Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment

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SEX, SCIENCE AND SOCIAL KNOWLEDGE: THE IMPLICATIONS OF SOCIAL SCIENCE RESEARCH ON IMPUTING LIABILITY TO EMPLOYERS FOR SEXUAL HARASSMENT

THERESA M. BEINER*

Senator Specter: . . . [U]nderstanding of the fact that you're 25 and that . . . you're shortly out of law school and the pressures that exist in this world . . . [E]ven considering all of that, given your own expert standing and the fact that here you have the chief law enforcement officer of the country on this subject [sexual harassment] and the whole purpose of the civil rights law is being perverted right in the office of the Chairman with one of his own female subordinates—what went through your mind, if anything, on whether you ought to come forward at that stage, because if you had you'd stop this man from being head of the EEOC perhaps for another decade. What went on through your mind? I know you decided not to make a complaint, but did you give that any consideration, and if so how could you allow this kind of reprehensible conduct to go on right in the headquarters without doing something about it?¹

. . .

Senator Deconcini: . . . [I]f you wouldn't mind repeating to me what went through your mind, why, number one, you would stay there after this happened several times, and number two, even though it ceased for a few months, why you would proceed on to another job with someone that hadn't just asked you out and pressed you, but had gotten into the explanations and—expletives and the anatomy and what have you that you pointed out to us today.

Ms. Hill: . . . At that time, though staying seemed the only reasonable choice, at that time staying was the way that—in a

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way—a choice that I made because I wanted to do the work. I, in fact, believed that I could have made that choice to do the work. And that’s what I wanted to do. And I did not want to let that kind of behavior control my choices. So, I attempted to end the behavior, and for some time the behavior did stop.\(^2\)

Senator Simpson: ... But let me tell you, if what you say this man said to you occurred, why in God’s name, when he left his position of power or status or authority over you, and you left it in 1983, why in God’s name would you ever speak to a man like that the rest of your life?

Ms. Hill: That’s a very good question. And I’m sure that I cannot answer that to your satisfaction. That is one of the things that I have tried to do today. I have suggested that I was afraid of retaliation. I was afraid of damage to my professional life. And I believe that you have to understand that this response—and that’s one of the things that I have come to understand about harassment—this response, this kind of response, is not atypical. And I can’t explain. It takes an expert in psychology to explain how that can happen. But it can happen, because it happened to me.

Senator Simpson: Well, ... it just seems so incredible to me that you would not only have visited with him twice after that period and after he was no longer able to manipulate you or to destroy you, that you then not only visited with him, but took him to the airport and then 11 times contacted him. That part of it appals [sic] me. I would think that these things which you describe are so repugnant, so ugly, so obscene, that you would never have talked to him again. And that will [sic]—is the most contradictory and puzzling thing for me.\(^3\)

I. INTRODUCTION

As the testimony quoted above shows, Professor Anita Hill endured a variety of questions about her own behavior regarding the alleged sexual harassment inflicted by now Justice Clarence Thomas. Why had she waited so long to come forward? Why didn’t she complain to the powers that be at the time? Why didn’t she continue to work for him, and even move with him from the Department of Education to the Equal Employment Opportunity Commission (EEOC)? How could she stay in contact with him after she left the EEOC?\(^4\) Many of the Senators’ assumptions about the

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2. Id. at *71.
3. Id. at **73-74.
4. See Adrienne D. Davis & Stephanie M. Wildman, The Legacy of Doubt: Treatment
manner in which women should behave came out in their questioning. They are not, however, the only ones who make such assumptions. Many assumptions about the way people should behave also sneak into both lower court and Supreme Court precedent on sexual harassment.\textsuperscript{5} Yet, as social scientists’ research shows, Professor Hill’s response to the alleged harassment by Clarence Thomas was consistent with the manner in which many women actually behave when faced with harassing situations.\textsuperscript{6}

This Article attempts to bridge the gap between how the courts assess sexual harassment complaints and how sexual harassment actually occurs in the workplace. In particular, one developing area of sexual harassment law will be explored: the defense to employer liability for supervisor harassment set out in \textit{Faragher v. City of Boca Raton}\textsuperscript{7} and \textit{Burlington Industries, Inc. v. Ellerth}.\textsuperscript{8} In \textit{Faragher} and \textit{Ellerth}, the Supreme Court established vicarious liability for employers for harassment perpetrated by supervisors. Along with establishing this form of liability, the Court created a defense for employers. It is in this defense, and lower courts’ interpretations of it, that a disconnect occurs between the way courts look at harassment and the manner in which harassment occurs and is responded to on the job. This disconnect becomes apparent after a review of the latest social science literature on sexual harassment.

In Part II, I begin by setting out both the Supreme Court precedent and lower courts’ current assessment of the \textit{Ellerth/Faragher} defense. In Part III, I review studies from the fields of Sociology, Psychology, Psychiatry, Organizational Theory and Women’s Studies in an attempt to explain how sexual harassment operates in the workplace. Finally, I conclude in Part IV that the assumptions courts make about the way people should behave in harassment situations are out of sync with the actual

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of \textit{Sex and Race in the Hill-Thomas Hearings}, 65 S. CAL. L. REV. 1367, 1375 (1992). As one commentator stated after the hearings:

The insensitivity and lack of comprehension about the complex psychology of sexual harassment displayed by the Senators questioning the witnesses in the Clarence Thomas hearings was, in a word, unbelievable. To not understand why a woman might fear reporting her powerful supervisor’s abysmal behavior or why a woman beginning her career might take a job which allows advancement but which reports to a known harasser is to be oblivious to the total imbalance of power between most men and women in today’s workplace.


5. See infra Part II.B.
6. See infra Part III.B.
responses of harassment victims. After exploring the work of social scientists, I recommend changes to the law of sexual harassment—changes that are consistent with the purposes of Title VII, including preventing discrimination and making victims whole.

