VII narrowly and invalidate employer policies which discriminate against appearance unless such a policy is a business necessity that is essential to the employer's business. However, while the courts have been hesitant to allow BFOQs where employers regulate stereotypical images of the sexes, where they seek to regulate other physical aspects, the courts have been more sympathetic to the arguments of the employer.\(^{222}\) This is evidenced in cases where women are denied employment based upon their physical stature and strength.

(b) Physical Stature and Strength

The seminal case upholding a valid BFOQ based on physical stature and strength is *Dothard v. Rawlinson*.\(^{223}\) In *Dothard*, the Supreme Court found a valid BFOQ when a woman was denied employment as a correctional counselor at an Alabama penitentiary.\(^{224}\) The penitentiary was maximum security and the position was a "contact position."\(^{225}\) The Court held that being a man was a BFOQ for such a position\(^{226}\) because of the threat that the inmates would become rowdy upon seeing a female guard and security would thus be jeopardized.\(^{227}\) The Court emphasized that security was the essence of the job of a correctional counselor\(^{228}\) and that women would not be able to perform adequately in that capacity.\(^{229}\)

The Court pointed out that its decision was not an exercise of "romantic paternalism."\(^{230}\) It stated that it was not attempting to affect the choice of a woman whether or not to take a dangerous employment position.\(^{231}\) Rather, the real reason the BFOQ was valid was the potential threat of breached prison security when

\(^{221}\) 653 F.2d at 1276-77.
\(^{222}\) See discussion infra Part II.B.1.b.5.b.
\(^{224}\) See id. at 336-37.
\(^{225}\) See id.
\(^{226}\) See id.
\(^{227}\) See id. at 336.
\(^{228}\) See id.
\(^{229}\) 433 U.S. at 336.
\(^{230}\) See id. at 335.
\(^{231}\) See id.
women are employed as correctional counselors in contact positions.  

While the Supreme Court in *Dothard* argued that it was not engaging in paternalism in upholding the employer's BFOQ, it is also arguable that it was being stereotypical in its determination that prison security would be breached.  

Justice Marshall, concurring, pointed out that the Court had no basis for its finding that women were any more susceptible to the attack of prison inmates than men.  

"There is simply no evidence in the record to show that women guards would create any danger to security in Alabama prisons significantly greater than that which already exists." Marshall urged that the decision in *Dothard* be limited to its specific facts. To do otherwise, he stated, would be to perpetuate unlawful sex discrimination. "To deprive women of job opportunities because of the threatened behavior of convicted criminals is to turn our social priorities upside down."  

One commentator has stated that *Dothard* has been limited to its particular factual circumstances. However, other professions have seen the denial of women from employment positions where physical capabilities are required. Two such professions are those of fire fighting and police work. These professions make use of physical abilities tests where women have the potential to be disadvantaged due to society's lack of concern for the physical activity of women. "The development of an exclusionary device more subtle than absolute exclusion—rank-order use of physical performance examinations—is the cause of this."  

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232. See id.  
234. See id. at 342.  
235. 433 U.S. at 342.  
236. See id. at 347.  
237. See id.  
238. Id. at 346.  
241. See id.  
242. See id. at 805.  
243. Id.
Another area of employer assertions of a BFOQ where "subtle exclusion" is attempted is pregnancy. The seminal case in this area is the 1991 Supreme Court decision in UAW v. Johnson Controls, Inc. In that case, the Supreme Court unequivocally stated that gender specific fetal protection policies violate Title VII. The employer, a battery making operation where employees were exposed to harmful lead, had enforced a policy whereby only men or sterile women would be accepted for employment. The employer argued that it was reasonably necessary to the business of battery making that any women hired be sterile. The Court disagreed, stating that such a "safety exception," aimed at protecting the future health of potential children born to women employees, may only be utilized as a BFOQ in "limited . . . instances in which sex or pregnancy actually interferes with the employee's ability to perform the job." Thus, the potential future tort liability of an employer, which may be asserted by women whose children become damaged as a result of exposure to harmful materials, was held to be insufficient for the establishment of a BFOQ. "[T]he incremental cost of hiring women cannot justify discriminating against them."

In reaching its conclusion, the Court applied both the "essence of the business" and "all or substantially all" BFOQ tests and also relied upon the Pregnancy Discrimination Act and the amendment it made to Title VII.

C. Options Other than Title VII to Combat Subtle Sexual Discrimination

Discrimination against women based upon physical appearance and characteristics is a more subtle attempt by employers to exclude women from the workplace. In the area of sex plus dis-

244. See discussion infra Part II.B.1.b.5.c.
246. See id. at 206-07.
247. See id. at 197.
248. See id. at 204.
249. Id.
250. See id. at 210.
251. 499 U.S. at 211.
252. See id. at 203, 207.
253. See id. at 204.
crimination, employers have been successful in their sexual differentiation among employees where they have instituted grooming codes regulating mutable characteristics. A problem in this area, however, is what is considered a mutable characteristic, subject to employer regulation. A way to dispel some of the ambiguity—and the consequent discrimination against women which ensues—might be to more narrowly and precisely define mutable characteristics. Also, as suggested, appearance and grooming should be recognized as two distinct inquiries. Appearance should not enter into an employment decision. Another solution might include recognizing the bias behind community standards when using such community standards to validate reasonable grooming codes.

If such grooming codes continue to be upheld by the courts, women may be forced to find remedies other than Title VII to rectify employment discrimination. Indeed, some already have. Bonnie Cook, a morbidly obese woman who was fired because of her weight, recovered under the Rehabilitation Act of 1973. A like remedy may be available under the Americans with Disabilities Act. Older women have sought recourse under the Age Discrimination in Employment Act. There has also been a recent trend where appearance laws are being enacted in various cities. Perhaps, if these appearance laws are granted a federal analogue, it would work even better than Title VII to affect equal employment opportunity for all.

When employers attempt to assert the BFOQ defense to Title VII violations based in appearance related employment practices, the courts have been more amenable to invalidating those practices. Thus, fetal protection policies and stereotyped characterizations of the sexes are not valid BFOQs. As illustrated above, valid BFOQs are those which relate to the reasonable business necessity of the employer, a concept which the courts have narrowly construed.

254. See Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993).
In the final analysis, it appears that full realization of equal opportunity between the sexes will depend upon eliminating the opportunity of employers to avoid Title VII liability by alleging reasonable grooming codes based upon the broad and elusive category of appearance. A woman’s appearance should not be made to influence what employment she will receive. Title VII never intended that it should.

D. An Overview of Sexual Harassment in the U.S.

In 1998, the Supreme Court is still grappling with the sexual harassment form of sexual discrimination, an ancient foe bearing a modern name. On March 25, 1998, the Court heard oral argument in Faragher v. City of Boca Raton, where the issue is whether employers are liable when supervisory employees sexually harass lower-level employees. In April, the Court heard oral argument in Burlington Industries v. Ellerth, which raised the definitional question of whether a mere threat, without any “adverse consequences,” is sufficient to substantiate a case of quid pro quo sexual harassment.

The Supreme Court is currently hearing numerous sexual harassment cases in order to provide the lower federal courts with a much needed framework for proceeding in a quickly developing area.

258. See generally Patti Buchman, Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance, 85 COLUM. L. REV. 190 (1985) (discussing the difference between grooming and appearance).
259. See Michael Rubenstein, Combating Sexual Harassment at Work, 11 CONDITIONS OF WORK DIG., 7 (1992) (stating how scholars have referred to sexual harassment as a “new name describing an old problem”).
260. 111 F.3d 1530 (11th Cir. 1997).
262. 123 F.3d 490 (7th Cir. 1997).
263. See Linda Greenhouse, Supreme Court Will Revisit Issue of Sexual Harassment, N.Y. TIMES, Jan. 24, 1998, at A11; see also Greenhouse, Court to Examine Sex Harassment—Justices Embarking Upon an Amplification of Earlier Decisions, supra note 261, at 22 (stating that the issue in Burlington is whether an employee maintains a valid sexual harassment claim when no “adverse economic consequences” were suffered after the employee rejected the supervisor’s sexual advances and remained on the job).
and complex area of the law. The urgency for uniform rulings on these varied sexual harassment issues is perhaps best illustrated by the eight separate opinions issued by the twelve judges of the Seventh Circuit in Burlington, as well as a rare unsigned plea for the Supreme Court to "bring order to the chaotic case law in this important field of practice."

The practice of human beings violating the integrity of one another based upon gender differences can be traced to Genesis 39, when the master's wife "cast her eyes upon" a servant, Joseph, and demanded that he "lie with her" as a condition of employment. In 1997 alone, an estimated 15,889 sexual harassment complaints were filed with the EEOC. Although both men and women are victims of sexual discrimination, studies suggest that women are more likely to be victimized, and this section will focus on various forms of sexual harassment directed against women.

The term "sexual harassment" was ingrained into our vocabulary during the Clarence Thomas Supreme Court confirmation hearings, but was first used in the Carmita Wood case in 1976.

264. See Greenhouse, Court to Examine Sex Harassment—Justices Embarking Upon an Amplification of Earlier Decisions, supra note 261, at 22.
265. Id.
266. See e.g., LYNNE EISAGUIRRE, SEXUAL HARASSMENT (1993) (offering an excellent chronology of the development of sexual harassment law, from before the twentieth century through the 1990s).
267. See Greenhouse, Court to Examine Sex Harassment—Justices Embarking Upon an Amplification of Earlier Decisions, supra note 261, at 22; see also Anita Hill, A Matter of Definition, N.Y. TIMES, Mar. 19, 1998, at A21 (stating that "[l]ast year more than 17,000 sexual harassment claims, more than ever before, were filed with the Equal Employment Opportunity Commission, the Federal agency charged with enforcing anti-discrimination law").
269. See Ronni Sandroff, Sexual Harassment: The Inside Story, WORKING WOMAN, June 1992, at 47, 48-49 (noting that as a result of the national attention associated with the Clarence Thomas hearings, surveys have shown that more and more victims have come forward to tell of the abuse they have experienced).
270. See LYNNE EISAGUIRRE, SEXUAL HARASSMENT 15 (1993); see also CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION xiv (1979) (stating that Working Women United Institute, located at 593 Park Ave., New York, N.Y. 10021, serves as a base for inquiries); Enid Nemy, Women Begin to Speak Out Against Sexual Harassment at Work, N.Y. TIMES, Aug. 19, 1975, at 38 (discussing sexual harassment more than 20 years ago). Prior to the Carmita Wood case, the courts would decide similar issues under different branches of law, like state contract law, without ever mentioning the term sexual harassment. See Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974).
Carmita Wood, a forty-four year-old administrative assistant, left her job and filed for unemployment compensation when her employer, a Cornell physician, directed sexual overtures at her. Eventually, Lin Farley, a women's movement activist teaching at Cornell, and two colleagues, Susan Meyer and Karen Sauvigné, found Wood an attorney and invented the "sexual harassment" name for her claim. Although Wood ultimately lost her case, she triumphed in establishing a legal term to begin defining the abuse women had been suffering for years. Before Carmita Wood, victims of what is now accepted as sexual harassment were left with little, if any, recourse unless the attack amounted to an assault or battery. In fact, until the late twentieth century a woman's claim of sexual harassment would only stand a chance of succeeding if a victim were beaten, molested, or raped. While such egregious violations, discussed below as "quid pro quo" harassment, were acknowledged, as illustrated in the preceding sections, the more subtle discrimination experienced by women often went ignored.

