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Sexual Harassment and Expertise: The Admissibility of Expert Witness Testimony in Cases Utilizing the Reasonable Woman Standard

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SEXUAL HARASSMENT AND EXPERTISE: THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY IN CASES UTILIZING THE REASONABLE WOMAN STANDARD

I. INTRODUCTION

Sexual harassment in the work-place is by no means a new phenomenon. However, its being addressed by the courts is relatively new. Although Title VII of the 1964 Civil Rights Act has precluded discrimination based on sex since its passage, it was not until 1986 that the U.S. Supreme Court, in Meritor Savings Bank, FSB. v. Vinson, held that hostile work environment sexual harassment was actionable as a form of sex discrimination under Title VII. With the decision in Meritor, the Court now recognizes two types of sexual harassment: hostile environment and “quid pro quo” harassment. “Quid pro quo,” or “this for that” sexual harassment is simply a demand or request for sex or sexual activity in exchange for some job-related benefit, i.e., raises, promotions, or even keeping one’s job.

Hostile environment harassment is the creation, through the use of unwelcome conduct of a sexual nature in an employment situation, of an environment that makes an individual, almost always a woman, uncomfortable to the point of interfering with her job performance. The “conduct” need not be anything so blatant as physical touching. It can include verbal harassment, such as suggestive or derogatory comments, jokes, inappropriate discussions of sexual practices, and repeated requests for dates when such requests

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5. Id. at 65.
6. See id. In Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993), the U.S. Supreme Court held that actual harm to work performance need not occur to sustain a cause of action for hostile environment sexual harassment. Id. at 370. Instead, behavior that would interfere with a reasonable person’s work performance will be viewed as sufficient to constitute creation of a hostile environment. Id.; see also infra text accompanying notes 116-17.
are denied. Hostile environment harassment also has included the creation of a sexually hostile work area through actions that are not directly aimed at the plaintiff, e.g., through the use of nude pin-ups. This comment will address hostile environment sexual harassment.

With regard to matters of proof, quid pro quo harassment cases are fairly straightforward. The complainant needs to prove that there was a demand or request for sexual favors in exchange for some job benefit. Hostile environment harassment, however, immediately raises more difficult questions of proof. What is a hostile environment? What should be qualified as sexual banter or joking, and what as actual harassment? As will be explained below, in 1991 the Ninth Circuit Court of Appeals, in *Ellison v. Brady*, took a significant step in defining the prima facie case that must be met for a plaintiff to prevail in a hostile environment action, and in doing so affected problems of proof in such cases.

With the creation of the “reasonable woman” standard in *Ellison v. Brady*, problems of proof have become somewhat more complex. The standard establishes that behavior which would create a hostile work environment for a reasonable woman will be considered harassment, regardless of the intentions or beliefs of the alleged harasser. Although this would presumably make it easier for female plaintiffs to prevail in hostile environment cases, it raises interesting problems of proof.

What exactly constitutes a reasonable woman is still

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9. Of course, what constitutes a demand or request can become somewhat difficult to establish. But the basic nature of the charge, the “this for that,” is fairly straightforward.
10. 924 F.2d 872 (9th Cir. 1991).
11. See infra notes 93-98 and accompanying text.
12. Ellison, 924 F.2d at 879.
13. Although the *Ellison* court expressly applied a “reasonable woman” standard, its holding supports generally the use of a “reasonable victim” standard. This would apply a reasonableness standard appropriate to whatever gender the alleged victim of harassment happened to be. *Id.* at 878.
14. The presumption that the reasonable woman standard makes it easier for women to prevail is based on a notion underlying the creation of the reasonable woman standard: that the perspectives of women have been traditionally underrepresented in the courtroom. Were these perspectives to be better represented, the existence of harassment would be more often realized. See infra notes 120-28 and accompanying text.
a matter to be determined by the trier of fact. Perhaps the most obvious question raised by the standard is, to what extent can men know just what the reasonable woman would find harassing? More precisely, to what extent can men understand the position and viewpoints of women sufficiently to understand the effects of allegedly harassing behavior?

In seeking to establish just what behavior is offensive to a reasonable woman, some parties have sought to introduce the testimony of expert witnesses to educate triers of fact as to exactly what constitutes a reasonable woman standard, and ultimately, to whether or not certain behavior constitutes harassment. This creates two problems under the Federal Rules of Evidence, as they have been interpreted by the courts: 1) is the matter of what a reasonable woman is or would find harassing something the jury can determine for itself, and 2) does the introduction of such testimony actually aid the jury in determining the ultimate issue of fact? There is no agreement in the federal courts on these issues, and they have yet to be addressed by the U.S. Supreme Court. The United States Supreme Court has only recently decided, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the proper standards to be applied with regard to expert witnesses generally, and it has not yet had the opportunity to address the use of the reasonable woman standard, much less the use of expert testimony relating to the standard. There is, however, some indication that the Court foresees itself addressing the reasonable woman standard.

This comment examines the rules of evidence and case law that address the issue of admissibility of expert testimony in hostile environment sexual harassment cases. The comment first examines the Federal Rules of Evidence as they relate to the admissibility of expert testimony as a whole, and the past disagreement as to how these rules should be interpreted. Although this disagreement has been settled by the decision in *Daubert*, those cases that have addressed the use of expert witnesses in sexual harassment cases were decided prior to the *Daubert* decision. It is

15. 113 S. Ct. 2786 (1993).
16. *See infra* text accompanying notes 115-16.
17. *See infra* text accompanying notes 24-62.
18. *See infra* discussion accompanying notes 42-56
19. *See infra* notes 82-117 and accompanying text.
therefore necessary to examine the evidentiary standards under which these cases were decided, so as to determine how these cases might have been differently decided under *Daubert*.

This comment then reviews the cases in which the admissibility of expert witnesses in sexual harassment cases has been considered.20 During the following analysis portion of the comment, the connection between the cases and the rules is examined, as are the ways in which the conclusions of the cases reflect past differing theories regarding means of applying the rules, and how these conclusions might be different in light of *Daubert*.21 The rationales of the case decisions will also be considered in light of the reasonable woman standard.

The comment then proposes that the use of expert witnesses to testify to the reasonable woman standard is not only permissible, but necessary.22 Not only are such witnesses of assistance to triers of fact in these cases, but to not use them would be antithetical to the very notions embodied in the establishment of the reasonable woman standard. Finally, the comment will address possible means of making this necessity a reality, and the actual possibilities that such will occur.

II. BACKGROUND

A. Federal Rule of Evidence 702

The Federal Rules of Evidence briefly address the use of expert witnesses and their testimony as to the ultimate issues of fact. Federal Rule of Evidence 702 states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."23

This rule establishes a two-part test for evaluating the admissibility of expert witness testimony: 1) the testimony must be based upon "scientific, technical, or other specialized

20. See infra notes 82-117 and accompanying text.
21. See infra notes 119-93 and accompanying text.
22. See infra notes 194-98 and accompanying text.
23. FED. R. EVID. 702.
knowledge,” and 2) must “assist the trier of fact to determine the evidence.”

The first prong of the test serves as the basis for establishing what type of evidence exists within the realm of “expert testimony,” as opposed to lay opinion. The second prong of the test asks to what extent the expert testimony will actually be of aid to the jury or judge in determining issues of fact, or would merely serve to confuse or mislead it.

1. *Frye* and the “Acceptance in the Scientific Community” Standard

To satisfy the first prong of Rule 702, there must first be a determination that the field of study or type of knowledge to be addressed by the expert witness is based upon “scientific, technical, or other specialized knowledge.” The seminal case on the admissibility of types of evidence is *Frye v. United States.* Although Rule 702 was instituted after the decision in *Frye,* the standards established in *Frye* were for some seventy years still used, although not explicitly, for evaluations of this first prong. *Frye* can therefore help inform current applications of Rule 702. In *Frye,* the admission of evidence gained from a primitive version of the polygraph or “lie-detector” test was disallowed, because the test itself had not gained “general acceptance” in the scientific community. *Frye* thereby established a basic rule of evidence with regard to expert testimony: that “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”

There was, however, significant division in the courts concerning the applicability of the *Frye* test. On March 2, 1992, the U.S. Supreme Court denied certiorari in *Christophersen v. Allied-Signal Corp.* In *Christophersen,* Plaintiffs claimed that decedent Roy Christophersen had died from

24. Id.


27. *Frye,* 293 F., at 1014.