II. IMPUTING LIABILITY TO THE EMPLOYER

A. Supreme Court Precedent

In 1986, the Supreme Court first recognized a claim for sexual harassment under Title VII in *Meritor Savings Bank, FSB v. Vinson.* Since *Meritor,* lower courts have struggled to determine under what circumstances they should impute liability to employers for harassment by supervisors. They have not been so confused regarding harassment by co-workers, about which the courts have reached a consensus that if the employer knew or should have known of the harassment and failed to take effective remedial measures, the employer will be liable. There is also a consensus on quid pro quo cases: when a tangible employment action is taken against an employee by a supervisor for failing to engage in a relationship or other sexual acts with a supervisor, the employer is liable.


11. E.g., Fenton v. Hisan, Inc., 174 F.3d 827, 829-30 (6th Cir. 1999); Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999) (considering the racial harassment context); Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1241-42 (10th Cir. 1999); Burrell v. Star Nursery, Inc., 170 F.3d 951, 955 (9th Cir. 1999). The Court in *Ellerth* suggested that if a co-worker is the harasser and the harassee has a reasonable belief that the harasser is actually a supervisor, the employer could be held liable under an "apparent authority" theory. *Ellerth,* 524 U.S. at 759.

12. See *Faragher,* 524 U.S. at 780; *Ellerth,* 524 U.S. at 759-61. The *Ellerth* Court defined "tangible employment action" to include "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth,* 524 U.S. at 761. There is obviously room for interpretation in this definition. For example, is constructive discharge a "tangible employment action" for purposes of quid pro quo harassment? Compare Durham Life Ins. Co. v. Evans, 166 F.3d 139, 149 n.5 (3d Cir. 1999) (acknowledging that constructive discharge can be a tangible employment action under *Ellerth*), and Galloway v. Matagorda County, Tex., 35 F. Supp. 2d 952, 957 (S.D. Tex. 1999) (stating that "[c]onstructive discharge
When it came to hostile environments created by supervisors, however, the Meritor Court established no precise rule.13 Caught between the trial court's standard of actual notice and the court of appeals' strict liability standard, the Supreme Court "agree[d] with the EEOC that Congress wanted courts to look to agency principles for guidance in this area."14 The Court referred to agency rules because the language of Title VII defined employer to include an agent of the employer.15 It also acknowledged that common law agency principles might not be "transferable in all their particulars to Title VII."16 With the standard so vague, it is not surprising that it led to confusion among the lower courts and scholarly debate as to the standard for imposing liability on employers for harassment perpetrated by supervisory employees.17

Since Meritor, the Court has clarified this standard in two recent cases: Faragher v. City of Boca Raton18 and Burlington Industries, Inc. v. Ellerth.19 In Faragher, the Court addressed the circumstances under which an employer may be held liable for a supervisor's acts of harassment that create a hostile work environment.20 In doing so, the Court acknowledged that its "cases have established few definite rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive."21 In order to frame a standard, the Court looked at various theories of imputing liability to employers

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13. Meritor, 477 U.S. at 72. Justice Marshall, joined by Justices Brennan, Blackmun and Stevens, would have issued a definitive rule. Id. at 74-75 (Marshall, J., concurring). Believing the question to be properly before the Court, they urged the adoption of the EEOC guideline's standard for employer liability, rather than leaving the issue indefinite. Id. Specifically, they would have held an employer strictly liable for the acts of harassment by its agents and supervisory employees, while only holding an employer liable for harassment by co-workers if the employer "knew or should have known" of the alleged harassing behavior. Id. at 74-78.
14. Id. at 72.
15. See id. (citing 42 U.S.C. § 2000e(b) (1994)).
16. Id.
17. See Faragher, 524 U.S. at 785 (acknowledging the lower courts' difficulties); Oppenheimer, supra note 10, at 71; Verkerke, supra note 10, at 277.
20. Faragher, 524 U.S. at 807.
21. Id.
for the actions of their supervisors. The Court took into consideration that supervisors can easily misuse their authority and that the threat of an adverse employment action is always there for an employee who does not act in the manner a supervisor wishes. However, the Court acknowledged its statement in Meritor that employers would not automatically be liable for the acts of their supervisors.

With this in mind, as well as Title VII's emphasis on correcting problems before they reach litigation, the Court provided an affirmative defense to "liability or damages" for employers:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In both cases, the Court did not specifically state that the defense is a complete bar to liability. Instead, it explicitly stated that the defense may be used for liability or damages. Thus, it contemplated that lower courts would decide how the defense should be used in particular cases and conceded that it might be used, in appropriate circumstances, to limit only damages. The Court also clarified that this defense does not exist if the supervisor's harassment involves a tangible employment action against the harassed employee, such as a demotion, pay cut, etc.

In Faragher, the Court stated that it arrived at this compromise after considering common law distinctions in agency

22. Id. at 804-05.
23. Id. at 804.
24. Id.
25. Id. at 807 (citation omitted); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (using identical language).
26. See Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
27. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
28. Ellerth, 524 U.S. at 742; Faragher, 524 U.S. at 807.
29. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 808. These cases involve liability for quid pro quo harassment. See supra note 12 and accompanying text.
law between supervisory acts that benefit the employer and those it characterized as a personal frolic. While acknowledging that sexual harassment was prevalent enough in the workplace for employers to reasonably anticipate the occurrence of such conduct, the Court stopped short of holding the employer liable for all acts of harassment by supervisors, instead preferring to provide an affirmative defense. The affirmative defense born out of the Court's compromise in *Faragher* was incorporated into its decision in *Ellerth*.

In *Ellerth*, the Supreme Court addressed whether an employee must prove a tangible job detriment in order to maintain a quid pro quo harassment claim. However, the Court recharacterized the issue as whether the company was vicariously liable for the acts of its supervisor. The Court reasoned that the terms “quid pro quo” and “hostile environment” are useful in separating harassing situations in which an employer carries out a threat and one in which the employer does not. Beyond that, the terms do not have much significance. Thus, although *Ellerth*’s claim involved unfulfilled threats, that did not defeat her harassment claim. It simply meant that her claim was a hostile environment claim instead of a quid pro quo claim. After recharacterizing the case in this manner, the Court adopted the identical affirmative defense as adopted in *Faragher*.