During the past ten years, the Clarence Thomas confirmation hearings for the United States Supreme Court provided a bold wake-up call in terms of increasing U.S. awareness of the problem.

272. See id.
273. See id. at 16.
274. See id. at 13.
275. See id. at 13; see also Catharine MacKinnon, supra note 270, at 27-28 (noting that while in the earlier part of the twentieth century sexual harassment was unmentionable, the "unnamed should not be mistaken for the nonexistent. . . . Silence often speaks of pain and degradation so thorough that the situation cannot be conceived as other than it is").
276. See Lynn Eisaguirre, Sexual Harassment 13 (1993). In general, courts were wary of recognizing sexual harassment claims at that time, resulting in women tolerating such abuse, which was especially predominant in factories at the start of this century. See id. at 14; see also Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976) (holding for the first time that sexual harassment falls within the definition of sex discrimination as protected by Title VII). But see Craker v. Chicago & N.W. Ry. Co., 36 Wis. 657, 659, 661, 678 (1875) (awarding $1000 in damages to a woman for both mental suffering and being "wronged" when a male train conductor accosted her, thrusting his hands into her muff and kissing her several times).
277. See Beverley H. Earle & Gerald A. Mader, An International Perspective on Sexual Harassment Law, 12 Law & Ineq. J. 43, 49 (1993); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (helping the victim's plight in establishing a sexual harassment claim by moving away from the requirement that the victim prove that she suffered serious psychological harm, and holding that "Title VII comes into play before the harassing conduct leads to a nervous breakdown").
of sexual harassment. The problem is widespread throughout the U.S. workplace, with a reported 1,608 plaintiffs registering sexual harassment claims with the EEOC in the fourth quarter of 1992. In addition, sexual harassment pervades the entire spectrum of the labor force, with sixty percent of women lawyers in the Ninth Circuit, reporting an instance of sexual harassment. It has often been suggested that the most effective way of dealing with sexual harassment is to develop and implement a preventive policy, which includes the following four components: "a policy statement, a complaints procedure, disciplinary rules, and a training and communication strategy." The goal of such measures is not as concerned with damage awards as with educating the workforce and eliminating the offensive behavior.

Today in the United States, three categories of laws cover sexual harassment in the workplace: (1) the United States Civil Rights Act, administered by the EEOC, (2) individual state fair employment practices (FEP) statute, and (3) common law tort principles. The U.S. case law pertaining to sexual harassment has evolved in two varieties, Quid Pro Quo Claims and Hostile Environment Claims.

278. See Earle & Madek, supra note 277, at 43.
279. See Earle & Madek, supra note 277, at 44.
280. See Earle & Madek, supra note 277, at 44 (citing Mark Hanson, 9th Circuit Studies Gender Bias, 78 A.B.A. J. 30 (1992)).
282. See id.; see also Ronnie Sandroff, Sexual Harassment: The Inside Story, WORKING WOMAN, Jun. 1992, at 51 (illustrating how, according to a 1992 survey, 81% of Fortune 500 companies have instituted training programs dealing with sexual harassment, whereas only 60% did so in 1988); Alisa Solomon, One Year After Anita Hill . . . Has America's Crash Course in Preventing Sexual Harassment Made a Difference?, GLAMOUR, Nov. 1992, at 239 (explaining how certain jurisdictions like Maine and Connecticut have passed legislation requiring certain sized workplaces to offer sexual harassment training).
283. See supra Parts II.A-II.B.
285. See id. at 57; see also JULIO J. MARTINEZ VIVOT, ACOSO SEXUAL EN LAS RELACIONES LABORALES 22-25 (explaining how, with respect to categorization, Argentine law similarly divides sexual harassment law into "quid pro quo claims," or "acoso sexual por chantaje," and "hostile environment claims," or "acoso sexual ambiental").
1. Quid Pro Quo Claims

The EEOC, entrusted with the responsibility of enforcing the Civil Rights Act of 1964, defined quid pro quo claims to include blatant forms of harassment, such as an employer conditioning tangible job-related consequences upon obtaining sexual favors from the employee. Literally speaking, quid pro quo translates to “this for that,” because it effectively forces an employee to choose between succumbing to sexual demands or being deprived of job benefits. Quid pro quo harassment was the first identified form of illegal sexual harassment in the U.S. In order to sustain a quid pro quo claim of sexual harassment, a plaintiff must prove the following: “1) that she was subjected to unwelcome sexual advances or requests for sexual favors; 2) that this harassment was based on sex; and 3) that her reaction to the harassment affected tangible aspects of the employee’s compensation, terms, conditions, or privileges of employment.”

Two problems which have been identified with regard to quid pro quo harassment are (1) even if the definition of “employer” is broadly interpreted to include managers and supervisors, it excludes behavior by co-workers and (2) since it is not the harassment, but the subsequent retaliatory act (such as lost job benefits) that is regarded as unlawful, a woman may have no recourse if there were not any “tangible actions” taken against her after the sexual harassment occurred.

286. See EiSAGUIRRE, supra note 284, at 56.
287. See EiSAGUIRRE, supra note 284, at 57. See generally Henson v. City of Dundee, 682 F.2d 897, 908 n.18 (11th Cir. 1982) (outlining quid pro quo harassment); Shrout v. Black Clawson Co., 689 F. Supp. 774, 780 (S.D. Ohio 1988) (holding employer liable for supervisor’s quid pro quo sexual harassment based on doctrine of respondeat superior when supervisor offensively touched woman employee, refused to give her salary reviews, and told her “things don’t have to be this way”).
289. See Rubenstein, supra note 281, at 13.
290. Earle & Madek, supra note 277, at 49 (citing Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990)).
291. See Rubenstein, supra note 281, at 14. Practically speaking, however, an employer’s failure to address an employee’s complaints of harassment by a colleague will likely result in an employer’s liability. See Rubenstein, supra note 281, at 14.
292. See Rubenstein, supra note 281, at 14 (citing Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)); see also supra note 262-63 and accompanying text (discussing how the Supreme Court might address this precise question this term).
2. Hostile Environment Claims

In 1980, the EEOC turned its attention to more subtle forms of sexual harassment, recognizing hostile environment claims of sexual harassment in stating: "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Rather than focus on whether the infringement was serious enough to meet the threshold of a civil rights violation, as is the case in quid pro quo harassment, hostile environment claims of sexual harassment focus on whether an employer or co-worker's actions interfere with the right to a workplace free of harassment.

It was not until 1986 that the Supreme Court handed down its landmark decision in Meritor Savings Bank v. Vinson, recognizing the first hostile environment claim under Section 703 of Title VII. In Meritor, plaintiff Mechelle Vinson was hired by a bank as a teller-trainee and as a result of her achievement advanced to branch manager before being terminated for excessive use of sick leave. Soon thereafter, Vinson sued the bank and her supervisor, Sidney Taylor, alleging hostile environment sexual harassment. She claimed that during her stay at the bank, Taylor had sex with her forty to fifty times, had raped her on several occasions, followed her into the women's restroom, and fondled her in front of co-workers. While Taylor claimed that Vinson's actions were all voluntary, citing the fact that Vinson had failed to utilize the bank's

293. Earle & Madek, supra note 277, at 50 (quoting 29 C.F.R. § 1604.11 (a)).
294. See Earle & Madek, supra note 277, at 50. Note that "unreasonable interference" to one person may not be to another, and thus courts may have to struggle with this subjective versus objective assessment of "unreasonable interference." See Earle & Madek, supra note 277, at 54-55.
295. See Earle & Madek, supra note 277, at 52 (noting that sexual discrimination was first recognized by Title VII in 1964, some 22 years earlier).
297. See Earle & Madek, supra note 277, at 50-51 (1993); see also Meritor, 477 U.S. at 87 (establishing the harassment as sex discrimination as defined by Title VII, even if the victim had suffered no economic loss).
298. See Meritor, 477 U.S. at 59-60.
299. See id. at 60.
300. See id.
301. See id.
anti-discrimination policy and complaint procedure, Vinson claimed that her failure to use the internal process was due to fear of reprisal.\textsuperscript{302}

In \textit{Meritor}, the hostile environment claim of sexual harassment was brought within the protection of Title VII, as the Court noted that “the language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent to ‘strike at the entire spectrum of disparate treatment of men and women.’”\textsuperscript{303} The court explicitly stated that the crucial issue is not the voluntariness of the complainant’s action but, rather, the “welcomeness” of the alleged sexual advances.\textsuperscript{304} The Court held that the determinant of unwelcomeness should be whether the victim “by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”\textsuperscript{305} One negative byproduct of the unwelcomeness standard was the lower courts’ focus on the conduct of the victim rather than on the conduct of the accused, which may sometimes work to vindicate the accused.\textsuperscript{306}

In establishing whether the alleged harassment has the purpose or effect of “unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment,”\textsuperscript{307} the EEOC recommends adopting both an objective and subjective reasonable person standard, so as to be fair to both the employer and the victim.\textsuperscript{308} The problem of applying the reasonable person standard, however, was illustrated in \textit{Rabidue v. Osceola Refining Co.}\textsuperscript{309} In \textit{Rabidue}, the court held that while the

\textsuperscript{302} See LYNNE EISAGUIRRE, SEXUAL HARASSMENT 20-21 (1993). While Vinson first rejected Taylor’s requests that she sleep with him, she ultimately conceded out of what she described as “fear of losing her job.” See \textit{Meritor}, 477 U.S. at 60.

\textsuperscript{303} \textit{Meritor}, 477 U.S. at 65.

\textsuperscript{304} See \textit{id.} at 68; see also Beverley H. Earle & Gerald A. Madek, \textit{An International Perspective on Sexual Harassment Law}, 12 LAW & INEQ. J. 43, 53 (1993) (commenting upon how the Supreme Court, by shifting the emphasis from “voluntariness” to “welcomeness” of the alleged harassment, understood the power politics of the situation).

\textsuperscript{305} \textit{Meritor}, 477 U.S. at 68.

\textsuperscript{306} See \textit{Earle & Madek, supra note 304, at 53.}

\textsuperscript{307} \textit{Rabidue v. Osceola Ref. Co.}, 805 F.2d 611, 619 (6th Cir. 1986).