28. Id.

29. Id.

cancer caused by fumes at his place of employment.\textsuperscript{31} Plaintiffs sought to substantiate their claim through introduction of the expert testimony of an internist and toxicologist.\textsuperscript{32} The district court ruled that an affidavit prepared by the doctor was "not based upon the type of evidence usually relied upon by experts in the field of cancer research," and disallowed the testimony.\textsuperscript{33} After a panel of the Fifth Circuit Court of Appeals reversed, the court sitting \textit{en banc} affirmed the district court decision,\textsuperscript{34} essentially relying on the \textit{Frye} standard of general acceptance within the scientific community.\textsuperscript{35}

Dissenting from the majority decision not to hear Christophersen, Justices White and Blackmun noted at the time that there was a division in the federal circuit courts as to whether the \textit{Frye} standard or "a lower threshold for determining the admissibility of expert evidence" should be applied.\textsuperscript{36} The Justices noted that a number of courts had found the \textit{Frye} rule to have been "superseded in 1975 by the Federal Rules of Evidence."\textsuperscript{37} This "lower standard" to which the justices refer would allow juries to determine which expert testimony they find valid.\textsuperscript{38} The judge would only determine the expert's status as an expert, according to Federal Rule of Evidence 702: "[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify . . . ."\textsuperscript{39} Unlike the \textit{Frye} standard, this standard would focus not upon the evidence and the extent to which it was derived by a means acceptable to the scientific community, but rather upon the expert witness and his or her qualifications as an expert.\textsuperscript{40} An expert applying a new or uncommon method or theory would simply have to face the skepticism of the jury and contradictory testimony by the opponent's ex-

\begin{itemize}
\item \textsuperscript{31} \textit{Id.} at 1281 (White, J., dissenting).
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} Christophersen v. Allied-Signal Corp., 112 S. Ct. 1280, 1281 (1992) (White, J., dissenting).
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.} (citing United States v. Jakobetz, 60 U.S.L.W. 2470 (2d Cir. 1992); DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d. Cir. 1990)).
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} For an examination of the \textit{Frye} standard, see supra text accompanying notes 25-29.
\end{itemize}
experts. Although Frye predates Rule 702, in practice it was not rendered irrelevant by Rule 702, but rather was retained as one of two alternative theories interpreting Rule 702. Because Christophersen was not heard by the full Court, a universal standard for the admissibility of expert testimony was not established. Such a universal standard was established in 1993, in Daubert v. Merrell Dow Pharmaceuticals, Inc.\(^{41}\)

2. Current Standards of Admissibility: Daubert v. Merrell Dow

The U.S. Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. finally determined the standards for district courts to apply in evaluating the admissibility of expert testimony. In Daubert, the Court held that "the Frye test was superseded by the adoption of the Federal Rules of Evidence."\(^{42}\) In so ruling, the Court dispensed with the Frye requirement that focuses upon "general acceptance" in the scientific community, as not being in any way incorporated into Rule 702: "Nothing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility. Nor . . . [were] Rule 702 or the Rules as a whole . . . intended to incorporate a 'general acceptance standard.'"\(^{43}\)

The Court's statements concerning the general conflict between the Frye Rule and the Federal Rules of Evidence is equally illuminating, in that it describes the key distinction between the rationales of Frye and the Federal Rules: "[A] rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'"\(^{44}\)

In outlining what standards of admissibility are established by Rule 702, the Daubert Court focused upon the Rule's use of the word "scientific."\(^{45}\) It stated that "[t]he adjective 'scientific' implies a grounding in the methods and procedures of science."\(^{46}\) It also focused upon the word "knowledge," stating that the word "connotes more than subjective

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41. 113 S. Ct. 2786 (1993).
42. Id at 2793.
43. Id. at 2794.
44. Id. (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).
45. See id. at 2795.
belief or unsupported speculation." 47 The Court concluded that "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." 48 This would suggest that the Court did wish to ensure that expert opinion not be reduced to baseless assertions. At the same time, however, it wished to expand admissibility standards beyond Frye to allow for that expert opinion which though not yet generally accepted within its field, is generated through a legitimately scientific means. Ultimately, the Court expressed that its goal was "trustworthiness" and "reliability:" 49 "In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." 50

In setting forth guidelines by which judges could find "evidentiary reliability," the Court mentioned several considerations: whether the theory or technique has been tested, 51 whether it has been "subjected to peer review and publication," 52 and to what extent the evidence presented is subject to error. 53 The Court also mentioned as a possible, though by no means exclusive or even binding consideration, general acceptance in the scientific community. 54

In explaining the rationale for its decision, the Court addressed the issue of whether or not a standard for expert witnesses more liberal than that of Frye would result in a "'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." 55 But the Court found this concern to be minimal, and concluded that juries are well able to evaluate the relative reliability of expert assertions and their bearing on the cases heard: "Vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional

47. Id.
48. Id.
49. Id. at n.9.
50. Id. at 2795.
52. Id. at 2797.
53. Id.
54. Id.
55. Id. at 2798.
and appropriate means of attacking shaky but admissible evidence."56

3. The Helpfulness of Expert Testimony

The second prong of the test for satisfaction of Rule 702 (determining the extent to which the evidence or expert witness testimony itself will actually aid the trier of fact, be it judge or jury) has within it two issues, best summarized by two questions: 1) Does the trier of fact need expert witness testimony to determine certain issues, and 2) Will the expert testimony result in confusion?

The first question goes to notions of just what triers of fact are expected to know. That is, it begs the question of whether or not the fact-finder needs an expert to tell it about the subject. Expert testimony generally not allowable is that which is within "the common knowledge of the average layman,"57 or "invade[s] the field of common knowledge, experience, or education"58 of the trier of fact.

The importance of whether or not expert testimony falls outside the realm of common experience is directly tied to the role of a jury or a judge hearing a bench trial. They are triers of fact, and it is their province to determine the ultimate issues of fact, and ultimately the case at hand.59 The expert's place as an aid to the trier of fact raises the second question addressed by the second prong of Rule 702: the value of the testimony to be presented. Not only must the testimony be of some worth, but it must also be unlikely to result in confusion or prejudice, lest it be properly excluded. In United States v. Scavo,60 the court held that although expert testimony may be admissible under Rule 702, it can be excluded if its "probative value is substantially outweighed by risks of unfair prejudice, confusion or waste of time."61 This language is taken directly from Rule 403,62 the effects of which on Rule 702 will

57. Fineberg v. United States, 393 F.2d 417, 421 (9th Cir. 1968).
59. The importance of the juror's duty as a determiner of factual issues is of course a basic tenet of American jurisprudence. "Trier of fact" is defined as "the jury and . . . the court when the court is trying an issue of fact . . . ." BLACK'S LAW DICTIONARY 1506 (6th ed. 1990).
60. 593 F.2d 837 (8th Cir. 1979).
61. FED. R. EVID. 702 n.152.
62. FED. R. EVID. 403.
be discussed further below. Often, the decision that evidence creates prejudice, confusion, or results in a waste of time is made because it is determined that the evidence addresses the "ultimate issue of fact" to be considered by the fact-finder.

B. The Ultimate Issue of Fact

The arbiter of any case is the trier of fact, whether that case is tried by a jury or a judge at a bench trial. It is the trier of fact who must ultimately make determinations as to the "ultimate issue of fact." Logically, the purpose of expert testimony is to in some way aid in these determinations of the ultimate issue. According to Rule 702, expert testimony must "assist the trier of fact," that is, be helpful. Yet the fact that experts in some way help fact-finders decide the cases before them and the requirement that experts be helpful, while seemingly congruous, are often in opposition. There is, in fact, a tradition of finding testimony to be not helpful because it addresses the ultimate issue. Therefore, "ultimate issue of fact" must be addressed when considering the admissibility of expert witness testimony.