The *Ellerth* and *Faragher* Court also described what evidence might suffice to prove the affirmative defense:

31. *Id.* at 798, 807. The Court also left open the potential for other agency principles to be used to impute liability to the employer. Some lower courts have picked up on these alternatives. See, e.g., Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1241 (10th Cir. 1999) (holding the *Ellerth/Faragher* defense unavailable under straight negligence theory for imputing liability for supervisor harassment); Lintz v. Am. Gen. Fin., Inc., 50 F. Supp. 2d 1074, 1081 (D. Kan. 1999) (same).
32. *Faragher*, 524 U.S. at 800.
33. *Ellerth*, 524 U.S. at 768.
34. *Id.* at 753.
35. *Id.* at 751.
36. *Id.* at 753. This is a bit disingenuous of the Court. Because the Court has created a defense to employer liability for harassing acts of supervisors in hostile environment cases, but has created no such defense in quid pro quo cases, the characterization of the case as one or the other can have a distinct effect on the plaintiff's success in a lawsuit. Characterization of a case as involving quid pro quo harassment does not allow the employer to use the affirmative defense.
37. *Id.* at 754.
38. *Id.*
39. See *id.* at 764-65 (using identical language to that of *Faragher*); see also *id.* at 766 (Ginsburg, J., concurring) (noting that the standard adopted in *Ellerth* was "substantively identical" to that of *Faragher*).
While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.\(^{40}\)

The Court's description supports the use of anti-harassment policies by employers. Although the Court does not mandate that all employers must have these policies, it suggests that such a policy often will be the key for an employer to successfully use this defense. Indeed, lower court interpretations of the \textit{Ellerth/Faragher} affirmative defense reflect the usefulness of an anti-harassment policy in meeting the defense.\(^{41}\) The Court suggested that the combination of an employer-promulgated anti-harassment policy and the employee's unreasonable failure to use such a procedure provides proof of both elements of this defense.\(^{42}\) As the Court in \textit{Faragher} explained:

> An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.\(^{43}\)

Thus, while the burden of proof for this affirmative defense is obviously on the employer, it appears that there may be an implicit


\(^{41}\) See, e.g., \textit{Brown v. Perry}, 184 F.3d 388, 396 (4th Cir. 1999); \textit{Shaw v. AutoZone, Inc.}, 180 F.3d 806, 811-12 (7th Cir. 1999). I will discuss lower court interpretations of the \textit{Ellerth/Faragher} defense in this regard later in this Article. See infra Part II.B.

\(^{42}\) See \textit{Faragher}, 524 U.S. at 806-07.

\(^{43}\) \textit{Id.}
burden on an employee who fails to use the complaint system in place. The Court is effectively placing the employee in the position of justifying her failure to use the employer's complaint procedure. As I explain in the next section, depending on how the lower courts interpret this, these cases may not establish a very difficult burden for the employer.

The element of imputing liability is just one of several an employee must establish in order to make out a prima facie claim of sexual harassment. A review of lower court cases reveals four basic elements: (1) an employee was subjected to unwelcome harassment, (2) the harassment was based on his/her gender, (3) the harassment must be “sufficiently severe or pervasive” to alter a term, condition or privilege of employment and (4) in the case of a co-worker, the employee must show that the employer knew or should have known of the harassment, but in the case of a supervisor, the employer will be vicariously liable, subject to the Ellerth/Faragher affirmative defense. The Court also has stated that harassment should be judged by both the subjective perception of the victim, as well as that of the objective, reasonable person.

The EEOC has also interpreted the Ellerth/Faragher defense. In addition to discussing who should be considered a supervisor for purposes of the vicarious liability rule, the agency gave a detailed analysis of both prongs of the defense. It appears from the beginning of its report that the EEOC’s position is that, once proven, the defense results in no liability to the defendant employer. However, later examples given by the EEOC in conjunction with Faragher and Ellerth indicate that the defense could be used to limit damages.

44. Id.
45. See infra notes 71-75 and accompanying text.
47. Carter v. Chrysler Corp., 173 F.3d 693, 702 (8th Cir. 1999).
50. See id. at **2-4.
51. See id. at **6-15.
52. See id. at *1.
The EEOC has liberally interpreted other aspects of the Ellerth/Faragher defense in favor of plaintiffs. For example, the EEOC points out that the employer must exercise reasonable care to prevent harassment, as well as ensure that it is corrected promptly. Thus, even if the employer corrects a harassing situation once it occurs, if it did not exercise reasonable care in preventing the harassment in the first place, it will still be liable. It is easy to envision a situation in which an employer might be aware that a particular supervisor harasses employees (perhaps based on earlier complaints), but has not taken any measures to effectively stop this serial harasser. Under such a fact pattern, even if the employer stops the harassment of the latest employee harassed, the employer arguably has failed to exercise reasonable care in preventing the harassment given the harasser's proclivity to engage in such behavior. The employer, therefore, would not be able to take advantage of the Ellerth/Faragher defense, because it failed to exercise reasonable care to prevent the harassment.

The EEOC also provided examples of situations in which the employee did not unreasonably fail to avoid harm, but the harassment persisted. One example the agency gave is where the employer took reasonable actions to halt harassment after an employee complaint. The employee acted reasonably in complaining. Therefore, although the employer can satisfy the first prong of the Ellerth/Faragher defense, it would not be able to satisfy the second—that the employee failed to take advantage of any preventive or corrective opportunities. In addition, the harassment might become sufficiently severe or pervasive before the employee has an opportunity to complain. If the employee complains in a reasonable manner in order to avoid further harm, the Ellerth/Faragher defense will not relieve the employer from liability due to the initial severity of the harassment.