\textsuperscript{308} See \textit{Earle & Madek, supra note 304, at 54-56. The notion of an objective reasonable person standard protects employers from frivolous actions. See \textit{Earle & Madek, supra note 304, at 55.}

\textsuperscript{309} 805 F.2d 611 (6th Cir. 1986).
obscenities routinely used by the victim's boss were "annoying," they were "not so startling as to have affected seriously the psyches of the plaintiff or other female employees."\footnote{310} The court's application of the reasonable person standard in \textit{Rabidue} epitomizes the same sexist and "culturally accepted behavior" that Title VII was meant to eliminate.\footnote{311} This proposed solution of replacing the reasonable person standard with a reasonable woman standard may be traced to sociological differences and the fact that the experiences of men and women in American culture are very different.\footnote{312}

The Ninth Circuit adopted this reasonable woman standard in \textit{Ellison v. Brady}.\footnote{313} In \textit{Ellison}, the court found a hostile environment was created when a co-worker persistently pestered the victim, including sending obsessive notes that frightened her.\footnote{314} The \textit{Ellison} court reiterated the three prong standard used to establish a hostile environment claim: (1) employee must show he or she was the object of "sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature," (2) the conduct was unwelcome, and (3) the conduct was severe enough to alter the conditions of the victim's employment and to create an "abusive working environment."\footnote{315}
Employers' fear the "reasonable woman standard" because it makes them vulnerable to hypersensitive plaintiffs filing claims. Therefore, in *Andrews v. City of Philadelphia*, the court emphasized a need for a standard which combined subjective and objective components. While men and women are socialized differently, which suggests a reasonable woman standard is appropriate, it has been suggested that it is "inherently unfair" to hold a man "responsible for an offense he did not realize he was committing." Another critical point to consider when examining a reasonable woman standard is that, in recognizing women's differences from men, one "may ignore women's differences from each other, and [the] result . . . [may be] the assumption that all reasonable women will perceive a situation similarly, regardless of differences in race, age, class or sexual orientation." Therefore, the reasonable woman standard might result in gender stereotyping, thereby emphasizing the victim’s behavior instead of the perpetrator's.

Unlike quid pro quo claims of sexual harassment, a successful hostile environment claim usually requires a "pattern of abusive behavior," not one instance, unless the one instance is unusually severe.

While the Supreme Court in *Harris v. Forklift Systems, Inc.*, ruled that psychological harm need not be proven to prevail in a hostile environment claim of sexual harassment, the Court used a sub-

316. See Lynne Eisaguirre, *Sexual Harassment* 94 (1993) (stating that the reasonable woman standard is more "sensitive" than the reasonable man standard, because a reasonable man may find sexually suggestive material less offensive than would a reasonable woman).
317. 895 F.2d 1469 (3d Cir. 1990).
318. See id. at 1483 (the subjective standard is that the discrimination must detrimentally affect the plaintiff, while the objective standard is that the discrimination would detrimentally affect a reasonable person of the same sex in that position).
319. See supra note 312 and accompanying text.
320. Earle & Madek, *supra* note 304, at 60. Perhaps this is even more the case when we cross cultures, where accepted norms seem to clash, and the argument that one "should know" that the conduct is offensive is not as credible in a land with different conceptions of offensiveness.
321. Earle & Madek, *supra* note 304, at 60; see also Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (acknowledging the "broad range of viewpoints among women as a group").
322. See Earle & Madek, *supra* note 304, at 60.
323. See Earle & Madek, *supra* note 304, at 64; Rabidue v. Osceola Refining Co., 805 F.2d at 620.
jective and objective test explaining that “if the victim’s perspective differs too radically from that of a reasonable person, a claim may not be actionable.” Therefore, the suggestion is that if the victim is more sensitive than the objective reasonable person, the Court could reject the sexual harassment claim based on the fact that the environment was not sufficiently hostile. While the standard is “too vague to be easily applied in every case,” the Supreme Court has made it clear that courts must consider the circumstances in their totality, including the frequency and severity of the offensive conduct. In effect, Harris provided a more expansive notion of actionable hostile environment claims than Vinson, because the Harris court sustained the harassment claim despite the fact that there was no physical harassment. In Harris, the Court sustained the hostile environment sexual harassment claim because a “reasonable person would perceive the work environment at Forklift Systems as an impediment to optimal and equal job performance.”

In 1980, the EEOC issued guidelines which defined sexual harassment as “unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature.” Subsequently, the literature has emphasized that, in order to sustain a sexual harassment claim, the conduct must be unwanted by the recipient. Therefore, because sexual harassment is based in large part upon unwanted behavior, many emphasize that it is for “each person to determine what behavior they welcome or tolerate, and

325. Earle & Madek, supra note 304, at 66 (citations omitted).
326. See Earle & Madek, supra note 304, at 66.
327. Earle & Madek, supra note 304, at 66. Severity was meant to include whether the offensive conduct was physically threatening or humiliating, or a mere offensive utterance, and whether it “unreasonably interferes with an employee’s work performance.” Earle & Madek, supra note 304, at 66.
328. See Earle & Madek, supra note 304, at 67 (stating that, unlike the Harris court, the factual circumstances before the Vinson court consisted of pervasive physical harassment).
329. Earle & Madek, supra note 304, at 60.
331. See supra notes 303-05 and accompanying text; Michael Rubenstein, Combating Sexual Harassment at Work, 11 CONDITIONS OF WORK DIG. 7, 10 (1992) (suggesting that opposition to sexual harassment is not aimed at imposing puritanical standards in the workplace, but rather recognizing that humiliation is not pleasant); see also Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1980) (defining sexual harassment as “unwelcome verbal or physical conduct of a sexual nature”).
from whom."

First, one must define what is "unwanted." Furthermore, considering how interpretations of "unwantedness" vary among people of the same culture, it might arguably follow that defining "unwanted" is a much more onerous task cross-culturally. Others might argue, however, that certain conduct, even in these "borderline" cases is universally unwanted, but that cultural norms in some countries silence victims from speaking out to advocate change. Whether or not a universal definition of "unwanted" exists, one must ask if one nation alone should be deciding where the lines are drawn.

III. THE LABOR LAW RAMIFICATIONS OF LATIN AMERICA'S INCREASING ROLE IN THE GLOBAL ECONOMY

The global marketplace is constantly changing the way U.S. corporations transact their business, resulting in U.S. factories and U.S. workers spread throughout the far corners of the Earth, and confirming the notion that in the twenty-first century overseas sexual discrimination will significantly affect U.S. labor and employment law, if it has not done so already. "Acoso sexual," Spanish for sexual harassment, is now being examined much more closely in industrialized nations, such as Argentina. Considering the evolving global nature of the world economy, it is not difficult to envision the following hypothetical which the authors term the 'borderline' case. Imagine a male Argentine supervisor managing female U.S. and female Argentine workers in a U.S. corporation located in Buenos Aires, Argentina. After several encounters, the U.S. worker alleges that the Argentine supervisor's demeanor, actions or com-

332. Rubenstein, supra note 331, at 10. Trying to impose a uniform standard for what is "unwanted" based on one nation's values may be difficult and inequitable. See discussion infra notes 471-77 and accompanying text.

333. See Lewin, supra note 330, at 28 (stating how words like "unwelcome are subjective, making for murky legal territory").

334. See generally Glenn Collins, Coke Drops 'Domestic' and Goes One World, N.Y. Times, Jan. 13, 1996, at 35 (noting that the Coca-Cola Company, for example, recently eliminated the "domestic" and "international" administrative divisions and opted for a unified global approach instead); Leslie Alan Glick, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT 118-19 (2d ed. 1994) (stating that the North American Free Trade Agreement ("NAFTA") is another vivid example of the emphasis on free trade across borders, and the establishment of certain minimum labor standards as economies enter into trade relationships with one another).


336. See Rubenstein, supra note 331, at 19; infra notes 340-47 and accompanying text.
ments have created a hostile work environment, and she then seeks to hold the U.S. corporation liable for the Argentine supervisor's actions. The result may be that the sexual harassment allegation by the U.S. worker, over which a U.S. court would appear to have jurisdiction, would stem from what might arguably be, at the margins, a cultural difference. The suggestion is that extraterritorial application of U.S. law may be overlooking valid cultural differences in certain borderline circumstances. The analysis of such a hypothetical will be laid against the backdrop of the pervasive, albeit subtle forms of sexual discrimination in the United States, as well as a discussion of sexual harassment in both the United States and Argentina.

Similar to NAFTA, Mercosur, the Southern Common Market in South America, seeks to integrate South American economies with the aspiration that a unified group of nations is better equipped to compete in the global marketplace than each nation would be individually. Therefore, an understanding of the status and effects of sexual harassment and the corresponding labor laws of our Latin America neighbors will be of particular interest as businesses continue to expand their operations into South America.

Latin America, in particular, has provided fertile ground for many commercial entities. On the world stage, Latin American countries currently participate as members of the World Trade Organization [hereinafter WTO], which has been designed to implement the General Agreement on Trade and Tariffs [hereinafter GATT], a comprehensive international trade agreement aimed at liberalizing trade among member nations. Furthermore, South

337. See Official Transcript - Proceedings Before The Supreme Court of the United States at 11-12, Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir. 1997) (No. 97-282) (illustrating how this issue was recently before the U.S. Supreme Court, and how the Justices' expressed discomfort with imposing strict liability on an employer for a supervisor's actions towards subordinates, as well as Justice Scalia's specific concern that perhaps it would be inefficient if all such cases resulted in a "full-fledged trial . . . if all the woman [victim] has to do is say, I had a reasonable fear?"); Linda Greenhouse, High Court Hears 2 Sex-Harassment Liability Cases, N.Y. TIMES, Mar. 26, 1998, at A19.

338. See GLICK, supra note 334 and accompanying text.


340. See generally Mark Landler, Big Executive at Wal-Mart Taking Reins at Blockbuster, N.Y. TIMES, Mar. 29, 1996, at D1 (stating that many commercial enterprises are expanding into Latin America, including Wal-Mart in Brazil and Argentina).

America has traditionally been associated with vast potential, including a plethora of natural and human resources, thereby making it a focal point to many, especially the United States.\textsuperscript{342}

This often talked about potential, however, has not always been realized.\textsuperscript{343} Financial experts at the start of the twentieth century believed that Argentina, with a solid economic base in grain and meat production, was poised to join the leading industrial economies of Europe and North America, but domestic unrest and corruption, together with several military governments,\textsuperscript{344} impeded progress.\textsuperscript{345} The latter part of the twentieth century, however, has featured both a political\textsuperscript{346} and economic rebirth for Argentina, and high aspirations, such as were held at the beginning of the century.

\textsuperscript{342} See generally Sam Dillon, Venezuela Again Opens to Foreign Oil Concerns, N.Y. Times, Mar. 5, 1996, at D9 (describing future forecasts that illustrate how Venezuela, the leading petroleum supplier to the United States, together with a handful of Middle Eastern countries, represents an elite group capable of increasing its petroleum production to satisfy world oil needs during the next 10 years); Murray Chass, A New Baseball Strategy: Latin-American Bargains, N.Y. Times, Mar. 22, 1998, at 1, 26 (noting that, as of Nov. 1997, Venezuela is ranked six, behind California, the Dominican Republic, Florida, Texas, and Illinois, as having the highest representation among players in Major League Baseball).

\textsuperscript{343} See Diana Jean Schemo, In Paraguay Border Town, Almost Anything Goes, N.Y. Times, Mar. 15, 1998, at 3 (describing how currently, 90% of the goods sold in Ciudad Del Este, Paraguay, an immense and bustling marketplace located between the Brazilian and Argentine sides of the majestic Iguacu Falls, are counterfeit and how the U.S. is threatening economic sanctions if Paraguay does not attempt to protect intellectual property laws). Consider the vast economic gateway to Latin America a venue like Ciudad Del Este, for example, could provide to U.S. businesses if these intellectual property issues are properly addressed.