1. Common Law Exclusion of Expert Witness Testimony

Because the trier of fact is the determiner of the ultimate issue of fact, it was for some time universally held that expert witnesses could only provide evidence, and not state their opinions as to the ultimate issues of fact. The development of the common law rule in this regard reflected concern with the "usurping of the province of the jury" as the fact-finder. On this basis, expert testimony which directly addressed, and sought to make a determination of, ultimate issues of fact was excluded. With regard to the type of cases addressed

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63. See infra text accompanying notes 76-80.
64. FED. R. EVID. 702.
by this comment, such testimony would include an expert’s opinion that sexual harassment had occurred, or even that the facts as alleged by the complainant constitute sexual harassment.

2. Modern Developments—Allowing Experts to Testify to the Ultimate Issue

For some fifty years, there has been a movement away from the “ultimate issue” exclusion of expert witness testimony.\textsuperscript{68} Courts have been increasingly willing to disregard the traditional “ultimate issue” prohibition and allow expanded scope of expert witness testimony. In 1975, Federal Rule of Evidence § 704 explicitly abolished the “ultimate issue” rule: “Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”\textsuperscript{69} This trend, to allow experts to address the ultimate issue, is generally considered helpful in finding the truth. The concept is that the “ultimate issue” rule unduly limited the amount and type of evidence that might aid the trier of fact and that to exclude expert testimony simply on the basis that it addresses the ultimate issue is “empty rhetoric.”\textsuperscript{70}

The importance of preventing expert testimony from invading the province of the fact-finder has not, however, been wholly forgotten. The notes to Rule 704 refer to the requirements that must still be met under Federal Rule of Evidence 702.\textsuperscript{71} According to Rule 702, expert witnesses must still “assist the trier of fact.”\textsuperscript{72} The Advisory Committee notes to Rule 704 state that “[t]he abolition of the ultimate issue rule

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\textsuperscript{68} In the 1944 case of People v. Wilson, 153 P.2d 720 (Cal. 1944), a physician’s testimony concerning the necessity of an abortion to save the life of the mother was allowed, despite the fact that the issue of such necessity was the ultimate issue before the jury, inasmuch as it would determine the legitimacy of the abortion. In Clifford-Jacobs Forging Co. v. Industrial Comm., 166 N.E. 2d 582 (Ill. 1960), another physician addressed the issue of medical causation as an expert witness. Nor are cases limited to the field of medicine. Dowling v. L.H. Shattuck, Inc., 17 A.2d 529 (N.H. 1941) allowed engineering experts to address the proper method of shoring a ditch, and in Schweiger v. Solbeck, 230 P.2d 195 (Or. 1951), an expert gave testimony regarding the cause of a landslide; see \textit{Fed. R. Evid.} 704 advisory committee’s note.
\textsuperscript{69} \textit{Fed. R. Evid.} 704.
\textsuperscript{70} \textit{7 Wigmore, supra note 66, § 1920; see also Cleary, supra note 66, § 12.}
\textsuperscript{71} \textit{Fed. R. Evid.} 704, advisory committee’s note.
\textsuperscript{72} \textit{Fed. R. Evid.} 702.
\end{flushright}
does not lower the bars so as to admit all opinions." The notes point to Rules 701, 702, and 403 stating that "[t]hese provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach . . . ."

Of the three basic rules regarding witness testimony, 701 (the rule for lay opinion), 702 (the basic standards for expert testimony), and 403 (reasons for which testimony may be excluded), it is the last which provides judges the greatest discretion in disallowing expert testimony. Rule 403 allows for exclusion of evidence which may create "the danger of unfair prejudice, confusion of the issues, or [result in] misleading the jury . . . ." As stated above, expert witness testimony may be excluded under Rule 702 as not helpful to the fact-finder. However, it may also be excluded as falling within the prohibitions of Rule 403: unfair prejudice, confusion of the issues, and misleading the jury. Expert witness testimony which goes directly to the ultimate issue before the court might clearly fall within these areas, and thereby be prohibited.

C. Applications of the Rules of Evidence in Sexual Harassment and Discrimination Case Law

As sexual harassment case law has developed, so has the use of expert witness testimony in such cases, including that testimony which addresses the ultimate issue. There is def-

73. Id. at advisory committee notes.
74. Rule 701 relates only to lay testimony, but requires that lay testimony be "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701(b).
75. Rule 702 requires that the expert testimony relate to "scientific, technical, or other specialized knowledge." It also requires that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702.
76. Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.
77. Fed. R. Evid. 704 advisory committee's notes.
78. Fed. R. Evid. 403.
79. See supra notes 64, 71-76 and accompanying text.
initely a lack of agreement, however, as to the admissibility of such evidence.

1. Inadmissible Testimony—Ward v. Westland Plastics, Inc.

The first case to address the admissibility of expert witnesses in sexual harassment or sexual discrimination cases is Ward v. Westland Plastics, Inc. In Ward, the Plaintiff brought a claim of sexual discrimination in compensation, working conditions, and discharge under Title VII of the Civil Rights Act of 1964. The plaintiff sought to admit the testimony of an expert in discrimination and affirmative action who would testify that in his opinion the defendant had discriminated against the plaintiff on account of her gender. The district court refused to admit the testimony of the expert. The Ninth Circuit Court of Appeals presumed that the district court had feared the expert would “invade the province of the jury,” yet refrained from treating the exclusion of the witness as reversible error. The court stated that “district courts enjoy broad discretion in admitting or rejecting evidence, including the testimony of experts.” In so holding, the court cited Kline v. Ford Motor Co., and included this reading of Kline: “[the] district court may properly refuse to admit expert opinion on the ultimate issue based on its assessment of the borderline value of the evidence to the jury.”

Significant here is the court’s evaluation of the value of the testimony plaintiff sought to present. In considering whether or not plaintiff Ward had been prejudiced by the ex-

82. 651 F.2d 1266 (9th Cir. 1980).
83. Id. at 1268.
84. Id. at 1270.
85. Id.
86. Id.
88. Ward, 651 F.2d at 1270.
89. 523 F.2d 1067 (9th Cir. 1975).
90. Ward, 651 F.2d at 1270.
91. The language used gave a reason for refusing ultimate issue testimony that goes beyond the testimony’s merely addressing the ultimate issue. By focusing on the testimony’s “borderline value,” the court avoids an accusation that Fed. R. Evid. 704 has not been followed. See id.
pert's exclusion, the Ward court stated that "the question whether gender was the basis of differential treatment is not so technical as to require the aid of an expert to enlighten the jury or court." In so stating, the court effectively placed the issue within the "field of common knowledge" of the trier of fact.

It should here be noted that the Ward case preceded the Ninth Circuit's 1990 opinion in Ellison v. Brady by ten years. In Ellison, the court ruled that under Title VII sexual harassment cases, the determination of whether or not sexual harassment occurred should be made according to "the victim's perspective," and employed a "reasonable woman" standard. That is, if the conduct proved to be harassing to a reasonable woman in the same circumstances, it would be termed harassment in that instance. The recognition of the reasonable woman standard had two effects. First, it shifted the focus of determinations of harassment from the perspective of the accused harasser (did the harasser think his conduct was harassing) to the perspective of the victim (would a reasonable woman have been harassed by the behavior). Second, recognition of the reasonable woman standard moved the court away from previously used standards of reasonableness: the old "reasonable man" or later "reasonable person" standards, both of which the court found to represent essentially male views of proper behavior. Ellison clearly stands for the proposition that "courts 'should consider the victim's perspective and not stereotyped notions of acceptable behavior.'" In adopting the reasonable woman standard, the court thereby recognized the differing perspectives of men and women in American society. This result was expressly realized by the court.