55. See id. at *7.
56. See id. Interpretation of the Ellerth/Faragher defense in this context has caused confusion for at least one lower court. See Indest v. Freeman Decorating, Inc., 168 F.3d 795, 796 (5th Cir. 1999) (Wiener, J., concurring in judgment) (agreeing with the holding of the majority, but disagreeing with majority's failure to apply the Ellerth/Faragher standard); Indest v. Freeman Decorating, Inc., 164 F.3d 258, 265 (5th Cir. 1999) (Jones, J., concurring) (distinguishing Faragher and Ellerth as the employer in Indest promptly reacted to plaintiff's harassment claim).
57. See EEOC, supra note 49, at *7.
58. See id. The EEOC's interpretative example in this regard seems to undermine the agency's initial statement that the employee's delay in reporting provides an absolute defense. See id. at *7 ("If an employer can prove that it discharged its duty of reasonable care and that the employee could have avoided all of the harm but unreasonably failed to do
Finally, the EEOC's *Enforcement Guidance* contemplates that one possible approach is a limitation on damages, although it does not elaborate on this point. Of course, the EEOC's *Enforcement Guidance* is just that—guidance. It remains to be seen whether lower court decisions will be consistent with the EEOC's rather broad interpretation.\(^5\)

One final recent case bears mentioning at this point because of its potential effect on my solution to the current anomalies in the manner in which harassment occurs in the workplace and is addressed by the courts. In 1999, the Court, in *Kolstad v. American Dental Association*,\(^6\) rendered a decision concerning punitive damages liability under Title VII. *Kolstad* involved allegations of a sexually discriminatory promotion.\(^6\) The Court held that the plaintiff need not show that the employer acted egregiously in violating her rights in order to be eligible for punitive damages.\(^6\)

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5. EEOC, *supra* note 49, at *8.* The *Enforcement Guidance* provides that "in some cases, an employer will be unable to avoid liability completely, but may be able to establish the affirmative defense as a means to limit damages. The defense only limits damages where the employee reasonably could have avoided some but not all of the harm from the harassment." *Id.* It also provides an example of a situation in which an employee does not promptly complain about frequent racial epithets from a supervisor. "[A]n unreasonable delay by the employee could limit damages but not eliminate liability entirely." *Id.*

6. Indeed, the Supreme Court itself has been inconsistent in its deference to EEOC interpretations. Sometimes it has given them great deference. *E.g.*, *McDonald v. Santa Fe Trail*, 427 U.S. 273, 278 (1976) (stating that EEOC decisions are "entitled to great deference"). Other times the Supreme Court has eschewed EEOC interpretations altogether. *E.g.*, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 140-42 (1976) (stating that because "Congress . . . did not confer upon the EEOC authority to promulgate rules or regulations," the level of deference given its interpretations depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"). *See generally* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51 (discussing the authority of the EEOC to interpret Title VII).


62. *Id.* at 531.

63. *See id.* at 534-35.
Instead, the Court held that section 1981a requires only that the "employer must act with 'malice or with reckless indifference to [the plaintiff's] federally protected rights." In particular, it explained that the "terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.

Beyond that holding, the Court also engaged in a rather odd analysis of how agency principles might affect the award of punitive damages. The Court wanted to give credit to employers who act in good faith to comply with Title VII, thereby encouraging employer compliance. In light of this, the Court held:

Recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the Restatements' strict limits on vicarious liability for punitive damages, we agree that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's "good-faith efforts to comply with Title VII."

It remains unclear how this standard would apply in the context of sexual harassment, where the Court has clearly established in both Faragher and Ellerth that the employer is vicariously liable for the harassment by supervisors, absent the employer's proving the affirmative defense set out in those cases.

65. Kolstad, 527 U.S. at 534 (quoting 42 U.S.C. § 1981a(b)(1)).
66. Id. at 535. This seems like an odd distinction to make in the context of Title VII discrimination. Given employers' widespread knowledge that discrimination based on race, sex, religion, national origin, age and disability is illegal under federal law, it is hard to imagine a situation in which an employer would be discriminating and not be aware that its actions might violate federal law. The only arguable exceptions are situations involving bona fide occupational qualifications (BFOQs), where the employer might argue that it was acting in good faith based on job requirements and, therefore, believed its actions were within that exception to the statute. While the Court contemplated this possibility, id. at 535, its examples only included BFOQs, novel theories and Age Discrimination in Employment Act (ADEA) cases. It is not surprising that sexual harassment law, being firmly established at this point, was not among its examples.
67. Justice Stevens, writing for Justices Souter, Ginsburg and Breyer, dissented from this portion of the decision on a number of grounds, including that the issue was not before the Court. Id. at 547. (Stevens, J., concurring in part).
68. Id. at 544.
69. Id. at 545.
B. Lower Court Interpretations of Supreme Court Precedent

While lower courts have only begun to assess the applicability and contours of the *Ellerth/Faragher* affirmative defense, several themes have already emerged. First, although the courts are careful to note that an employer’s anti-harassment policy alone does not meet the requirements of the defense,71 as a practical matter, that is the implication of many rulings to date.72 Second, courts appear skeptical of plaintiffs’ reasons for not reporting harassment at the earliest moment, which helps employers maintain the second element of the defense—“that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”73 Finally, cases applying the *Ellerth/Faragher* defense generally have used it as a complete defense and not simply as a means of formulating the appropriate remedy.74 Courts also use the defense to remove the case from the jury, either by granting summary judgment or judgment as a matter of law.75

Courts discussing the *Ellerth/Faragher* defense have acknowledged that implementation of an anti-sexual harassment policy may not insulate an employer from liability.76 Implementation of such a policy, however, seems to satisfy the first prong of the defense in many cases.77 As the Fourth Circuit explained in

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71. Indeed, both *Faragher* and *Ellerth* suggest this. See supra notes 40-41 and accompanying text.


73. *Ellerth*, 524 U.S. at 765; see infra notes 82-98 and accompanying text.

74. See, e.g., *Watkins*, 1999 WL 1032614, at *5; *Brown*, 184 F. 3d at 397-98; *Caridad*, 191 F. 3d at 296. But see *Todd v. Ortho Biotech Inc.*, 175 F.3d 595, 599 (8th Cir. 1999) (Arnold, J., concurring in judgment) (“The affirmative defense set out in the two recent Supreme Court opinions, however, is not always a complete defense to liability. It can also be a defense to damages only.”).