\textsuperscript{344} But see Calvin Sims, Argentine Officer Who Hailed '70's Is Cashiered, N.Y. Times, Jan. 24, 1998, at A5 (noting how the current Argentine President Carlos Saúl Menem, expelled a retired Argentine navy captain for publicly defending the torture and murders committed under the 1976-83 military dictatorship).


\textsuperscript{346} See Calvin Sims, Argentina Says Israel Can Have Croat Who Headed Camp, N.Y. Times, Apr. 10, 1998, at A3 (explaining how Argentine President Carlos Saúl Menem, who continues to distance himself from past governments who protected Nazis, said that a recently discovered Nazi camp leader, who has been living undetected in Argentina for the past 51 years, would be extradited).
In 1996 emerging markets in Latin America raised eyebrows on the economic side of the ledger, with record signs of growth.\textsuperscript{347} Equities analysts have been paying particular attention to the prospects of advancement among the region’s larger markets in Brazil and Argentina.\textsuperscript{348} The revival of the Argentine stock market comes on the heels of Mexico’s financial crisis in late 1994, and experts attribute the comeback to a renewed faith that Argentina will not devalue its currency.\textsuperscript{349} The increased stability, which has made the country more attractive to foreign investors, is largely due to the country’s convertibility plan, which “peggs the Argentine peso one-to-one” with the U.S. dollar.\textsuperscript{350} Finally, fixed income mutual funds, including bonds issued by these emerging markets, were top performers for the second quarter of 1996.\textsuperscript{351}

IV. AN OVERVIEW OF SEXUAL HARASSMENT IN ARGENTINA INCLUDING DECREE 2385

It has been only within the past four years that explicit sexual harassment laws have appeared on the Argentine labor law landscape. While industrialized nations, such as Argentina, have made tremendous strides in developing sexual harassment law in a brief period time,\textsuperscript{352} they are still far from offering some of the legal remedies and voluntary aid programs that we have become accustomed

\textsuperscript{347} See Carole Gould, \textit{After a Dismal '95, Small Markets Surge}, \textit{N.Y. Times}, Feb. 11, 1996, at 8 (discussing the Latin American transition from recession to growth, including a 14% increase in Jan. of 1996 in funds invested in Latin American stock).

\textsuperscript{348} See id.

\textsuperscript{349} See Calvin Sims, \textit{The Sun Shines Again in Brazil and Argentina}, \textit{N.Y. Times}, Feb. 11, 1996, at 8.

\textsuperscript{350} Id. (noting that “[s]tockbrokers are recommending Argentine stocks in the banking and utility sectors, including Banco Francés, Banco de Galicia, Telefónica, Telecom Argentina, and the oil company YPF.”); see also Paul Lewis, \textit{Keeping the Tap Open for Thirsty Economies}, \textit{N.Y. Times}, Oct. 4, 1996, at D4 (discussing the fact that Argentina has also helped its own cause by establishing a $5 billion credit line with private banks to protect the Argentine peso); \textit{Domingo Cavallo’s Achievement}, \textit{N.Y. Times}, Aug. 10, 1996, at 22 (noting that during his five year tenure from 1991 to 1996, Argentine foreign minister Domingo Cavallo was credited with helping to stabilize an economy in freefall by controlling inflation and establishing a seven percent annual growth rate).

\textsuperscript{351} See Timothy Middleton, \textit{First-Rate Returns on Third-World Bond Funds}, \textit{N.Y. Times}, Oct. 6, 1996, at 16 (revealing that, even though emerging market debt occupies a small percent of the fixed-income market, the message is that the debt of these emerging markets seems less risky to investors today, thus increasing the potential future role these emerging markets may play in the global economy).

\textsuperscript{352} See Rubenstein, supra note 331, at 19.
to in the U.S. Argentina has established a governmental organization, known as “Consejo Nacional de la Mujer” [National Council for Women], whose responsibilities include the study of sexual harassment in the workplace, and the provision of support for victims. This examination, however, has occurred mostly in public and not in private sector companies.

Within the past decade, Argentina has considered the general issue of equal protection for women, as well as the specific issue of sexual harassment in its executive, legislative, and judicial branches of government. In 1985, Argentina passed Ley 23.179 [hereinafter Law 23.179] prohibiting discrimination against women in general. In 1993, Argentina passed an Executive Regulatory Decree entitled Decreto 2385 [hereinafter Decree 2385], in addition to ruling on two sexual harassment cases.

The Argentine Department of Labor has also issued a manual entitled “Sexual Harassment in the Workplace,” where sexual harassment is defined as follows:

Sexual harassment is any pressure of a sexual nature, whether it is physical or verbal, explicit or implicit, not welcomed by the one [who] suffers it, exercised by any person by virtue of their employment relationship and which results in a hostile environment affecting the dignity of the worker, their conditions of promotion and job retention.

353. Consejo Nacional de la Mujer is located at Avenida Roque Sáenz Peña 648, 7th floor, 1035 Buenos Aires, Argentina. The telephone numbers are (54-1) 345-6402/6403/0683.
354. See id.; see also Secretaría de la Mujer, Violencia Laboral: Estudio sobre Acoso Sexual [Study on Sexual Harassment], UNION DEL PERSONAL CIVIL DE LA NACION (1991) (explaining how, in Argentina between June 15, 1994 and Sept. 8, 1994, a survey of 302 public sector workers was conducted whereby five levels of sexual harassment were identified); ELPIDIO GONZALEZ, ACOSO SEXUAL 25-26 (1996) (explaining how, in Spain, the Institute of Women conducted a study of 772 women, classifying sexual harassment into the following five levels, ascending in order of severity: (1) slight verbal, (2) non-verbal conduct without physical contact, (3) insistence verbal behavior, (4) physical contact, (5) aggravated physical contact).
355. See MÔNICA PETRACCI & ANA LÍA KORNBLIT, EL ACOSO SEXUAL EN EL ESCENARIO LABORAL 126 (1997).
357. See JULIO J. MARTÍNEZ VIVOT, ACOSO SEXUAL EN LAS RELACIONES LABORALES 75 (1995).
358. See id. at 111-13.
359. See PETRACCI & KORNBLIT, supra note 355, at 126 (noting that the exact title as it appears in Spanish is “Acoso sexual en el lugar de trabajo”).
360. See PETRACCI & KORNBLIT, supra note 355, at 126.
The recommendation section of this manual offers a series of steps to protect against sexual harassment as well as a procedure for filing claims for alleged offenses.\textsuperscript{361} The section reads as follows:

The employer should manifest his disapproval of sexual harassment in the workplace and inform the workers of their right to [file a] complaint. He should implement the necessary means so that the workers know the procedure to follow when they are the object of sexual harassment. This procedure should guarantee a serious agreement, efficient and confidential, protecting the workers against the persecutions and reprisals that were the object of their complaint.\textsuperscript{362}

Decree 2385 is the only legislative measure in Argentina directly speaking to the issue of sexual harassment regarding public functionaries.\textsuperscript{363} In fact, Decree 2385 incorporated sexual harassment into Article 28 subsection (e) of Law 22.140 of the Basic Rules of a Public Functionary, which prohibits certain conduct.\textsuperscript{364} The language of Article 28 subsection (e) of law 22.140 of the Basic Rules of a Public Functionary originally prohibited the “realization, with motive or within exercise of one’s function, advertising or political campaigning, [of] any ideological or other coercion, wherever it may occur.”\textsuperscript{365} Decree 2385, which makes use of the phrase “other coercion,” from subsection (e) of law 22.140, indicates that the term should be interpreted to include sexual harassment.\textsuperscript{366} One should note, however, that some scholars believe sexual harassment could have been more appropriately incorporated into Argentine law.\textsuperscript{367} The drafters of Decree 2385 may have purposely opted for a more

\textsuperscript{361} See Petracci \& Kornblit, supra note 355, at 126.

\textsuperscript{362} See Petracci \& Kornblit, supra note 355, at 127 (stating that, despite the educational value of this manual issued by the Argentine Department of Labor, critics have claimed that it only provides a “conceptual summary” without clearly articulating the steps a victim of sexual harassment may follow).


\textsuperscript{364} See id.; Vivot, supra note 357, at 79 (noting that while the initial concern was that Decree 2385 only applied to National Public Administrators, a closer look at the language, “equally within as well as outside the National Public Administration,” suggests that even private violations of sexual harassment could be reached by a more extensive reading of the decree).

\textsuperscript{365} Vivot, supra note 357, at 76.

\textsuperscript{366} See Vivot, supra note 357, at 76.

\textsuperscript{367} Vivot, supra note 357, at 76. When one closely examines the language of subsection (e) of Law 22.140 prohibiting “ideological or other coercion,” it is arguable that the
indirect incorporation of sexual harassment, so as to restrict the authority afforded the legislature under Article 99 subsection (2) of the Argentine Constitution.  

Decree 2385 reads:

[S]exual harassment consists of a reproachable conduct that may manifest itself in a work environment, equally within as well as outside the National Public Administration, affecting women as well as men.

That the alluded to conduct would fundamentally appear in those environments of human activity where there exists a hierarchical relationship that could result in the abuse of a superior's position with respect to a subordinate.  

At the end of the formal portion of Decree 2385, there exists an addendum by current Argentine President Carlos Menem which states in further defining sexual harassment: “that with motive or in the exercise of his functions one takes advantage of a hierarchical relationship inducing another to accede to the other's sexual requirements, with or without carnal knowledge.”  

The main points of Decree 2385 include the following: sexual harassment cases involve those between men and women and those between people of the same sex, the victim of harassment may file her complaint with human resources or another comparable department in her workplace, the complaint is confidential, following a complaint an investigation would be initiated, and witnesses statements would be taken.

Decree 2385, although revolutionary in that it codifies sexual harassment and recognizes that a victim may accede to sexual demands out of fear of losing her job, does have its limitations. It appears that Decree 2385 refers mainly to traditional sexual harassment subsection deals more with pressure arising from political disputes than from sexual harassment.  

Id.

368. See Vivot, supra note 357, at 76; see also Robert L. Maddex, Constitutions of the World 5-9 (1995) (presenting an interesting overview of the Argentine Constitution of 1853, as well as later developments).


371. See Petracchi & Kornblit, supra note 355, at 131-32.

372. See Vivot, supra note 357, at 78.
claims and fails to address sexual harassment imposed by a colleague or third party in the workplace.\textsuperscript{373}

A. Constitutional and Secondary References

The Argentine legal community also turns to other sources, ranging from its own Constitution, to its own law of contracts dealing with labor, to find additional protection against sexual harassment.\textsuperscript{374} Article 16 of the Argentine Constitution establishes the general notion of equality.\textsuperscript{375} Article 81 of the Argentine Labor Contract Law addresses the concept of equality in the workplace, specifically prohibiting discrimination based on sex, religion, or race,\textsuperscript{376} while Article 172 of the Argentine Labor Contract Law further refines the concept of equality, guaranteeing women access to a workplace free of discrimination.\textsuperscript{377}

The reformation of the Argentine Constitution in 1957 produced Article 14, which assured "dignified and equitable working conditions."\textsuperscript{378} This language has been interpreted in a manner that permits one to conclude that sexual harassment violates Article 14.