92. Ward v. Westland Plastics, Inc., 651 F.2d 1266, 1271 (9th Cir. 1980).
93. 924 F.2d 872 (9th Cir. 1991).
94. Id. at 878.
95. Id. at 879.
96. Id. at 878-80.
97. Id. at 879.
98. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (quoting EEOC Compliance Manual (CCH) § 615, ¶ 3112, C at 3242 (1988)).
99. "We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share." Id. at 879. Here the court looked to Kathryn Abrams who wrote, "[W]omen as a group tend to hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate." Id. at
It is not clear, therefore, whether or not the Ward decision would have been the same post-Ellison. Arguably, the Ward court might have concluded that a reasonable woman standard does raise issues "technical" enough to necessitate the use of expert testimony.  

2. Other Exclusions of Testimony

Other cases have excluded similar expert testimony for other reasons. Perkins v. General Motors Corp. is one such case. In Perkins, district court Judge Bartlett wrote in an order relating to sanctions that prior to trial he had "made clear to both parties that no witness would be permitted to testify about the law on sexual harassment." To this extent, witnesses were prohibited from testifying to the ultimate issue of fact. The witness, Karen C. Wagner, who has a background in women's issues was, however, recognized as an expert qualified to testify to matters regarding the effects that harassment can have on employees and the appropriate responses of employers to allegations of sexual harassment.

879 n.9 (quoting Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183, 1205-6 (1989)).

100. The reasonable woman standard itself casts doubt on the legitimacy of the Ward decision in that there is, in creating the reasonable woman standard and recognizing the different perspectives of men and women, an implication that evaluations of reasonableness in the sexual harassment context are not simple. Reasonableness depends on factors and perspectives not apparent to all jurors. Identification of reasonableness in this context may therefore be technical enough a matter to require expert testimony. See infra notes 71-73 and accompanying text.


102. Id. at 667.

103. "Women's issues" is a broadly-read term that can encompass, among other things, a host of subject matters dealing with women, feminist literary and legal criticism, and sociological studies of women's perspectives. The expert at hand, Karen Wagner, had worked for the Working Women's Institute, which studies sexual harassment in the workplace, had received her Master's degree in social work, and had served as a consultant to both management and employees regarding sexual harassment. See Robinson v. Jacksonville Shipyards, 780 F. Supp. 1486, 1505-06 (M.D. Fla. 1991).

104. Perkins, 129 F.R.D. at 666-67. Judge Bartlett noted that Ms. Wagner had previously been found competent to testify as an expert regarding "the impact of harassment on the job on individual employees and the appropriate response that employers should make to harassment on the job." Id. at 667 (quoting Moffett v. Gene B. Glick Co., 621 F. Supp. 244, 283-84 (N.D. Ind. 1985)). Judge Bartlett's refusal to admit portions of Ms. Wagner's testimony was based instead on plaintiff's intention to have her testify concerning sexual harassment law, and the extent to which the actions of defendant actually constituted sexual harassment. Perkins, 129 F.R.D. at 666-67.
Neither of these matters would appear to address the ultimate issues of fact, which were allegations of both a sexually hostile work environment and quid pro quo sexual harassment.\textsuperscript{105} However, it might be noted that employers' improper responses to sexual harassment claims can in some cases be determinative of liability.\textsuperscript{106} The extent to which Ms. Wagner testified to such matters is not clear; but it should be noted that here again her testimony ran the risk of addressing actual matters of law.

The testimony of Karen Wagner was also at issue in Lipsett v. University of Puerto Rico.\textsuperscript{107} Here her testimony was excluded because of the court's determination that the jurors were themselves able to determine the extent to which the work environment was "intimidating, hostile, and offensive."\textsuperscript{108} It was the court's concern that the testimony of Ms. Wagner would "usurp[ . . . the prerogative of the jury as the fact finder and would not assist the jury in understanding the evidence or determining a main issue of fact in [the] case . . . ."\textsuperscript{109}

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105. \textit{Id.} at 656. \\
106. Improper employer responses to allegations of sexual harassment can themselves lead to liability. Although employers are not per se liable under the doctrine of respondeat superior for the harassing actions of the victim's co-workers, an employer can be held liable if he knew or should have known of the behavior. Clearly, once a complaint has been made, the employer is aware of the harassment. The possibility of liability for the employer is then determined by the employer's actions. The importance of disciplinary measures was indicated in Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991): "employers should impose sufficient penalties to assure a workplace free from sexual harassment." \textit{Id.} at 882. The Ellison court also applied a standard established in Katz v. Dole, 709 F.2d 251 (4th Cir. 1983), in which the court held that employer action following a confirmed claim of sexual harassment must be "reasonably calculated to end the harassment." \textit{Ellison}, 924 F.2d at 882 (quoting \textit{Katz}, 709 F.2d at 256). \textit{See also} Intlekofer v. Turnage, 973 F.2d 773 (9th Cir. 1992). In \textit{Intlekofer}, the court found that although an employer, the Veterans Administration, had conducted a full investigation, and had taken steps to end the harassment, it was liable because the remedies it chose were not of a disciplinary nature. \textit{Id.} at 779. \\
108. \textit{Id.} at 925 (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)). \\
109. \textit{Id.} 
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In contrast to Lipsett and Ward is a more recent case, Robinson v. Jacksonville Shipyards, Inc.,110 where the testimony of Ms. Wagner was again at issue. Here, district court Judge Melton allowed the testimony of an expert witness speaking to issues of sexual harassment and what might constitute it.111 In doing so he referred to and contrasted the case before him with the Lipsett decision. The simple distinction drawn by Judge Melton was that his case was a bench trial; Lipsett was heard by a jury.112 It was Judge Melton’s opinion that he might need the expert testimony to educate himself to what constitutes a “reasonable woman,”113 as established by Ellison v. Brady.114 He accepted the possibility that a jury would be able to establish the reasonable woman for itself, presumably because of the presence of women on the jury.115

It should here be noted that although the Supreme Court has not yet explicitly addressed the use of the reasonable woman standard, it has recently referred to the use of the victim’s perspective. In Harris v. Forklift Systems, Inc.,116 the Court stated that to find hostile environment harassment the standard “requires an objectively hostile or abusive environment—one that a reasonable person would find hostile or abusive—as well as the victim’s subjective perception that the environment is abusive.”117 This reference to “the victim’s subjective perception” recognizes the importance of viewing harassment from the harassed’s perspective, rather than an abstract notion of behavior, and can therefore be read to support usage of the reasonable woman standard. At the very least it does not reject the standard.

111. Id. at 1505.
112. Id. at 1507 n.4.
113. Id.
114. 924 F.2d 872, 879 (9th Cir. 1991).
117. Id. at 368.
III. IDENTIFICATION OF THE LEGAL PROBLEM

The problem that exists in determining whether or not to admit the testimony of experts testifying to the reasonable woman standard is two-fold. First, although Daubert118 decided the proper admissibility standards for expert witnesses, the admissibility of experts on the reasonable woman is still undecided. With the rejection of the Frye rule, the opinions of such experts no longer need to be generally accepted in a relevant scientific community. However, their field of expertise itself is not yet universally accepted, and it is not clear that the establishment of the reasonable woman standard will in and of itself establish study of the reasonable woman as a field of expertise. Second, even given this area of expertise, courts might still determine that the testimony would not be helpful to the trier of fact, either because it is misleading, prejudicial, or causes confusion—this last perhaps because it addresses the ultimate issue of fact. These issues, the connections between them, and the ways they have been addressed by the courts will be considered in the following section.