76. See, e.g., *Watkins*, 1999 WL 1032614, at **4-5; *Hurley*, 174 F.3d at 118.

77. E.g., *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811 (7th Cir. 1999) (“[T]he existence of an appropriate anti-harassment policy will often satisfy this first prong.”); *Watkins*, 1999 WL 1032614, at *4.
Watkins v. Professional Security Bureau, Ltd.,[78] the sexual harassment policy's "existence . . . militates strongly in favor of a conclusion that the employer exercised reasonable care to prevent and promptly correct sexual harassment."[79] Even if the employer is unsuccessful in stopping harassment following a complaint pursuant to an anti-sexual harassment policy, the employer still may satisfy the first prong of the defense. As the court in Caridad explained "[a]n employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and correcting sexually harassing conduct."[80]

Further, the existence of such a policy is useful in meeting the second element of the defense. As the Watkins court also explained, "[w]hen an employer has in place a viable anti-harassment policy, a demonstration that an employee unreasonably failed to utilize the complaint procedure provided by the employer 'will normally suffice to satisfy the employer's burden under the second element of the defense.'[81] If a plaintiff delays in reporting harassment pursuant to such a policy, many courts appear willing to find that the second element has been satisfied. For example, the plaintiff's delay in reporting her rape by a supervisor in Watkins was about four months.[82] In Caridad v. Metro-North Commuter Railroad,[83] the employee also waited a few months to report the harassment.[84] These delays provide defendants with proof of the second element of the defense.

Although the plaintiffs in these cases tried to explain their reasons for not reporting the harassment earlier, many courts have been unreceptive to such explanations, deeming them unreasonable. As the court in Caridad explained:

We do not doubt that there are many reasons why a victimized employee may be reluctant to report acts of workplace harassment, but for that reluctance to preclude the employer's

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[79] Id. (quoting Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999)); see also Caridad, 191 F.3d at 295 (stating that the existence of a policy and employer's "endeavors to investigate and remedy problems reported by its employees" are sufficient).
[80] Caridad, 191 F.3d at 295; see also Savino v. C.P. Hall Co., 199 F.3d 925, 929, 933-34 (7th Cir. 1999) (explaining that the defendant still may take advantage of the defense even though "a stern warning" did not end the harassment).
[82] Id. at *1.
[83] 191 F.3d 283 (2d Cir. 1999).
[84] Id. at 290.
affirmative defense, it must be based on apprehension of what the employer might do, not merely on concern about the reaction of co-workers.

The court in Caridad fails to recognize the circumstances that led to the plaintiff’s delay. The plaintiff was the only woman out of twelve electricians in her work unit. Initially, Caridad did not report the harassment she experienced from both her supervisor and co-workers. After telling her employer about the harassment, she did not want to pursue the complaint because “she did not think an investigation would improve matters.” She also did not trust the company’s equal employment office. Therefore, the employer did not take further action on her allegations. Although the employer offered to transfer her to another shift, Caridad refused the offer, believing it would not help; all other work areas, like her current one, were predominately male.

The plaintiff in Savino v. C.P. Hall Co. likewise delayed reporting for about four months. Similarly, the plaintiff in Watkins did not report her rape by a supervisor until four months after it happened. When a less severe subsequent incident occurred, she did inform another supervisor. The Fourth Circuit held that no reasonable jury could find for Watkins and upheld the lower court’s granting of judgment as a matter of law.

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85. Id. at 295; see also Shaw v. AutoZone, 180 F.3d 806, 813 (7th Cir. 1999) (concluding that the plaintiff’s excuse for not reporting that “she did [not] feel comfortable enough” with anyone at work to discuss the harassment with them was not reasonable).
86. Caridad, 191 F.3d at 290.
87. Id. Caridad alleged that her supervisor harassed her over a seven month period. Id. The harassment included sexual touching. Id. Her co-workers treated her in a hostile manner as well, telling her “that ‘nobody cares what happens to you’ and that she had ‘walked into a lion’s den.’” Id. Eventually, she broke down during a disciplinary hearing about her absenteeism and told the employer, including the affirmative action director, about the harassment. Id.
88. Id.
89. Id.
90. Id.
91. Id.
92. 199 F.3d 925 (7th Cir. 1999).
93. Id. at 933. As the court explained, “unreasonable foot-dragging will result in at least a partial reduction of damages, and may completely foreclose liability.” Id. at 935. The court also held that the employer took prompt remedial action once it learned of the harassment. Id. at 934.
95. This “less severe” incident included a supervisor fondling her breasts and putting his hands down her pants as she was changing clothes in the uniform room. Id. at *1.
96. Id.
court in *Shaw v. AutoZone, Inc.* explained, "an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment."

The *Watkins* court extended this further. Faced with a situation in which the plaintiff testified that she was unaware of the employer's anti-harassment policy, the court found that she could be found constructively aware based on the employer's inclusion of the policy in the employee handbook (which the plaintiff denied receiving), posting the policy in an area frequented by employees and placing the employee handbook at work sites. "Under these circumstances, a reasonable jury could only conclude that Watkins was at least constructively aware of the policy."

Some courts have been a bit more lenient in their interpretation of the second element. For example, in *Watts v. Kroger Company,* the Fifth Circuit reversed in part the granting of summary judgment because a jury could find that waiting a couple months to report the harassment was not unreasonable. Further, the court held that the plaintiff's use of a union grievance mechanism rather than the employer's internal procedure could satisfy the plaintiff's obligation to take advantage of corrective opportunities or otherwise avoid harm.

Failure to aggressively pursue a claim can also result in the court finding that the plaintiff "failed . . . to avoid harm otherwise," which will also satisfy the second prong of the

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97. 180 F. 3d 806 (7th Cir. 1999).
98. *Id.* at 813.
100. *Id.* Interestingly, that is not what the actual jury found in this case. Instead, it ruled in favor of Watkins on her hostile environment claim and awarded her $63,000 in damages. *Id.* at *2. The district court refused to submit the issue of punitive damages to the jury. *Id.* The district court ultimately granted a motion for judgment as a matter of law or in the alternative a new trial on the hostile environment claim. *Id.; see also Shaw,* 180 F.3d at 811 (explaining that plaintiff had "constructive knowledge" of the anti-harassment policy because the plaintiff signed an acknowledgment that stated, "I understand it is my responsibility to read and learn the policies and procedures contained in the AutoZone Handbook and Safety Booklet").
101. 170 F.3d 505 (5th Cir. 1999).
102. *Id.* at 510. The plaintiff stated that the supervisor's harassment intensified in the spring of 1994; she reported the harassment in July of 1994. *Id.*
defense. In Brown v. Perry, the plaintiff's supervisor attacked her in his hotel room while attending a conference. Although she told her bosses about this attack, she decided that she did not want to pursue the matter formally. Six months later, she was again attacked in a hotel room by the same supervisor. Referring to the second attack, the court stated that:

The record in this case is replete with uncontroverted evidence that Brown utterly failed to "avoid harm otherwise." Less than six months after rebuffing advances from Boyd in his hotel room late at night, Brown unnecessarily put herself in a situation that permitted repetition of precisely the same kind of advances.