In addition, Article 23 of the 1948 Universal Declaration of Human Rights may also be applied in sexual harassment cases. This is mainly due to the assurances of (1) equal and satisfactory conditions of work, (2) the right to work without discrimination, with an equal salary for an equal job, and (3) the right to a fair

\textsuperscript{373} See Vivot, supra note 357, at 78-79; see also Luis Armando Rodríguez Saich, Acoso Sexual, Hurto y Otras Causas de Despido 155 (highlighting the distinction between actions by co-workers and actions by supervisors).

\textsuperscript{374} See Vivot, supra note 357, at 79-80.

\textsuperscript{375} See Petracchi & Kornblit, supra note 355, at 125 (stating that one school of thought in Argentina seeks to prevent sexual harassment via education, while another seeks to do so via improved legislation).

\textsuperscript{376} See Petracchi & Kornblit, supra note 355, at 125.

\textsuperscript{377} See Petracchi & Kornblit, supra note 355, at 125.

\textsuperscript{378} Robert L. Maddex, Constitutions of the World 6 (1995) (citing to Article 14 of the Argentine Constitution, which provided for many employee protections, including a limited work day, paid leave, a "flexible minimum wage," equal pay for equal work, "democratic organization of labor unions," trade unions guaranteed the right to strike, "collective agreements," conciliation, arbitration, social security, and "flexible retirement pay and pensions"); see also Argentina, Constitución de 1994. Disposiciones laborales y aquellas indirectamente vinculadas con las relaciones laborales, 5 Relasur 143 (1995) (providing a detailed breakdown of the labor ramifications resulting from the Constitutional Amendments of 1994).
"renumeration" which assures provision for the worker. Article 23 protects an employee's right to equitable and dignified conditions of work as well as the victim's right to be free from sexual harassment and the concomitant threat of losing future retirement benefits, such as social security.

The Constitutional reformation of 1994, specifically Article 75 which replaced Article 67, also referred to federal powers under which sexual discrimination and sexual harassment may be regulated. Article 75 subsection (22) grants congress the power to approve agreements with other nations and international organizations, such as the 1979 Convention for the Elimination of Discrimination Against Women, discussed immediately below.

Additionally, Congress has the ability to state that certain agreements carry a "constitutional hierarchy," and should thus be viewed as an addendum to the rights and guarantees established in the national constitution. Therefore, regarding sexual harassment and the implications of Article 75 subsection (22), special "constitutional hierarchy" may be granted with regard to such occurrences as the 1948 Universal Declaration of Human Rights and the 1979 Convention for the Elimination of All Forms of Discrimination Against Women.

**B. International Conventions and Resolutions**

The 1979 Convention for the Elimination of Discrimination Against All Forms of Discrimination Against Women sought to

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379. See *Vivor*, *supra* note 357, at 82-83 (referring to Article 23 of the 1948 Universal Declaration of Human Rights and arguing that, pragmatically, Article 23 protects the employee from being sexually harassed under the threat of losing his or her job, or from being sexually harassed under the threat of not being hired for the job in the first place).

380. See *Vivor*, *supra* note 357, at 79-80 (noting that this right was previously articulated by Article 14 of the 1957 Constitutional reformation).

381. See *Vivor*, *supra* note 357, at 83.

382. See *Vivor*, *supra* note 357, at 81, 92 (stating that, today, what is often referred to by Article 75 has been replaced by Labor Law 24.557, referring to risks incurred during employment).


384. See *id.*; see also *id.* at 83-84 (quoting the preamble of the Convention for the Elimination of All Forms of Discrimination Against Women which recognized that "women continue being the object of important discrimination [which violates] the principles of the equality of rights and of respect for human dignity," and furthermore, that, the discrimination against women in all forms should be condemned and adequate means should be adopted to prohibit future discrimination against women).
broaden the interpretation of human rights while recognizing certain cultural and traditional limitations, including stereotypes and norms, which were hindering women. The preamble, called for a modification of the traditional roles of both men and women within society, as a whole, as well as within the individual family unit.

Argentina also recently ratified the International Labour Organisation's (ILO) Conference for the Resolution on Equal Opportunity and Equal Treatment for Men and Women in Employment, whose objective was to eliminate all forms of discrimination. One excerpt from the Resolution reads, "Sexual harassment at the workplace is detrimental to employees' working conditions and to employment and promotion prospects. . . . [and policies] should therefore include measures to combat and prevent sexual harassment." Eventually, the resolutions of the ILO's Conference discussed above were incorporated into Articles 17, 81 and 172 of the Law of Contracts regarding employment.

C. Argentine Law 23.592 and Human Dignity

The Constitutional provisions cited above, as well as the International conventions discussed, are both secondary in importance to Law 23.592, passed in 1988, which protects the dignity of the human being in Argentina.

D. Argentine Law of Labor Contracts

Furthermore, the Argentine Law of Labor Contracts contains a plethora of provisions, including the aforementioned Articles 75,

385. See id. at 84.
386. See id. (stating that members of the convention were asked to help "modify the sociocultural patterns of conduct of men and women in order to eliminate 'the prejudices . . . that are based in the idea of inferiority or superiority of either one of the sexes or in the stereotypical roles of men and women'").
387. See id. at 86 (noting that while, technically, the ILO does not have binding effect in Argentina, it is useful in interpreting local legislation).
388. Michael Rubenstein, Combating Sexual Harassment at Work, 11 CONDITIONS OF WORK DIG. 7, 44 (1992); see also Vivot, supra note 383, at 81-82 (1995) (illustrating that Article 75 subsection (22) of the Argentine Constitution confers a "Constitutional hierarchy," which is not extended to the ILO, and reinforcing the point that the ILO possesses not binding but persuasive authority).
389. See Vivot, supra note 383, at 86.
390. See Vivot, supra note 383, at 87 (pointing out that Article 1, paragraph 1 of the Argentine Constitution provides the basis for prohibitions against sexual discrimination and sexual harassment).
81, and 172, which help a victim file a claim of sexual harassment. Law 24.465, which was passed March 15, 1995, modified portions of the Law of Employment Contracts and provides a general examination of Argentine employment practices.

E. Argentine Adaptation of U.S. Law

In addition to turning to its own Constitution and labor laws to find protections against sexual harassment, the Argentine legal culture has adopted some United States judicial decisions as well, such as Barnes v. Costle. In Barnes, the court held that the harassment would not have occurred had the victim not been female. Some scholars, however, astutely illustrate the severe injustice that results even when a sexual harassment claim is acknowledged by the law and compensation is granted. The notion is that the job that the victim must leave is a scarce resource, and despite the fact that the victim receives, for the most part, very limited compensation, she will still be burdened with the task of finding new employment, all of this arising out of a situation which was not the victim's fault.

Two scenarios may be outlined regarding the options available to a victim of sexual harassment: (1) the dismissal of the victim, direct or indirect, as a consequence of the sexual harassment, or non-acceptance of such, whereby the victim can be compensated in addition to bringing a suit for damages or (2) the victim is not fired.

391. See Vivor, supra note 383, at 88. For a general overview of the application of the Labor Law of Contracts and how it applies to sexual harassment see Articles 17, 62, 63, 65, 66, 68, 69, 75, 76, 81, 172, and 242, which deal with various aspects of sexual discrimination and harassment. See Vivor, supra note 383, at 88-90. Also, a victim may pursue a civil claim for a breach of contract by relying upon Articles 511, 519, and 520 of the Argentine Civil Code. See Vivor, supra note 383, at 97. A more complete analysis of each of the corresponding Articles of the Labor Law of Contracts is beyond the scope of this Note.


393. 561 F.2d 983 (D.C. Cir. 1977).

394. See Vivor, supra note 383, at 91.

395. See Vivor, supra note 383, at 92-93 (citations omitted).

396. In certain rare instances, the Argentine courts have turned to Article 1078 of the Argentine Civil Code, which provides for an additional compensation known as “daño moral,” or emotional distress, to supplement the victim’s limited compensation received from the Law of Labor Contracts. See Vivor, supra note 383, at 99-100.

397. See Vivor, supra note 383, at 99-100.
whereby the victim may seek to retain her same employment while
demanding the cessation of such sexual discrimination. 398

F. Criminal Sanctions

In addition to the civil remedies available, there may also be
applicable criminal charges. 399 The potential criminal charges
found in the Argentine Penal Code include: (1) Rape, Article 119,
(2) Dishonest Abuse, Article 127, and (3) Obscene Exposure, Arti-
cle 129. 400

G. Pending Legislation

Currently in Argentina there are two pending legislative bills in
Congress which deal with sexual harassment. 401 The first was intro-
duced by Deputy Irma Roy, and was examined in an expert report
issued by the Legislation Commission of Employment on Novem-
ber 5, 1991. 402 The Second was introduced by Deputy Graciela
Camañio and advocates a reform of the Criminal Code to include
sexual harassment. 403

Roy’s proposed bill defines sexual harassment as “all pressure of
a sexual kind, either physical or verbal, exercised by one’s superior,
not invited by the one who suffers, that arises in a relationship of
employment and that emits as a result, anything ranging from a hos-
tile work environment to the total loss of employment.”404 In addi-

398. See Vivot, supra note 383, at 93-94 (stating that the second scenario is based on the
concept of “continuity of employment,” as articulated in Article 10 of the Argentine Law of
Labor Contracts, which says that “where a doubt exists the situations should resolve
themselves in favor of the continuation or subsistence of the contract”).

399. See Vivot, supra note 383, at 104.

400. See Vivot, supra note 383, at 104-06. The relevant portion of Article 119 defines
rape as “having carnal knowledge with person of either sex . . . using force or intimidation.”
Vivot, supra note 383, at 104. Article 127 prohibits the “dishonest abuse of a person of
either sex,” which in the sexual harassment context has been interpreted to include near or
actual bodily contact of a sexual and voluntary nature, such as touching, or grazing, without
carnal knowledge. Vivot, supra note 383, at 104. Finally, Article 129 prohibits the “obscene
exhibitions . . . [of oneself or forcing another to . . . [expose oneself] in a public place . . . [or]
in a private place.” Vivot, supra note 383, at 106. Such obscenity will usually create a hostile
work environment. See supra notes 293-333 and accompanying text.

401. See Vivot, supra note 383, at 107.

402. See Vivot, supra note 383, at 107 (discussing the fact that this bill has obvious labor
implications and should have been re-introduced within two years after it was initially
presented so as to maintain its legal status).