IV. ANALYSIS

A. Understanding the Rulings in Terms of the Federal Rules of Evidence

All the sexual harassment cases addressed above in which the admissibility of expert testimony was at issue were decided subsequent to the revision of the Federal Rules of Evidence in 1975. They must therefore be evaluated with respect to the requirements of the Rules, and in light of the differing theories of the applicability of the Frye rule that preceded Daubert.119

1. Acceptance in the Scientific Community—The Frye Standard

Prior to the Supreme Court's decision in Daubert, there was no agreement on the proper standard to apply when evaluating the admissibility of expert testimony.120 In determining whether or not an expert is acceptable under the lan-

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119. Id.
120. See supra notes 36-41 and accompanying text.
guage of Rule 702, i.e., whether the expert brings to the court the requisite "scientific, technical, or other specialized knowledge," the Frye standard was often applied. The Frye standard, inasmuch as it seeks to require a "scientific community" standard, proved particularly problematic when addressed in hostile environment sexual harassment cases. The problems in establishing the existence of this scientific community were addressed in Lipsett and Ward.

a. Lipsett and Ward

In both the Ward and Lipsett decisions are indications that there is no accepted area of expertise regarding what constitutes sexual harassment. The Ward court refused to find exclusion of an expert to be reversible error largely because it felt an expert to be unnecessary. Simply put, the court determined that whether or not gender was the cause of discrimination is something that jurors could determine for themselves. This implies a failure to satisfy the requirements of the Frye rule. If an area is not so technical as to require an expert, then the area is not even one in which the term "expert" can be applied; therefore, there is no area of expertise. If there is no area of expertise, then there is no "scientific community" against whose standards an expert's theories or methodologies can be judged for satisfaction of the Frye test. In this light, the Ward court's exclusion of the expert might have been different had it followed Daubert. Although the court did not explicitly rely on Frye, it would stand to reason that the more liberal test of Daubert's interpretation of Rule 702 would have informed the Ward court of a preferred tendency to admit expert testimony. However, in that the Ward decision seemed to rest more upon objections concerning experts addressing ultimate issues of fact, it is possible that it would be unchanged even after Daubert.

Lipsett contained a far more explicit rejection of the existence of a field "sufficiently technical" to constitute areas of expertise. In generally describing what constitutes "[e]xperts in the traditional professions," the court considered

121. Fed. R. Evid. 702.
122. See Mosteller, supra note 26, at 94-96.
123. See infra notes 82-100 and accompanying text.
general standards of professional training. 125 The court stated that “experts begin to develop their qualifications long before they are admitted to their particular professional school, because they must attend individual colleges and major in fields of study that prepare them for graduate school.” 126 The court also examined the high selectivity of professional schools. 127 Finally, and perhaps most significantly, the court then discussed the “deep respect for truth and ethics which are of great importance in [experts’] practice” 128 and the fact that this respect ensures the court that it and the jury “will receive objective testimony and the truth as seen by the professional.” 129

The court then stated that “the education and experience of Ms. Karen Wagner and Ms. Mercedes Rodriguez, proposed experts in the area of sexual harassment, fail to rise to the level of specialized knowledge we deem necessary to qualify them as experts, and that their testimony would not possess the professional safeguards ensuring objectivity.” 130 In this regard, the court simply rejected the qualifications of two proposed experts. But the court’s refusal to qualify them was also based on its interpretation of the study of sexual harassment as not containing a field of expertise.

The court held that “the jury does not need additional enlightenment on this particular issue: the subject does not lend itself to expert testimony because it deals with the common occurrences that the jurors have knowledge of through their experiences in everyday life and their attitudes toward sexual matters.” 131 In holding that jurors are able to determine for themselves what constitutes an intimidating, hostile, and offensive work environment, the court found, as was implied in Ward, 132 that there is no area of “expertise” that may properly address the facts. Nor did the Lipsett court rely on Frye. In asserting this basis for excluding the testimony, the Lipsett court’s decision, like that of Ward, might be expected to be unaffected by application of a Daubert rationale.

126. Id.
127. Id.
128. Id. at 923-24.
129. Id. at 924.
131. Id. at 925.
But again, the liberal standard of *Daubert* suggests a lower standard of admissibility than had previously often been presumed. The *Lipsett* court feared that "the proposed expert's testimony in this case would not bring to the jury 'anything more than the lawyers can offer in argument.'" But *Daubert* can be read to indicate that even testimony of this nature should be included. *Daubert* refers to the Supreme Court's disdain for pessimism regarding "the capabilities of the jury, and of the adversary system generally." It would seem that opposing and contradictory experts, even those which do little more than echo counsel, are in keeping with "the adversary system." Although these experts may be, in the minds of a judge, of minimal value, they do not appear to be ripe for exclusion under *Daubert*, in that such valuations are to be left to the fact-finder rather than the trial judge.

b. Indications of Expertise—Perkins and Robinson and Indications of a Daubert Rationale

As was made clear in the *Christophersen* dissent, many courts applied a standard more liberal, or "lower," than that established by *Frye*, even before *Daubert* was decided. This standard merely requires a judicial determination that the expert to be presented is an expert in his or her field, and utilizes the scientific method. It does not require that the evidence or testimony this expert will present meets the *Frye* standard of acceptance within the scientific community. This standard is far more like that established in *Daubert*. *Perkins* and *Robinson*, in utilizing this looser standard, give some indication of how courts might rule on the admissibility of reasonable woman experts after *Daubert*. In *Perkins*, although the testimony of Karen Wagner was ultimately disallowed, there were explicit statements by the court that her testimony would be acceptable in a context other than a direct addressing of the law. Judge Bartlett recognized that

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133. *Lipsett*, 740 F. Supp. at 925 (quoting In re Air Crash Disaster, 795 F.2d 1230, 1233 (5th Cir. 1986)).
135. See supra notes 36-38 and accompanying text.
136. See supra notes 36-38 and accompanying text.
137. See supra notes 36-38 and accompanying text.
138. "I think her expertise is established generally with respect to harassment on the job site, primarily sexual harassment and the effects of that on
Ms. Wagner is “an experienced social worker with an extensive background in women’s issues.” Also noted was the fact that Ms. Wagner’s expert testimony had been accepted by other courts. This might imply that the testimony would have been allowed under the standards identified in either Frye or Daubert.

The decision not to allow the expert’s testimony in Perkins was not based on the evidence somehow failing the Frye standard, but instead upon Plaintiff’s intention that the expert testimony address matters of law. In evaluating Ms. Wagner’s testimony in another case, Broderick v. Ruder, Judge Bartlett observed that “[t]he opinion does not state whether Wagner’s opinion about the stress effects [of harassment] was based on a hypothetical question or whether Wagner was qualified to opine on whether plaintiff had in fact been subjected to a sexually hostile work environment.” Considering Judge Bartlett’s statement that “no witness would be permitted to testify about the law on sexual harassment,” one might presume that in Broderick he would have disallowed testimony regarding both whether or not sexual harassment had existed in the situation then before the court, and that which answered hypothetical questions asking whether certain situations constitute hostile environment harassment. But it does seem possible that although Judge Bartlett would object to expert testimony which addressed what a hypothetical woman would find harassing, he would...


139. Id. at 666.

140. Plaintiff offered into evidence a portion of the trial transcript from Moffett v. Gene B. Glick Co., 621 F. Supp. 244 (N.D. Ind. 1985), in which the district court judge commented upon Ms. Wagner’s testimony in the following terms: “She’s testified primarily about the effects of harassment on individual workers and the appropriate response for employers to make to activities of harassment; and with respect to the matters about which I understand her to have testified, its absolutely clear to me that she is an expert.” Perkins, 129 F.R.D. at 667 (emphasis added).

141. In that the Perkins and Robinson courts used a more liberal standard than that of the Frye rule, the rulings were more akin to those that will be found under the Daubert rule. By finding Ms. Wagner “experienced” and therefore credible, Judge Bartlett allows for another inference that he would find her methods credible according to the Daubert test.


145. Id. at 666.
not object to testimony regarding whether or not the plaintiff herself had been harassed. But Perkins's refusal to admit the testimony should not be read as concluding that expert testimony which addresses what women find to be harassing behavior is necessarily in conflict with the Frye rule. Frye excluded testimony which is based on methods not accepted within the scientific community; the Perkins exclusions were based on the inadmissibility of testimony regarding the ultimate issues before the court, i.e., regarding matters of law.