The effect of these cases appears to be that, although the burden of proof for the Ellerth/Faragher affirmative defense is on the defendant, a significant burden is placed on the plaintiff to report harassment, effectively causing the plaintiff to disprove the second element of the affirmative defense. As one court put it:

"[T]he law against sexual harassment is not self-enforcing" and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists. In short, Shaw acted in precisely the manner that a victim of sexual harassment should not act in order to win recovery under the new law.

In Brown v. Perry, the court held the employer's response, not doing anything pursuant to the plaintiff's wishes, adequate even though the employer's own policy required that all instances of sexual harassment be reported to a resources manager. Although Brown reported the harassment to her supervisors, they did not pass this information on to a resources manager, which was required by

105. Id. at 388.
106. Id. at 390.
107. Id. at 391.
108. Id. at 397.
110. Brown, 184 F.3d at 396. But see Distasio v. Perkin Elmer Corp., 157 F.3d 55, 64 (2d Cir. 1998) (finding that an employer may be held accountable for knowledge of harassment where employee, with a duty to report it to employer pursuant to company policy, possessed knowledge of the harassment).
company policy. Instead, the court placed the entire burden on the plaintiff:

We believe that in these circumstances offering immediate unconditional support to the victim and suggesting that she pursue her EEO remedies constitutes an entirely reasonable effort to prevent further incidents. That this effort proved unsuccessful is unfortunate, but it does not mean that the effort was unreasonable. Sometimes, as in this case, an employer's reasonable attempt to prevent future harm will be frustrated by events that are unforeseeable and beyond the employer's control. The law requires an employer to be reasonable, not clairvoyant or omnipotent.

Unfortunately, the effect is to require the plaintiff, instead of the employer, to be clairvoyant and predict subsequent harassment by a superior.

The Watkins court also suggested that the defendant need not satisfy the second prong of the defense in order to be successful. As the court explained:

Even if Watkins' disclosure of the harassment to Dowling were adequate to establish that she took advantage of available preventive or corrective opportunities, our result would be the same. Although the Supreme Court did not speak to this issue in Burlington Industries, we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment ... would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense. ... Such a result would be wholly contrary to a laudable purpose behind limitations on employer liability identified by the Supreme Court in Burlington Industries: to promote conciliation.

This interpretation is at odds with the EEOC Enforcement Guidance, which requires that an employer satisfy both prongs.

The result in most of these cases is that lower courts used Ellerth/Faragher to formulate a complete defense to liability. The courts did not consider the possibility of the defense being used only

111. Brown, 184 F.3d at 396.
112. Id.
114. EEOC, supra note 49, at **6-7.
to limit damages.\textsuperscript{115} In \textit{Savino}, the trial court's jury instruction contemplated that the jury could choose to reduce the damages based on the affirmative defense,\textsuperscript{116} and the court of appeals supported this position.\textsuperscript{117} However, the jury ultimately decided that the affirmative defense was a complete bar to employer liability in that case.\textsuperscript{118} In light of these decisions, the next section examines how well these interpretations reflect the reality of how sexual harassment operates in the workplace.

III. THE IMPLICATIONS OF SOCIAL SCIENCE DATA

The case law on sexual harassment places the responsibility to prevent harassment on the employer and the responsibility to report harassment on the harassed employee.\textsuperscript{119} The Court also made clear that this defense does not exist if the supervisor's harassment involves a tangible employment action against the harassed employee, such as a demotion, pay cut, etc.\textsuperscript{120} The findings of social scientists regarding both employer control over the work environment and the reporting behavior of harassed employees has implications for the duties of both employer and employee in sexual harassment cases. Social scientists have posited that sexual harassment is a function of both the person and the situation.\textsuperscript{121} In this section, I review various studies in an effort to

\textsuperscript{115} See, e.g., Watkins, 1999 WL 1032614, at *5 (upholding judgment as a matter of law based on defense); Brown, 184 F.3d at 397-98 (affirming summary judgment on affirmative defense); Caridad v. Metro-N. Commuter R.R., 191 F.3d 283, 296 (2d Cir. 1999) (granting summary judgment on affirmative defense).

\textsuperscript{116} Savino v. C.P. Hall Co., 199 F.3d 925, 934 (7th Cir. 1999).

\textsuperscript{117} Id. at 934-35; see also Todd v. Ortho Biotech, Inc., 175 F.3d 595, 599 (8th Cir. 1999) (Arnold, J., concurring) ("The affirmative defense set out in the two recent Supreme Court opinions, however, is not always a complete defense to liability. It can also be a defense to damages only."); Phillips v. Taco Bell Corp., 156 F.3d 884, 889 (1998) (suggesting that proving the defense may only affect damages).

\textsuperscript{118} Savino, 199 F.3d at 929.

\textsuperscript{119} See supra notes 71-118. There appear to be two logical exceptions to this. First, if an employee has no one, realistically, to complain to, he/she may be absolved of the responsibility of informing the employer of the harassment. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 67, 72-73 (1986) (explaining that where plaintiff had to complain to harasser, employer not insulated from liability). Second, where the harassment is clearly obvious to management, the victim may be absolved of the duty to inform the employer. See, e.g., Davis v. City of Sioux City, 115 F.3d 1365, 1370 (8th Cir. 1997); Smith v. St. Louis Univ., 109 F.3d 1261, 1265 n.3 (8th Cir. 1997); Cross v. State Dept of Mental Health & Mental Retardation, 49 F.3d 1490, 1508 (11th Cir. 1995). It is unclear how the \textit{Ellerth}/Faragher defense might affect this second exception.

\textsuperscript{120} See Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). Such cases involve liability for quid pro quo harassment. See \textit{supra} note 12 and accompanying text.