403. See Vivot, supra note 383, at 107-08.

404. Vivot, supra note 383, at 108-09.
tion to Article 2 setting forth some fixed penalties, Article 4 of the bill considers an employer as equally guilty as the harasser, if an employer, adequately notified, does not take measures to stop the harassment.\textsuperscript{405}

Caamaño's proposed bill calls for a reformation of Article 127 of the Penal Code\textsuperscript{406} to read "It will be punishable by six months to one year in prison . . . [to] hara[ss] . . . another of the same or opposite sex, exercising intimidation or coercion, with dishonest looks, not consented to by the victim."\textsuperscript{407} One practical problem that has been raised, however, is the possibility of an employer's agents not being held within the reach of this Article.\textsuperscript{408}

\textbf{H. Case Law}

Currently, the judicial branch of the Argentine government has decided only two cases regarding sexual harassment, both by the National Appellate Labor Court.\textsuperscript{409} In \textit{M.,L.G. v. Antigua SA},\textsuperscript{410} the male plaintiff, a branch supervisor, appealed the lower court's finding that he had pressured two female employees to have sexual relations with him.\textsuperscript{411} Upon the rejection of his advances, plaintiff forced a third party messenger, via the threat of dismissal, to sign a statement saying that one of the female employees had acted in an insubordinate fashion with regard to her responsibilities.\textsuperscript{412} This prompted the dismissal of the female employee, but eventually the third party messenger came forward and confirmed that the plain-

\textsuperscript{405} See Vivot, supra note 383, at 108-09 (noting that a strict reading of Article 4, seems to suggest that if an employer is not expected to intervene, the harasser would be expected to exclusively compensate the victim, which could be quite unfair if the harasser is "judgement proof").

\textsuperscript{406} See supra note 400 and accompanying text.

\textsuperscript{407} Vivot, supra note 383, at 109.

\textsuperscript{408} See Vivot, supra note 383, at 109-10; see also supra note 405 (discussing a reverse scenario, where the law does not allow the victim to reach the employer, leaving the victim without a job and with only a financially insolvent harasser who can not pay the corresponding compensation).

\textsuperscript{409} See Julio J. Martínez Vivot, \textit{Acoso Sexual en las Relaciones Laborales} 110 (1995).

\textsuperscript{410} See id. at 111 (citing "M.,L.G.," CNTrab., Sala II [1992-B] Derecho Del Trabajo 1433); see also M. & M. Bomchil, \textit{Legal Aspects of Doing Business in Latin America} (Dennis Campbell ed., 1995) (noting that "SA," which appears in the defendant's name, is the Spanish abbreviation for "sociedad anonima," the equivalent of "corporation" in English legal parlance).

\textsuperscript{411} See Vivot, supra note 409, at 111.

\textsuperscript{412} See Vivot, supra note 409, at 111.
tiff had, in fact, coerced him into signing the statement which had falsely accused the female employee of subordination. The court recognized that the plaintiff's behavior seriously compromised the business entity's responsibility to protect the worker's dignity, as provided for by Article 75 of the Law of Labor Contracts.

In A.S., H. v. Carnicerías Integradas Coto SA, while there were no eye-witnesses to the actual sexual harassment, there were witnesses who affirmed that, on the day in question, the victim "was like in a nervous crisis," and was complaining to a superior about the conduct of another superior. One witness explained that the accused repeatedly harassed the victim during a period of several years, including one instance where the victim was so frightened that she took refuge in a bathroom. In writing the opinion, which was mentioned to be the only one of its kind pending, the court found that the numerous instances of sexual harassment against a co-worker were ample proof of the severe actions of the harasser, and therefore justified his firing. The court also stated that sexual harassment need not be evaluated solely on standards of criminal law.

In total, nine sexual harassment occurrences have been reported by the Argentine press even though they apparently have not been presented before the courts. The first such reported incident of sexual harassment was in 1988, by a woman working for the National Atomic Energy Commission, who claimed that her super-

413. See Vivot, supra note 409, at 111; Luis Armando Rodríguez Saiach, Acoso Sexual Hurtos y Otras Causas de Despido 92 (1993).
414. See Vivot, supra note 409, at 112.
416. See Vivot, supra note 409, at 113.
417. See Vivot, supra note 409, at 113 (noting that the victim informed her boss that she wanted to be transferred, and her boss promised her he would take care of the situation).
418. See Vivot, supra note 409, at 113.
419. See Vivot, supra note 409, at 113.
421. The sources the authors have reviewed provided only newspaper citations for the corresponding accounts, but no official case citations. Apparently, the cases were disposed of before ever reaching the courts. Therefore, the only confirmed case law is that discussed immediately above.
422. See Petracchi & Kornblit, supra note 420, at 129 (explaining that the accounts of sexual harassment discussed in this section have been excerpted from articles appearing in the Argentine daily newspaper entitled, “Clarín,” from 1992 through 1995).
rior rescinded her work contract after she failed to respond to his sexual advances.\textsuperscript{423} Another reported case included a November 1991 account of a male who allegedly was sexually harassed by another male during an underwear ad.\textsuperscript{424} Other reported incidents included the following: a September 2, 1994 article reporting a judge stepping down in order to avoid being formally charged with sexual harassment,\textsuperscript{425} a September 14, 1994 article reporting that a woman alleged that her doctor prescribed sedatives as a consequence of the harassment she suffered,\textsuperscript{426} and an April 17, 1995 article reporting how an eighteen year-old volunteer was allegedly sexually harassed by a first sergeant during her night watch.\textsuperscript{427}

In a November 18, 1993 article, Dr. Pedro Kesselman, President of the Association of Labor Attorneys, criticized Argentine Decree 2385 by saying:

[Incorporating the regulation of sexual harassment into] the labor legislation is not enough to end the system of authority and subordination that exists in labor dealings . . . the decree has a propagandistic tint because in this country [Argentina] the figure who commands the power is very strong . . . [such that] the person harassed accepts their role so that they do not risk their source of employment.\textsuperscript{428}

Other critics contend that while the Argentine press named and described Decree 2385, it failed to discuss the procedures one may follow if harassed.\textsuperscript{429}

\textsuperscript{423} See PETRACCI \& KORNBLIT, supra note 420, at 132.
\textsuperscript{424} See PETRACCI \& KORNBLIT, supra note 420, at 132.
\textsuperscript{425} See PETRACCI \& KORNBLIT, supra note 420, at 133.
\textsuperscript{426} See PETRACCI \& KORNBLIT, supra note 420, at 133.
\textsuperscript{427} See PETRACCI \& KORNBLIT, supra note 420, at 134-35 (stating that this same Apr. 19, 1995 Clarín article reported that, after the soldier filed her complaint, she was granted leave and her first sergeant was imprisoned for 30 days and was subsequently forced to retire and that several days later, this same soldier was run over by a truck while she was riding her moped.).
\textsuperscript{428} PETRACCI \& KORNBLIT, supra note 420, at 133; see also ELPIDIO GONZALEZ, ACOSO SEXUAL 40 (1996) (discussing how women in Perú, like their Argentine counterparts, are also averse to speaking out against sexual harassment because of social conventions which do not allow for the opposition of one's superior, general mistrust of colleagues, or an overall need to preserve employment in an oftentimes unstable economic environment).
\textsuperscript{429} See PETRACCI \& KORNBLIT, supra note 420, at 136.
I. Scholarly Publication

During the past five years many Argentine Scholars, have, like their U.S. counterparts many years earlier, begun to address the issue of sexual harassment in various professional publications.430 The publications in this area in Argentina outline the history of sexual harassment in the workplace, briefly address often overlooked groups such as homosexuals,431 and cite works of renowned U.S. scholars in the field.432 From a practical standpoint, the literature communicates, in an easily understandable manner, what behavior may qualify as sexual harassment, noting that there must be a connection between the inappropriate behavior and a demonstration of power.433 Also, Argentine scholars are quick to identify lapses within their own sexual harassment laws, such as the fact that President Menem's addendum attached to Decree 2385 only considers traditional sexual harassment, without considering that co-workers may also commit violations.435 There is also significant attention given to how sexual harassment is approached in other nations, such as Belgium, France, and Spain.436

Another article specifically aimed at analyzing sexual harassment after the enactment of Decree 2385 categorically approached the issue with the following sections: conceptualization of sexual harassment, the climate of sexual harassment, protected jurisprudence,

432. See Vivot, supra note 430, at 1001 (mentioning the work of Michael Rubenstein, supra note 332, and the general concept that sexual harassment is a display of power rather than of mere lust).
433. See Vivot, supra note 430, at 1002 (explaining how any unnecessary touching or grasping together with a coercive sexual intention, words of a similar nature, displays of pornographic material, or even gestures which cause discomfort or fear may constitute sexual harassment, especially of the quid pro quo variety).
434. See supra note 370 and accompanying text.
435. See Vivot, supra note 430, at 1005-06.
436. See Vivot, supra note 430, at 1006-07 (highlighting Belgium's more inclusive Decree regarding sexual harassment, issued on Sept. 18, 1992, which prohibits "whatever verbal, non-verbal, or physical behavior of a sexual nature, which the harasser knows or should know is offensive for the dignity of the woman or man in the workplace"); see also Graciela Medina, Acoso Sexual Laboral, 2 JURISPRUDENCIA ARGENTINA 967, 972-73 (1995) (offering examples of sexual harassment laws from Canada, Costa Rica, France, Spain, and the U.S. and providing a statistical analysis at the end of the article listing the following percentages, by country, of surveys by which females claimed to have been sexually harassed: England 52%, U.S. 88%, France 10%, Japan 81%, Germany 51%).
seduction, reaction of victim, and conclusions. The author of that article, Carlos Pose, elaborates on the fear of being fired, which victims of sexual harassment often feel could be realized if they reject the advances of a harasser. While U.S. legislation regarding discrimination and equal rights is much broader than the available Argentine counterparts, some scholars contend that situations of sexual harassment do not constitute discrimination, but rather, are a display of desire and attraction towards the "victim" with no discriminatory motive on the part of the actor.

Pose contends that seduction may be a rebuttal to a sexual harassment claim, explaining that an employer may use his authority to seduce an individual without there arising a valid sexual harassment claim, as long as there existed no threats or creation of a hostile environment to achieve consent. Perhaps the most difficult to understand from the U.S. cultural perspective is Pose's claim that only certain actions tied together with the threat of sanction are actionable forms of sexual harassment, not the "piropo," independent flattering remark, or "loving advances" themselves. From the Argentine perspective, while proving it is more difficult, "[o]bjectively it is easy to determine when sexual harassment exists." The underlying thought is that "[i]f there were no threats of firing, sanctioning, delay of promotion, etc., or directly the creation of a hostile environment, to attain the worker's consent, there is no harassment, and the loving advance, the sexual invitation or piropo, is not by itself a situation that demonstrates the [sexual] harassment." Therefore, this rationale identifies sexual harassment in Argentina only if there is a restriction on an individual's

437. See Carlos Pose, La Tipificacion Del Acoso Sexual Bajo El Marco Del Decreto 2385/93, 8 DOCTRINA LABORAL 197-201 (1994) (expressing Pose's particular disfavor with the penal applications of the sexual harassment laws, saying that the harasser's conduct is of a pathological type that is better combated via cultural and educational means rather than punitive means).
438. See id. at 199 (describing this as "economic subordination," which lends itself to the creation of a climate favoring situations of sexual harassment).
439. See id. at 200.
440. See id. (defining "threats" to include dismissal, sanctions, or disregard of seniority).
441. See generally JUDITH NOBLE & JAIME LACASA, THE HISPANIC WAY 76 (1995) (describing that "piropo" is Spanish for a complimentary but flirtatious remark and offering excellent insights into aspects of behavior, attitudes, and customs within Spanish speaking cultures, highlighting subtle differences between cultures); see Pose, supra note 437, at 200.
443. Id. at 94.
free choice or right of election. Finally, if the rejection of any such advances made by one's boss do not bring about damaging consequences, the conduct can not be classified as harassment.