A clear substantiation of the legitimacy of expert testimony in sexual harassment cases is to be found in Robinson v. Jacksonville Shipyards, Inc. Once again the testimony of Ms. Wagner was at issue. She testified to "common patterns and responses to sexual harassment and remedial steps." The court here found Karen Wagner to be well-qualified to testify: "Ms. Wagner is a self-employed consultant in the area of issues regarding women in the work environment, with particular emphasis on the prevention of sexual harassment on the job." The court recognized her more than seven years experience with an organization that studies sexual harassment, her experience teaching sexual harassment courses to managers and human relations specialists, as well as her experience as a consultant. The court also noted her master's degree in social work. Ultimately, the court "accepted Ms. Wagner... as an expert on common patterns and responses to sexual harassment and... as an expert in education and training relative to sexual harassment."

Clearly, the Robinson court recognized Ms. Wagner's qualifications. More significantly, unlike the Lipsett court it recognized the legitimacy of her field. This is a necessary inference to be drawn from the decision: if an individual may be qualified as an expert in the study of sexual harassment, then there must clearly be a legitimate field of study of sexual harassment. If Judge Melton's admission of the expert in Robinson is to be taken as in accord with the Frye standard, then it

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147. Id. at 1505.
148. Id. at 1505-06.
149. Id. at 1506.
150. Id.; see also supra note 142.
must be accepted that there exists a field of study that would include expertise in the area of sexual harassment. His admission of the expert also indicates a satisfaction of the lower Rule 702 standard identified in Christophersen, requiring established status as an expert in a given field. The decision is thereby also in line with Daubert, requiring legitimate scientific method.

2. Expert Testimony in Light of the Reasonable Woman Standard

In establishing the reasonable woman standard, the Ninth Circuit Court of Appeals explicitly emphasized the importance of "focus[ing] on the perspective of the victim." In doing so, it recognized that "[a] complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women." This difference of perspective is essential to substantiate the legitimacy of expert witness testimony under the requirements of Rule 702 and Daubert. Given the differing perspectives of men and women, it is quite possible that a fact-finder simply has neither the experience nor the education to know what constitutes the reasonable woman. More to the point, the fact-finder might not know what behavior a woman might reasonably find harassing in a particular circumstance. The expert on harassment and its effects may become not only useful but essential for the purpose of educating a jury or judge.

152. See supra notes 36-38 and accompanying text.
154. Id. The court here referred to a variety of sources to substantiate the existence of these differing perspectives. It noted Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment, 99 Yale L. J. 1177, 1207-08 (1990), which asserts that "men tend to view some forms of sexual harassment as 'harmless social interactions to which only overly-sensitive women would object.' " See Abrams, supra note 98, at 1203 (arguing that "the characteristically male view depicts sexual harassment as comparatively harmless amusement"). The Ellison court also looked here to two cases, one of which was, ironically, Lipsett v. University of P. R., 864 F.2d 881 (1st Cir. 1988): "[a] male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive." Id. at 898. Although the Lipsett court recognized these differing perspectives, it apparently did not consider knowledge of them to be outside the common experience of the jurors.
This was particularly true in *Robinson*. *Robinson* was a bench trial, tried by a male judge.\(^\text{155}\) This fact was key to Judge Melton's decision to admit the testimony of Karen Wagner. In his opinion, he referred to the decision in *Lipsett* not to admit the expert, and found that *Lipsett* and *Robinson* were essentially different in that the former was tried by a jury, the latter by a judge: "The *Lipsett* case, however, is a jury action and may be distinguished for this reason. For instance, Ms. Wagner's testimony . . . directly informs the inquiry into the effect of the conditions at JSI on the psychological well-being of the hypothetical reasonable woman."\(^\text{156}\) The opinion further states that "[w]hatever merit lies in the argument that jurors may draw on their common experiences to assess the issue, the court risks injustice if it attempts to fashion a reasonable woman's reaction out of whole cloth."\(^\text{157}\)

The importance of these statements lies not so much in their distinction between judge and jury trials, but between the common experiences of men and women and the likelihood of different perspectives between the genders. In admitting his inability to determine "a reasonable woman's reaction," Judge Melton recognized that what a reasonable woman is cannot properly be determined by a man who is without the aid of an expert. Only once the man has been educated as to what behavior would be harassing to a reasonable woman may he then determine if the facts in a given case constitute harassment.

The contrary decision in *Lipsett* should not be taken as an absolute rebuttal of this view. Although the *Lipsett* court did address the differing perspectives of men and women,\(^\text{158}\) its opinion precedes the creation of the reasonable woman standard in *Ellison*. Given this standard, it may well have ruled differently, in that the standard can be interpreted as establishing a field of expertise.\(^\text{159}\)

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157. *Id.*
159. See supra notes 153-57 and accompanying text.
experts in a recognized field. The court was willing to rely on the “common occurrences that the jurors have knowledge of through their experiences in everyday life . . . .” This language highlights the fact that there are various ways to exclude expert testimony. The fact that the subjects to which the experts were to testify were part of “common experiences” serves as a reason to find expert testimony unnecessary. The “common experiences” also provide a reason to find no area of expertise at all; that which is common knowledge is clearly not an area of expertise. But the Ellison court's opinion rejects the theory that jurors, at least male jurors, can make necessary determinations based solely on their own experiences and perspectives. Given this inability of juries, the Lipsett case, even though a jury trial, might have been decided differently after the Ellison decision to utilize the reasonable woman standard.

3. Legitimacy of Expert Testimony in Similar Contexts

Expert witness testimony that might address the reasonable woman standard is cultural testimony. That is, it seeks to define a cultural norm, here the views of American women's culture on the subject of sexual harassment. This type of evidence is often referred to as “social framework evidence.” This evidence frequently appears in the context of rape cases. Here, evidence of “rape trauma syndrome” is introduced to explain the behavior of rape victims following an attack. The analogy to be drawn between these situations and expert testimony involving the reasonable woman is that both circumstances involve reliance upon an expert's understanding of social framework. Rape trauma syndrome seeks to explain behavior not with reference to a specific victim's actions, as might be explained by a psychologist or other type of expert, but through an explanation of what behavior is typical in a given social framework. Specifically, an ex-

160. See supra notes 130-35 and accompanying text.
162. E.g., Mosteller, supra note 26, at 133 (explaining that social framework evidence attempts to explain witness testimony by putting into its proper cultural context, that is, by explaining how the testimony must be considered in light of the background of the witness).
163. Id. at 135-38.
164. Id.
165. Id.
Expert might testify to expected victim reactions following a rape. In like manner, an expert in sexual harassment might testify as to the expected reactions of a reasonable woman to certain allegedly harassing actions. The "reactions" could include simply feeling harassed. In this way, the expert would be testifying as to whether or not a reasonable woman would have been harassed by a certain environment.

This type of evidence has, in a few instances, been explicitly codified. California has amended its evidence code to allow for the introduction of expert witness testimony concerning phenomena such as "battered women's syndrome," a typical response of victims of domestic violence. There are, however, no federal codifications regarding the admissibility of evidence that could be defined as social framework evidence.

The importance of social framework evidence in sexual harassment trials has been identified by Professor Mary T. Coombs. She writes: "Women's true stories of acquaintance rape and hostile environment sexual harassment . . . tend to be complex, ragged, and contradictory, reflecting . . . the incoherence and contradictions of contemporary sexual mores . . . ." Therefore, social framework evidence is helpful in explaining the complexities of both the individual's circumstances and of the social context in which they arise. Professor Coombs also notes that "[t]he cultural scripts that the jurors bring to the court indirectly influence the stories they will be told." Expert witnesses should therefore be used to compliment the "cultural scripts" and preconceptions of the jurors. These witnesses can bring forth the perspectives that are so often not recognized in the courtroom, in this case the perspectives of women in a work environment. In Robinson, Judge Melton was reticent to determine the reasonable woman out of "whole cloth." Perhaps he was also reticent to do so while laboring under his own preconceptions.