\textsuperscript{121} John B. Pryor, \textit{The Social Psychology of Sexual Harassment: Person and Situation}
assess whether the courts have implemented a standard that reflects the manner in which harassment occurs in the workplace.

There are several caveats to the use of social science in formulating legal standards. Indeed, the use of social science evidence by courts is not without its detractors. While social science is not always perfect for the task, it still provides useful information and, in the right case, provides data that might well be essential to formulating an appropriate legal standard. That does not mean that one should not be careful in relying on social science. Instead, the nature of the information must be evaluated based on legal and factual circumstances to make certain that it provides reliable and useful information that might help either the judge or jury.

There are several things to consider before applying social science in a legal context. First, social science relies heavily on correlational studies. It cannot tell us what causes sexual harassment, but it can tell us whether there is a correlation between, for example, a supervisor's attitude toward sexual harassment and the rate at which sexual harassment occurs in the workplace. The accumulation of many studies showing such an effect certainly tells us something about the environment in which sexual harassment is likely to occur.

Second, many studies rely on data generated by studying college students. Although this is understandable given the easy

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122. See, e.g., David L. Faigman, To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy, 38 Emory L.J. 1005, 1008-09 (1989); Andrew Greeley, Debunking the Role of Social Scientists in Courts, Hum. RTS., May 1978, at 34, 34 (suggesting that social science should be relegated to a "minor footnote or two in a brief or decision"). See generally David M. O'Brien, The Seduction of the Judiciary: Social Science and the Courts, 64 Judicature 8 (1980) (discussing the use of social science in judicial decision-making); Sheri L. Gronhovd, Note, Social Science Statistics in the Courtroom: The Debate Resurfaces in McCleskey v. Kemp, 62 Notre Dame L. Rev. 688 (1987) (same).

123. See generally Faigman, supra note 122 (discussing the reliability of social science research).


access sociology and psychology professors have to such populations, this might not be the best population to use to study sexual harassment. Many college students have limited work experience, and consequently, limited experience with harassment. College students' ability to eat, house and clothe themselves does not generally depend on their jobs. Working populations are more likely to be representative of potential and actual harassment victims, therefore, I have endeavored to use studies based on those populations where possible.

Terminology is also a problem. What social scientists refer to as harassment may not be what courts consider harassment. Indeed, there is little consensus even among social scientists about precisely what behaviors the term sexual harassment encompasses. Thus, it is not always clear that the courts' definition of sexual harassment encompasses the behaviors social scientists study. For example, courts rely on the severe or pervasive standard. There are very few studies of sexual harassment by social scientists that incorporate that standard. However, this need not eliminate the usefulness of social science research. Social scientists generally study behaviors that are in and of themselves sufficiently severe or, if repeated enough, would be considered sufficiently "pervasive" to meet the legal standard. Therefore, these findings are germane to sexual harassment as the courts define it. Despite this terminology problem, it is clear that social science does help us understand a variety of societal phenomena. Furthermore, courts frequently rely on it for policy determinations. Indeed, providing the courts with some information is preferable to their relying on stereotypes or notions of behavior that have little or no basis in reality.

126. See, e.g., Richard D. Arvey & Marcie A. Cavanaugh, Using Surveys to Assess the Prevalence of Sexual Harassment: Some Methodological Problems, J. SOC. ISSUES, Spring 1995, at 39, 42 (noting the failure of studies to incorporate the severe or pervasive standard); Sandy Welsh, Gender and Sexual Harassment, 25 ANN. REV. SOC. 169, 171 (1999) (noting that in early surveys there was "little consensus as to how sexual harassment was defined").
127. See Welsh, supra note 126, at 171.
129. See, e.g., John B. Pryor et al., A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction, 42 J. VOCATIONAL BEHAV. 68, 68, 70 (1993) (including in their analysis a variety of behaviors: "(1) rape or sexual assault, (2) pressure for sexual favors, (3) sexual touching, (4) suggestive looks or gestures, (5) letters, telephone calls, or materials, (6) pressure for dates, (7) teasing, jokes, or remarks, (8) whistles or calls, (9) solicitation for participation in sexual activities and (10) other sexual attention").
Finally, much of this research is recent and still developing. This means that there is still much to be done, including such fundamentals as refining and testing the definitions of sexual harassment. There is little research discussing the interaction of sexual harassment with race, ethnicity and socio-economic status, as well as the sexual harassment of men and same-sex harassment. This research is critical given that courts have not been able to account for harassment that incorporates both race and sex, and instead disaggregate different forms of harassment as distinct and separate phenomena. Still, several areas of scientific research provide valuable information about harassment in the workplace.

A. Situational Factors: The Employer's Influence over the Work Environment

Social science research suggests that an important factor indicating whether a woman will be harassed in her workplace is her work environment. Increasing evidence suggests that controlling the workplace environment may be the key to reducing, and even ending, harassment. As Professors Jackie Krasas

131. See Welsh, supra note 126, at 169-70.
132. Id. at 172-73.
133. Id. at 185; see also Denise H. Lach & Patricia A. Gwartney-Gibbs, Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution, 42 J. VOCATIONAL BEHAV. 102, 112 (1993) (stating that few studies researched such interactions); Aysan Sev'er, Sexual Harassment: Where We Were, Where We Are and Prospects for the New Millennium, 38 CANADIAN REV. SOC. & ANTHROPOLOGY 469, 471 (1999) (noting that “most of the literature is focused on men towards women, but increasingly subsumes issues of racism and the harassment of gays and lesbians”) (footnotes omitted). For an example of a study that attempts to incorporate race, see Kathleen M. Rospenda et al., Doing Power: The Confluence of Gender, Race, and Class in Contrapower Sexual Harassment, 12 GENDER & SOC'Y 40, 44-45 (1998).
134. See Welsh, supra note 126, at 185-86.
136. Firestone & Harris, supra note 124, at 623 (finding that a 1998 survey revealed a “strong relationship between environmental and individual sexual harassment”).
137. See Eugene Borgida et al., On the Courtroom Use and Misuse of Gender Stereotyping Research, J. SOC. ISSUES, Spring 1995, at 181, 182-83 (suggesting that information about an individual reduces the potential stereotypes); Kay Deaux, How Basic Can You Be? The Evolution of Research on Gender Stereotypes, J. SOC. ISSUES, Spring 1995, at 11, 15-16 (discussing how stereotypical beliefs may be elicited from the work environment); Susan T. Fiske & Peter Glick, Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change, J. SOC. ISSUES, Spring 1995, at 97, 110-11 (discussing how the work environment influences gender stereotypes and incidents of sexual harassment); Louise F. Fitzgerald et al., Why Didn't She Just Report Him? The
Rogers and Kevin Hanson stated, "gendered work behavior (even that which results in sexual harassment) should be understood as constructed within and by gendered workplaces."\textsuperscript{138} In particular, the general atmosphere on the job, the attitudes of supervisors, the diversity of the workforce, as well as what behavior is tolerated or not tolerated, all appear to relate to the amount of harassment that occurs in the workplace.