From the Argentine point of view, when it comes time to assess the punishment for a sexual harassment violation, it should be done in accordance with the severity of the offense. To do otherwise would be a step backwards for humankind.

Pose's suggestion that it is impossible to eliminate the sexual component that exists within personal relations in the workplace, unless we hire only asexual individuals, would likely be met with fervent opposition in the U.S. However, perhaps it is the most tangible evidence that illustrates the cultural differences that exist between the U.S. and Argentina.

V. Aramco and Extraterritorial Application of Laws

EEOC v. Arabian American Oil Co., [hereinafter Aramco] before it was legislatively overruled, was the seminal case regarding extraterritorial application of a U.S. statute. In Aramco, the U.S. Supreme Court affirmed the Fifth Circuit and district court holdings that Title VII does not apply extraterritorially to regulate employment practices of U.S. employers who employ U.S. citizens overseas. The ramifications of this decision were numerous, but for our purposes it almost compelled U.S. businesses and workers overseas to gain a minimal understanding of local discrimination laws, including sexual harassment, because they would not be afforded Title VII protection. Shortly after Aramco was handed down, Congress overruled the decision by adding a new Section 2000e(f) to
the Civil Rights Act of 1991, which expanded the definition of "employee" to extend Title VII protection to U.S. employees working overseas for U.S. employers.

In *Aramco*, petitioner Boureslan, a U.S. citizen, was hired in 1979 by respondent Aramco Service Company (ASC), a U.S. corporation which was a subsidiary of respondent Arabian American Oil Company (Aramco), also a U.S. Corporation. Boureslan worked for ASC in Houston for one year before requesting to be transferred to Aramco's office in Saudi Arabia, where he remained until he was fired in 1984. Boureslan sought relief under Title VII of the Civil Rights Act of 1964, claiming that he had been discriminated against because of his race, religion, and national origin.

The Court explained how petitioner failed to dispel the established principle of American law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Therefore, unless

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451. 105 Stat. 1077; see also Linda Maher, Drawing Circles in the Sand: Extraterritoriality in Civil Rights Legislation After Aramco and the Civil Rights Act of 1991, 9 CONN. J. Int'l L. 1, 3 n.18 (1993) (citing that the statute overruling *Aramco* may also be found in Pub. L. No. 102-166, as well as in scattered sections of 42 U.S.C.).

452. The language of Section 2000e(f) reads as follows: "With respect to employment in a foreign country, such term [i.e., employee] includes an individual who is a citizen of the United States." 105 Stat. 1077. For the legislative history of Title VII and points of contention regarding extraterritorial application, see Maher, supra note 451, at 5-6. Note that the new legislation, however, has not completely silenced the spirit of *Aramco*, since many exceptions, immunities, and treaties still make it difficult to apply Title VII abroad. See generally Maher, supra note 451, at 30 (discussing some exceptions to the general applicability of Title VII overseas, for example, the Foreign Sovereign Immunities Act (FSIA), the International Organization and Immunities Act (IOIA), diplomatic treaties (FCNs), or Executive Orders); Lawford v. New York Life Ins. Co., 739 F. Supp. 906 (S.D.N.Y. 1990) (dismissing an ERISA claim over the Canadian subsidiary of an American corporation for lack of jurisdiction); Maher, supra note 451, at 31-32 (citing *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991), which by restricting the definition of an American corporation, effectively took back some of the benefits the Civil Rights Act of 1991 sought to achieve by extending Title VII to U.S. citizens working for U.S. employers abroad). But see Johnson v. Cloos Int'l, Inc., 55 Fair Empl. Prac. Cas. (BNA) 1534 (N.D. Ill. 1991) (finding that even a foreign parent company can be subject to Title VII protection overseas).

453. 499 U.S. 244, 247 (1991) (stating that Aramco's principal place of business was Dhahran, Saudi Arabia, while ASC's principal place of business was Houston, Texas).

454. *See id.*

455. *See id.*

456. *Id.* at 248 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)); see also McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 15, 19 (1963) (noting that even more compelling cases than Boureslan's, with statutes referring to "foreign commerce" in their definition of "commerce," were denied application overseas for lack of specific extraterritorial intent).
any clear, affirmative intention of Congress is expressed, the Court views Congressional legislation as being concerned with domestic conditions, evidencing a "presumption against extraterritoriality."

A. Rationale for Aramco

The rationale for this territoriality presumption and the refusal to extend laws overseas is deeply rooted within the international law limits on legislative jurisdiction and was succinctly articulated by Justice Oliver Wendell Holmes in *American Banana Co. v. United Fruit Co.* Holmes explained that "For another jurisdiction . . . to treat [one] . . . according to its own notions rather than those of the place where he did the acts . . . would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."

Furthermore, if any interference in external affairs is to occur, it has long been accepted that the President, not Congress, would be the appropriate party because the "President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Applying one's laws overseas, then, is within the field of international relations, whether or not these laws are applied to one's own citizens. Therefore, perhaps a Congress with varied state political agendas is not capable of making such decisions in the best interests of the U.S. In addition to the lack of legislative history suggesting that Title VII was intended to be applied overseas and the potential conflict of interest if Congress does make such decisions, there is a notion that Congress' power extends to domestic and not to foreign affairs. The Aramco Court reasoned that because customs differ so greatly across cultures, if extraterritorial application of U.S. law overseas were per-

457. See id. at 248; see also Maher, supra note 451, at 32-33 (explaining how, before U.S. Civil Rights Legislation in the 1960s, certain Friendship, Commerce and Navigation (FCN) treaties overrode the established principal that "law of the place" prevails and that the important notion is that the FCN treaties were agreed upon by both parties so that one nation was not extending into another to apply law without making an explicit agreement to do so beforehand).


459. Id. at 356; see also GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 571 (1996).


461. See Maher, supra note 451, at 18.
mitted, “American businesses overseas would be forced to refuse to employ Americans or to discontinue business.”

In the United States Court of Appeals Panel decision, the dissent in Aramco discussed the Third Restatement of Foreign Relations Law, where Section 403(2) “provides for concurrent jurisdiction as long as such jurisdiction is reasonable.” In the Supreme Court, the dissent maintained that a statute regulating the actions of U.S. citizens abroad, as both employers and employees, would not implicate “sensitive issues of authority of the Executive over relations with foreign nations.”

This logic is arguably flawed on at least two levels. First, as a general rule, U.S. citizens stationed overseas are likely to have direct or, at a minimum, indirect contact with locals and therefore, regulating the actions of U.S. citizens will not occur in a vacuum. Hence, despite the rare case where U.S. employees truly are isolated from locals, it may be inequitable to exclude the foreign nation in matters directly or indirectly impacting them, even if at first glance it seems as if the U.S. is merely regulating U.S. citizens. Second, putting an effects analysis aside, it is seemingly troublesome to allow a U.S. statute to transcend borders, applying to foreign people in foreign lands. Such behavior would seem to detrimentally affect the concept of territoriality and the concept of the independent nation state.

B. Problems with Section 2000e(f)

Inevitably, difficult choices must be made in this area of extraterritoriality and foreign relations, where the waters are murky, to say the least. For example, an issue might be so fundamentally important from a Western Hemisphere moral viewpoint that it trumps the importance of sovereignty among nation states. Such a fundamental issue is illustrated by EEOC v. Bermuda Star, where the

462. Maher, supra note 451, at 9 (stating that there were strong dissents in the Aramco case at the appellate level, particularly by Judge King).
463. Maher, supra note 451, at 18 n.68.
465. The notion of U.S. employees overseas operating in a “vacuum” would appear to arise in only the most limited circumstances, such as an isolated military base where everybody is a U.S. citizen, or perhaps a scientific lab in Antarctica, where U.S. employees are working exclusively with U.S. citizens.
defendant denied the plaintiff's application for a position on a cruise ship because she was female. In these instances, where the hypothetical Argentine supervisor is caught between the U.S. employee and U.S. employer, the failure to apply a U.S. law extra-territorially surely will bring about discomfort and perhaps, injustice when viewed from a U.S. perspective. However, this lack of protection for U.S. employees in foreign countries may be a necessary balance or price for living in a global community, with various nations who do not all categorize behavior as does the U.S. Regarding sexual harassment, we begin with the idea that there exist certain easily identifiable behaviors which would universally constitute quid pro quo sexual harassment in a Westernized nation. The controversy would then seem to reside within the more nebulous area of hostile environment sexual harassment claims, as discussed in Meritor.

In effect, the potential problem with Section 2000e(f) is that other cultures may need different reasonable woman standards to account for different cultures drawing different lines as to what constitutes a hostile environment. Consider those who contend that the term sexual harassment is used loosely and imprecisely to punish men for mistakes which they may have originally thought were “acceptable form[s] of social interaction that the woman will perhaps welcome, while to her it is unacceptable.”

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467. See id. at 1110. The court found that the foreign cruise line had enough contacts with the U.S. to satisfy jurisdictional issues, and Title VII was ultimately applied. See id. at 1112-13.

468. We are limiting our discussion to Westernized cultures. To provide an extreme example of how universally accepted behavior is not a foregone conclusion, one simply needs to recognize those cultures completely outside the Westernized concept of “civilization,” some of which still practice cannibalism. See Alvaro Felix Bolaños, Antropofagia y Diferencia Cultural: Construcción Retórica del Canibal del Nuevo Reino de Granada, 61 REVISTA IBEROAMERICANA 81 (Jan-Jun. 1995).

469. See supra note 304 and accompanying text.

470. As we saw in the reasonable woman standard discussed in Ellison, supra notes 314-23 and accompanying text, this seems to vary within the same culture, so the logic is that it would vary even more across cultures.

471. Lloyd R. Cohen, Fear of Flirting, N.Y. TIMES, Oct. 12, 1991, at 29 (suggesting that sexual harassment should not be applied loosely, because the workplace is “one of few places where women and men can hope to meet romantic partners without it being the central purpose of the activity”); see also Luis Armando Rodríguez Sáizach, Acoso Sexual: Hurtos y Otra Causas de Despido 81-82 (1993) (stating that it is logical that human beings, social as they are, upon spending many hours at work, may pursue a romantic relationship therein).
ment is perhaps lacking where the hypothetical man works and lives in a U.S. society where he knows, or at least should know, of the social sensitivity surrounding sexual harassment, the notion of what constitutes an acceptable form of social interaction is a more difficult question when a man lives outside the U.S. in a society with different social norms and practices. Where allegedly violative conduct is seemingly less severe (i.e., no physical contact and no threat of reprisal), the difference between harmless flirtation and a valid sexual harassment claim depends in large part upon common sense or moderation.\textsuperscript{472} Common sense or moderation may vary substantially across cultures, especially when one is dealing with conduct at the less severe end of the sexual harassment spectrum.

Considering again \textit{Meritor} and its emphasis on the “unwelcome-ness” of the behavior, the standard one chooses to use may very well determine whether there is a viable claim or not.\textsuperscript{473} Therefore, it may be unfair to hold a U.S. employer responsible for the actions of an Argentine supervisor, in Argentina for example, whose actions towards a U.S. employee are perhaps commonplace in Argentina, but not in the United States.\textsuperscript{474} After all, the events are taking place in Argentina not in the U.S.