166. Id.
167. CAL. EVID. CODE. § 1107 (West 1993).
169. Id. at 290.
170. Id. at 291.
171. See supra notes 97-99 and accompanying text.
Another analogous situation involves the introduction of expert testimony as to the reasonable behavior of an individual in a particular profession. As does social framework testimony, this seeks to establish a standard of behavior or perception with which the jury may be unfamiliar. A frequently appearing example is testimony concerning the "reasonable physician." In these instances, expert testimony helps inform the jury as to whether or not a physician's behavior was reasonable in a given set of circumstances, when statute requires reasonable behavior. Examples of the admission of this evidence can be found in Bunting v. United States and Thomas v. Hoffman-LaRoche, Inc. In both cases, a physician's reasonableness was at issue; in both cases, expert testimony as to standards of a "reasonable physician" was admitted. The introduction of this type of evidence of course differs from that in sexual harassment trials utilizing the reasonable woman standard. An expert testifying to the reasonable physician evaluates the perceptions and behaviors of the average individual in the same position as the defendant. In sexual harassment cases, the expert gives testimony regarding the perceptions of the victim. But in each instance, it is an individual's perceptions or behaviors which are at issue. In this way the situations are analogous, and cases such as Bunting and Thomas can stand for the proposition that expert witness testimony such as that recommended in this comment is indicated by precedent.

Even once the legitimacy and necessity of expert testimony in the sexual harassment context is established, the consideration of that testimony's admissibility is not at an end. Judges must still determine whether or not that testimony will fail to be helpful in the sense that it may mislead or otherwise prejudice the jury. General considerations of "helpfulness" and the extent to which an expert's addressing the ultimate issue of fact mitigate against helpfulness must therefore be examined.

173. 884 F.2d 1143 (9th Cir. 1989)
174. 949 F.2d 806 (5th Cir. 1992)
175. See supra notes 74-77 and accompanying text.
B. Helpfulness to the Finder of Fact and the Ultimate Issue

As has been outlined in the background to this comment, Federal Rule of Evidence 704 disallows the exclusion of expert testimony simply because that testimony will address the ultimate issue to be determined by the finder of fact. But judges, while not necessarily referencing the Rules directly, have used the standards of helpfulness to the jury, avoidance of prejudice, confusion of the issues, and misleading the jury found in Rules 702 and 403 to exclude expert testimony in sexual harassment cases. Even if the Daubert standard is applied, these limits must still be addressed by those seeking to introduce expert testimony.

1. Helpfulness to the Jury

In the previous sections, the Ellison court's establishment of the reasonable woman standard was recognized to have identified an area that might be beyond the understanding of the fact-finder. In so doing, it created the possibility of an area of expertise, one in which some courts had previously allowed for expert testimony. If hostile environment sexual harassment and the conditions that create it are areas to be addressed by experts, then they by definition are areas in which juries and judges sitting at bench trial might benefit from expert testimony. This can be attributed to two factors: the special perspective of women, and the special perspective of those within the workplace.

The existence of differing perspectives of men and women was identified in Robinson, Ellison, and even Lipsett. It is fairly clear then that men would benefit substantially from experts explaining to them what is commonly perceived by women as harassing behavior. The Lipsett court was satisfied with the fact that even though men and women have different perspectives, men are aware of what these perspectives are. The Robinson court was not so certain, and therefore allowed expert testimony regarding the matter.

176. See supra note 69 and accompanying text.
177. See supra text accompanying notes 93-100.
178. See supra text accompanying notes 93-100.
179. See supra text accompanying notes 93-100.
181. See supra notes 110-15 and accompanying text.
The *Lipsett* opinion might be interpreted to hold that the presence of women on a jury is sufficient for the education of the men on the jury. The *Robinson* court, in distinguishing its case from *Lipsett* primarily on the basis of the difference between judge and jury trials, contains nothing to refute such a contention. But simply relying on the perspectives of individual jurors is insufficient to ensure that a jury is capable of applying a reasonable woman standard. In addition, to do so puts a heavy burden on female jury members. As was illustrated in *Ellison*, there exist "ingrained notions of reasonable behavior fashioned by the offenders."\(^{182}\) It seems unlikely that a female juror (whose presence is not itself even guaranteed) could single-handedly successfully contradict such "ingrained notions." If women's views are marginalized generally, why would they not be in a jury room? Most significantly, there is no guarantee that a female juror's opinion will be given the weight that would be given a qualified expert, recognized by the court. And if male jurors were to give female jurors such deference in these matters, there is some risk that the female jurors would gain inordinate influence over deliberations. Finally, although jurors must frequently put themselves in the place of plaintiffs, there are circumstances apart from gender that might make this impractical or impossible.

Hostile environment sexual harassment arises in the employment context. The workplace doubtlessly has its own social framework. Even if a female juror were able to educate her male counterparts to some of the realities of having a woman's (as opposed to a man's) perspective, she might not be able to educate them about the perspective of a woman in the workplace. As was observed in *Robinson*, "Men and women respond to sex issues in the workplace to a degree that exceeds normal differences in other perceptual reactions between them."\(^{183}\) Therefore, even if women jurors or judges could make determinations concerning the reasonable woman without the aid of an expert witness, they might well be

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183. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991) (citing 4 Trial Transcript at 198) (emphasis added)). Simply put, the difference between male and female perspectives is even greater in a workplace context.
unable to do so with reference to that reasonable woman in a specific work context. In this light, the helpfulness of experts becomes clear not only with reference to differences in gender but to differences in working conditions as well.

2. Avoidance of Prejudice, Confusion of the Issues and Misleading the Jury

Federal Rule of Evidence 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."\(^\text{184}\) No federal court hearing a sexual harassment case has excluded expert testimony explicitly with reference to Rule 403, or for any of the reasons the Rule enumerates. It is foreseeable that a court could be concerned with the influence experts have. However, this concern can be eliminated as it has been in so many other contexts: with experts introduced by each side. In Robinson, the defendants offered the testimony of an expert who stated that the alleged behavior would not harass a reasonable woman.\(^\text{185}\) In such a circumstance, the court could determine that although the use of one expert might mislead or prejudice the jury, the use of two experts offering contradictory testimony would eliminate the possibility of misleading or prejudicial testimony. In addition, the jury or judge would still be making the ultimate determinations of reasonableness. Experts would only help inform those determinations.

3. Testimony Regarding the Ultimate Issue Before the Court

As indicated above, Federal Rule of Evidence 704 allows for expert testimony even if it addresses the ultimate issue to be addressed by the finder of fact.\(^\text{186}\) But the prohibitions against such testimony are still inferred from Rules 403 and 702,\(^\text{187}\) which are read to provide "assurances against the admission of opinions which would merely tell the jury what result to reach."\(^\text{188}\) If expert testimony is determined to be admissible with regard to a recognizable area of expertise and

\(^{184}\) Federal Rule of Evidence 403.

\(^{185}\) Robinson, 760 F. Supp. at 1507-08.

\(^{186}\) See supra notes 70-71 and accompanying text.

\(^{187}\) See supra notes 75-76 and accompanying text.

\(^{188}\) See supra note 77 and accompanying text.
helpful to the jury in terms of defining what behavior a reasonable woman would find to be harassing, it may still be excluded as not helpful in the sense that it addresses ultimate issues.

Such was clearly the case in Perkins. Here, the judge explicitly excluded all expert testimony which would directly address "the law on sexual harassment." The expert testimony that was to be introduced in this case would have done so. But this should not preclude expert testimony in this area entirely. There is a variety of expert testimony that would not simply define the law. If an expert were to testify to what a reasonable woman would or would not find harassing, that expert would only be defining a standard of reasonable behavior or response to behavior. It is true that when the reasonable woman standard is applied, it in large part determines the law to be applied. However, testifying as to what responses (i.e., to certain allegedly harassing behavior) are reasonable in general still allows a jury or judge acting as fact-finder to determine reasonable behavior in the circumstances before the court, and to determine if it was reasonable that a plaintiff felt harassed.