Furthermore, although the reasoning in \textit{Rabidue}, which ultimately led to the adoption of the reasonable woman standard, may be viewed as unjust and sexist in the domestic arena, the argument may be more credible in a foreign context. Perhaps, this may be the case when an Argentine supervisor’s conduct towards a U.S. employee, by a “reasonable Argentine person standard” is truly “not so startling as to have affected seriously the psyches of the plaintiff or other female employees.”\textsuperscript{475} Judging other cultures by U.S. reasonable person standards may be unfair because, perhaps, U.S. citizens are more sensitive to hostile environments than other cultures, so what may in fact be a valid hostile environment claim in the U.S., is merely a commonplace incident elsewhere.\textsuperscript{476} This

\textsuperscript{472} See \textit{Saiach}, supra note 471, at 83.
\textsuperscript{473} See \textit{supra} note 304 and accompanying text (discussing that, perhaps what is “unwelcome” by the U.S. standard in \textit{Meritor} regarding hostile environment claims, is not equally “unwelcome” in Argentina).
\textsuperscript{474} Again, we are referring only to hostile environment claims in these assertions.
\textsuperscript{475} \textit{Harris}, 510 U.S. at 21 (holding that a claim may not be actionable if the victim’s perspective is too divergent from that of a reasonable person); \textit{Rabidue}, 805 F.2d at 622.
\textsuperscript{476} See \textit{supra} note 332 and accompanying text. A commonplace practice might still be a form of sexual harassment that is never addressed. Therefore, the relevant inquiry should be
becomes more complex if we argue in favor of a "reasonable Argentine woman standard."\textsuperscript{477}

Regardless, it is not the case that Argentina has skirted the issue of sexual harassment to such an extent to merit international intervention. On the contrary, Argentina has taken enormous strides, both domestically and on an international front, to continue developing a legal framework for dealing with the problem of sexual harassment.\textsuperscript{478} Many foreign scholarly publications track events in the U.S. legal system with a sincere attempt to educate their own legal practitioners.\textsuperscript{479} In fact, a complete pamphlet was published by the Catholic University of Argentina dealing solely with the ethical rules of New York State attorneys.\textsuperscript{480} Unfortunately, however, even with all of the advances, many citizens in Argentina and other Latin American countries still lack confidence in their judicial system.\textsuperscript{481} Perhaps then, if the U.S. is to become involved at all, it may be a better course of action to assist nations such as Argentina in strengthening a democratic judicial system, so to develop a definition of sexual harassment that suits Argentina's own cultural and societal needs. It is worth reiterating at this point, while this discussion does not pertain to gross violations, but rather the more subtle

whether there are in fact legitimate cultural differences and different opinions of offensiveness, or is it that the behavior is universally offensive but is accepted or tolerated in one in one society but not the other. Even if the case is the latter, the issue is whether the U.S. should intervene at all via the enforcement of U.S. laws.

\textsuperscript{477} See supra, note 321 and accompanying text (discussing that, if Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991), acknowledged the broad range of viewpoints among women in the context of a U.S. case, it is logical that this would be even broader among women cross culturally).

\textsuperscript{478} See supra note 389 and accompanying text (discussing that Argentina adopted the ILO's prohibition of sexual harassment as part of the Conference for the Resolution on Equal Opportunity and Equal Treatment for Men and Women in Employment).

\textsuperscript{479} See generally Mario Daniel Montoya, El Comité Judicial del Senado de los Estados Unidos, 1993-A LA LEY 1176 (1992) (discussing the selection process and ultimate approval by the Senate Committee of U.S. Supreme Court Justices); Mario Daniel Montoya, El acoso sexual en la sociedad norteamericana, 1992-D LA LEY 1263 (1992) (providing an overview of sexual harassment as approached in the U.S., with special attention given to the development of U.S. case law in the area).

\textsuperscript{480} See UNIVERSIDAD CATOLICA ARGENTINA, Reglas De Etica De Los Abogados Del Estado De Nueva York, EL DERECHO 3 (1996).

\textsuperscript{481} See generally Maria Dakolias, A Strategy For Judicial Reform: The Experience In Latin America, 36 VA. J. INT'L. L. 167, 172 (illustrating that a program for judicial reform in Latin America needs to begin by addressing the ideas of "judicial independence, judicial administration, procedural costs, access to justice, legal education and training, and bar associations").
claims of sexual discrimination and harassment, it is still important to recognize that countries have their own unique cultures, as well as "political and economic realities," that must be respected.\(^{482}\)

The dissent from the appeals court decision in *Aramco* stated that the rights of other nations are not impaired by extraterritorial application of Title VII, and that therefore the U.S. is not prohibited by any rule of international law from governing the conduct of its own citizens in foreign countries.\(^{483}\) However, if the U.S. can freely reach into foreign nations and govern conduct, even if it is over U.S. citizens, the question becomes whether or not the concept of the sovereign nation state has been seriously eroded.

**C. Alternatives to Section 2000e(f)**

The U.S. has ratified several treaties, all of which have prohibited gender based discrimination.\(^{484}\) Although expressing concern for providing a meaningful answer within so short a period of time, as a lecture demands, U.S. Supreme Court Justice Anthony M. Kennedy stated at a recent address at Hofstra University School of Law, that treaties may be a better solution than strictly applying U.S. law overseas:

> I think a number of these issues ought to be established by treaty. . . . [and while] I think the United States must be very, very concerned about the slow growth of respect for law in the emerging democracies of Eastern and Central Europe and in South America. . . . You can’t just impose American law . . . . Law is based on consensus. Your Constitution survives only if it lives in the consciousness of the people . . . we have to allow other countries to build their consensus.\(^{485}\)

The ILO has addressed the concern of work conditions for women at several conventions.\(^{486}\) Some nations, such as Canada

\(^{482}\) *Id.*


\(^{486}\) See Maher, supra note 483, at 24.
and the Netherlands, have even begun to include sexual harassment as part of collective bargaining agreements. The United Nations General Assembly adopted The International Convention on the Elimination of All Forms of Discrimination Against Women, which former President Carter signed in July 1980. This treaty requires those who sign to "conform existing national laws, regulations, customs and practices that discriminate against women in almost all areas." It would seem apparent that the law should be able to reach those nations which have previously subjected themselves to the explicit terms of an official treaty. Without any official treaty to guide the parties, it becomes more problematic for one nation to simply impose its law on another nation, based upon actions which transpired within the territory of another, even if the nation is imposing those laws upon its own citizens. In any event, with or without the guidance of a treaty, sexual harassment is a complex issue, especially in the area of borderline claims which, while actionable in the U.S., might be no more than a culturally accepted norm of behavior in other nations, such as Argentina. It is difficult to adequately construe even that which, at first blush, seems to be completely unambiguous language, not to mention the more onerous task of accounting for cultural differences in analyzing a sexual harassment or discrimination claim.

Aside from treaties, perhaps the long term solution rests in education and eliminating the gender based roles that are transmitted through elementary school books from the time children begin to read. Perhaps education at such a young age would help allevi-

488. See Maher, supra note 483, at 24.
490. See generally Frigaliment Importing Co. v. B.N.S. Int’l Sales Corp, 190 F. Supp. 116, 120 (S.D.N.Y. 1960) (illustrating that even the apparently simple word “chicken” is subject to multiple definitions).
492. See Catalina H. Wainerman, Rebeca Barck de Raiman, Sexismo en Los Libros de Lectura de la Escuela Primaria 48, 62 (1987) (illustrating how gender roles begin forming at an early age when boys are shown to be active and fearless, while girls are shown to be at home, clean and tidy and also, how girls are characterized as being passive, sweet, fragile, and affectionate, while boys are characterized as being intelligent, rational, and secure); see also Leonor Calvera, Mujeres y Feminismo en la Argentina 96 (1990) (explaining how traditionally, women had a great deal less equality than today, and that it was said then that they must be “emancipated” from the clumsy preoccupations that prohibit
ate the problems of discrimination and harassment that arise years later in the workplace.

In fact, maybe the best solution to curbing sexual harassment in the workplace is to simply permit the market place to do so naturally.\textsuperscript{493} Perhaps borderline cases of what, by U.S. standards, are sexual harassment will disappear by themselves in Argentina if they become economically burdensome.

Turning to valid defenses, the BFOQ defense is based on the premise that the U.S. must occasionally yield to the law of the host country. For example, in \textit{Kern v. Dynallectron Corp.},\textsuperscript{494} conversion to Islam was considered a valid BFOQ, because a local requirement mandated all pilots flying into Mecca be Moslem, or else be beheaded.

VI. Conclusion

Title VII on its face, eliminates sexual harassment in the workplace. The addition of Section 2000e(f) to the Civil Rights Act of 1991 overruled \textit{Aramco} and permitted Title VII to apply to U.S. employees working for U.S. employers overseas. As a practical matter, the Argentine supervisor in the ‘borderline’ hypothetical discussed above, could easily be an everyday intermediary within a U.S. employer - U.S. employee relationship, which would then make the application of a U.S. standard possibly inequitable.\textsuperscript{495}

The focus of this Note has been to illustrate both the glaring problems of subtle sexual discrimination in the U.S. which have not been sufficiently addressed by Title VII, and the potential drawbacks in extraterritorially applying unsettled U.S. law. What makes the application of Title VII overseas less appealing is the already demonstrated trend of Argentine scholars adopting U.S. scholars’ rationale with regard to Argentine sexual harassment law.\textsuperscript{496} It may be that Argentina is moving towards a U.S. interpretation, and

\begin{enumerate}
\item[Citation Text]
\item[495] See supra notes 473-74 and accompanying text.
\item[496] See supra notes 430-32 and accompanying text.
\end{enumerate}
therefore, extraterritorial Title VII application may be simply unnecessary. Application of Title VII overseas has the potential for leading to seriously flawed judgements because it may impose U.S. standards of offensiveness in a situation where completely different cultural and moral values are operating.

In asking whether the United States, an economic and political world leader, should enforce its laws extraterritorially in these 'borderline' sexual harassment cases, one needs first to ask whether a universal standard of sexual harassment exists, or whether standards vary, at least at the margins, across cultures. Perhaps extraterritorial application of U.S. law is appropriate, considering that what may be seen as cultural acceptance might in fact be oppression, or a culture silencing what is truly repulsive behavior. Troubling as the reality may be, maybe it is not the role of the U.S. to unequivocally intervene. At a minimum, there is a strong case for the U.S. to consider the cultural diversity of foreign lands, at least within the context of these less severe, 'borderline' allegations of sexual harassment.

Whether or not the U.S. imposes its laws extraterritorially in such 'borderline' cases, an understanding of these cultural and legal differences will be paramount to overseas private enterprises effectively managing interactions between U.S. and foreign personnel abroad.

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497. Even if Title VII is applied overseas, at a minimum a "reasonable Argentine woman standard" should be applied, so that the Argentine supervisor in the example above is not expected to treat the U.S. employee any differently from the Argentine employee working right beside her.

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