The court in Robinson was a bit more liberal with its allowance of testimony that addresses matters of law. It found that expert testimony would be helpful in defining "the hypothetical reasonable woman." The expert did not testify that the plaintiff herself would reasonably have felt harassed, but rather what actions generally would constitute harassment. This is testimony concerning matters of law to the extent that it defines the reasonable woman. But it avoids the concerns that testimony not address the ultimate issue of fact. The use of a hypothetical reasonable woman avoids a circumstance in which an expert asserts that the plaintiff was harassed. By not addressing the plaintiff herself, the expert in Robinson only gave the judge guidance in matters concerning the perspectives of women. It was still for the fact-finder to determine whether or not the circumstances that would be harassing actually existed.

190. See supra notes 134-37 and accompanying text.
192. Id.
In Robinson, the court also allowed for testimony which involved "expert opinion that sexually harassing conditions for female employees exist at [defendant employer]." But here the ultimate issue was again avoided. The expert did not testify that the Plaintiff had been subjected to these conditions. This was still for the judge to determine.

The essential problem perceived in allowing experts to address ultimate issues of fact is that such testimony invades the province of the jury or judge as fact-finder. But the essential facts of a given case, i.e., did the alleged behavior take place, will always be determined by the fact-finder. It is for the judge or jury to decide which witnesses it believes, and which factual evidence is most compelling. It is true that if the parties were to stipulate to the facts, and were merely in disagreement over whether or not those facts included an incidence of harassment, the role of the expert would come closer to addressing the ultimate issue of the case. Admittedly, there is little difference between an expert describing "hypothetical" circumstances that in the expert's view would constitute harassment, and testifying that the facts before the court constitute harassment. In this sense the ultimate issue is addressed. It must therefore be accepted that often testimony as to what constitutes the reasonable woman in many circumstances will be the crux of litigation, and will address the ultimate issue before the jury. But according to Rule 704, this is not per se a cause for exclusion. And the extent to which this might mislead or otherwise improperly influence the jury must be weighed against the extent to which it is of aid to the jury. Given the above discussion of the differing perspectives of men and women, and the legal recognition of those differing perspectives that is embodied in the reasonable woman standard, the helpfulness of the expert testimony certainly outweighs any deleterious effects. It must be remembered that Rule 704 exists to allow for the introduction of testimony which is helpful to the jury despite that fact that it addresses the ultimate issue.

193. Id. at 1506.
194. Id.
195. See supra notes 70-71 and accompanying text.
4. Policy Considerations

There are policy considerations that weigh against the admissibility of such evidence as is addressed in this comment. The reasonable woman standard recognizes a problem: that men do not generally understand the perspectives of women with regard to sexual context. Therefore, it is impossible to apply a reasonableness standard that does not recognize these differing perspectives. In a perfect world men would understand women's perspectives (or perhaps the perspectives would be the same among the two genders). But what men do not find offensive women often do. This is a reality that can be addressed by the use of expert witnesses. But in using the experts, the court implies that men cannot, without aid, understand the woman's perspective. In this sense the court legitimizes men's failure to recognize women's viewpoints; it codifies and entrenches the differing perspectives, even as it seeks to mitigate their effects.

The alternative, allowing men to blindly search for the standard of the reasonable woman, is not acceptable. The courts must deal with the realities that are presented to it. To do otherwise would be to prefer a legal fiction, that men do understand the perspective of women, to the realization of justice that expert witnesses can help ensure.

A policy consideration that directly stands for allowing such testimony involves the common complaint that men do not know what kind of behavior is and is not acceptable. In a litigation context, this argument is irrelevant. In establishing the reasonable woman standard, the Ellison court moved the focus of inquiry from harasser to victim, and thereby made the harasser's intent irrelevant. But in accepting expert witnesses on the reasonable woman, courts would provide an opportunity for a legally institutionalized examination of proper (or at least legal) standards of behavior. In serving as a forum for examinations of reasonableness, the courts could illustrate what is and is not harassing behavior in the workplace. In this way the courts could give men clearer guidelines, they would be more difficult to attack as vague or unfair.

196. See supra notes 94-99 and accompanying text.
V. Proposal—Additions to the Federal Rules of Evidence

Expert testimony of the type used in Robinson and sought to be used in Ward, Perkins, and Lipsett should be admitted. Under the Frye standard, the testimony was required to be derived from a recognizable standard. The Daubert interpretation of Rule 702 requires a reliable scientific method. Study of women's behavior, although newer than other studies currently recognized as fields of expertise, is an established field. Social framework evidence has been allowed to address the perspectives and typical responses of women in circumstances of rape. There is no reason why testimony of a similar type should not be allowed when there are allegations of sexual harassment. Even more compelling is the existence of the reasonable woman standard. It is incongruous to accept the reasonable woman standard and simultaneously presume that men can reach it on their own. The reasonable woman standard was adopted to be used by the courts as a means of recognizing and dealing with the historical exclusion of women's perspective in society generally and the courtroom specifically. Given such exclusion, how can these perspectives be understood by a jury that has not been educated by experts? It is equally incongruous to accept that a workplace is a special environment, but not allow experts to explain what it is like to be within that environment.

Given the necessity of the expert testimony addressed in this comment, its admissibility should be ensured through an addition to the Federal Rules of Evidence. An excellent model is the aforementioned California statute which allows for the introduction of evidence concerning battered women's syndrome.

The amendment to the Rules should first include a statement that expert testimony will be admissible in sexual harassment cases brought under Title VII when it is introduced to show those circumstances that would for a reasonable woman create a sexually hostile, offensive, or intimidating work environment. Second, there must be a standard for the experts themselves. The California statute uses the following language: "The foundation shall be sufficient for admission of

197. See supra notes 153-54 and accompanying text.
198. CAL. EVID. CODE § 1107 (West 1993); see supra text accompanying note 166.
this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness.”\textsuperscript{199} Although the language, “proper qualifications,” is very flexible, judicial subversion of the intent of the statute would be prevented by a third section of the statute: “Expert opinion testimony on the reasonable woman as the standard is applied to sexual harassment shall not be considered a new scientific technique whose reliability is unproven.”\textsuperscript{200} This would prevent refusal of the evidence on the grounds that it is not in compliance with the Rule 702 requirement that expert testimony be based on “scientific, technical, or other specialized knowledge.” It would thus be legitimate under the new standard of \textit{Daubert}.

VI. CONCLUSION

The substantive changes to the Federal Rules of Evidence listed above would effectively guarantee the admissibility of established, legitimate, and helpful expert witness testimony in hostile environment sexual harassment cases utilizing the reasonable woman standard. However, the possibility of such changes actually being made is slight. First, the strongest argument for the necessity of these provisions is the existence of the reasonable woman standard. But this is not a universally applied standard. Although courts do tend to judge allegedly harassing behavior according to its effects on alleged victims, most often women, not all circuits have explicitly recognized this through an acceptance of \textit{Ellison}’s reasonable woman standard.

Secondly, the Federal Rules of Evidence relating to the admissibility of expert testimony are very general in their wording. This reflects the deference given to judges by appellate courts evaluating rulings on the admissibility of expert testimony. A rule as explicit as that outlined above would not be in keeping with the general language of the Rules or the deference this general language helps to ensure.

The faint hope for a statute such as that outlined above does not mean that those who seek to introduce the testimony addressed here will not be allowed to do so. As sexual harassment cases become more common, those who study it will be-

\textsuperscript{199} \textit{CAL. EVID. CODE} § 1107(b) (West 1993).
\textsuperscript{200} \textit{See id.}
come more recognized. As the field of study grows, so will the acceptability of experts in the field. Eventually, most courts will be able to make the same determinations that were made by the Robinson court, and allow for the admission of the testimony. As awareness of sexual harassment and the differing perspectives of men and women grow, the acceptance of this testimony will increase. Ironically, if this awareness is overestimated, the experts may appear unnecessary. If the expert testimony here discussed is to be introduced, judges must understand the difference between recognizing the existence of differing perspectives and understanding the perspectives themselves.

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