1. Environments That Objectify

To begin with, an environment free of demeaning images, talk and behavior is less likely to be harassing. Increasingly, studies show a correlation between the presence of pornography in the workplace and the incidence of harassment.\textsuperscript{139} The effects of pin-ups and other sexually explicit materials also have been studied. Researchers found that "interpersonal forms of sexual harassment such as uninvited sexual attention are more common in offices where the presence of pinups and other more impersonal sexual behaviors are part of the general sexual ambience."\textsuperscript{140} Although the

\textit{Psychological and Legal Implications of Women’s Responses to Sexual Harassment}, J. SOC. ISSUES, Spring 1995, at 117, 127 (explaining how work environment influences the victim’s response to harassment); Audrey J. Murrell et al., \textit{Sexual Harassment and Gender Discrimination: A Longitudinal Study of Women Managers}, J. SOC. ISSUES, Spring 1995, at 139, 140-41 (explaining how workplace stereotypes can influence incidents of sexual harassment); John B. Pryor et al., \textit{A Social Psychological Model for Predicting Sexual Harassment}, J. SOC. ISSUES, Spring 1995, at 69, 70 (relating how social norms influence sexual harassment); John B. Pryor et al., \textit{supra} note 129, at 69-73 (same).

\textsuperscript{138} Jackie Krasas Rogers & Kevin D. Hanson, "Hey, Why Don’t You Wear a Shorter Skirt?" \textit{Structural Vulnerability and the Organization of Sexual Harassment in Temporary Clerical Employment}, 11 GENDER & SOC’Y 215, 226 (1997). Rogers and Hanson offer a different theory of sexual harassment than one of the main perspectives on the causes of harassment—the sex-role spillover theory. For more on the sex-role spillover theory, see for example, Diana Burgess & Eugene Borgida, \textit{Sexual Harassment: An Experimental Test of Sex-Role Spillover Theory}, 23 PERSONALITY & SOC. PSYCHOL. BULL. 63 (1997). See also Barbara A. Gutek & Bruce Morasch, \textit{Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work}, J. SOC. ISSUES, 1982, No. 4, at 55, 55 (describing sex-roll spillover as "the carryover into the workplace of gender-based expectations for behavior").

\textsuperscript{139} E.g., Doug McKenzie-Mohr & Mark P. Zanna, \textit{Treating Women as Sexual Objects: Look to the (Gender Schematic) Male Who Has Viewed Pornography}, 16 PERSONALITY & SOC. PSYCHOL. BULL. 296, 305 (1990) ("For gender schematic males, exposure to nonviolent pornography seems to influence the way they view and act toward a woman in a task-oriented (or ‘professional’) situation."); see also Firestone & Harris, \textit{supra} note 124, at 623 (detailing a 1995 survey of the U.S. military regarding the effect environmental harassment has on individual harassment). The study showed that "in those work situations in which respondents reported no environmental harassment, over 98% also reported no individual harassment. However, in those contexts with reported environmental harassment, over two-thirds also reported individual harassment." \textit{Id.}

\textsuperscript{140} Pryor et al., \textit{supra} note 137, at 73.
Pryor study could not show a direct cause and effect relationship,\textsuperscript{141} it did note that there was a high correlation.\textsuperscript{142}

These studies are supported by others in which men were “primed” with sexual images. Studies have shown that “primed” men are more likely to respond to women in a sexual manner.\textsuperscript{143} As Professor Deaux explained:

Extending the analysis of situational influences to the work setting, we can predict that the presence of explicitly sexual material will prime images of women that emphasize sexual rather than professional qualities. Photographs from \textit{Playboy} or \textit{Hustler} magazine do little to evoke images of professional competence or traits of intelligence, knowledgeability, and career motivation. Rather, the sexual subtype takes precedence over other possible images of women and thus creates an atmosphere in which sexual harassment is likely to flourish.\textsuperscript{144}

Pornography affects the workplace because it “targets women and reduces them to their sexual characteristics.”\textsuperscript{145} In their study on the influence of sexist priming on subsequent behavior, Rudman and Borgida showed male subjects television commercials that portrayed women as sex objects.\textsuperscript{146} They then asked the subjects to interview and evaluate a female candidate for a managerial position using a preselected set of fourteen questions.\textsuperscript{147} The subjects were asked to pick seven questions from the set of fourteen—seven of which were sexist and seven of which were neutral.\textsuperscript{148} The researchers found that the test subjects primed with sexist images “asked significantly more sexist questions than did controls.”\textsuperscript{149} In addition, subjects who were told that they had the power to decide whether to hire the applicant and those who scored high on the likelihood to sexually harass scale (LSH)\textsuperscript{150} asked more sexist

\begin{enumerate}
\item They noted that it would be impossible to show cause/effect without manipulating the social norm. \textit{See id.} at 74.
\item \textit{Id.}
\item Deaux, \textit{supra} note 137, at 15 (recounting a study of men who viewed a sexual videotape as behaving in a more sexual manner than men who watched a political video).
\item \textit{Id.} at 15-16; \textit{see also} Borgida et al., \textit{supra} note 137, at 183 (citing studies showing the same effect).
\item Fiske & Glick, \textit{supra} note 137, at 111.
\item \textit{Id.} at 498-99.
\item \textit{Id.}
\item \textit{Id.} at 503.
\item \textit{See infra} notes 200-20 and accompanying text.
\end{enumerate}
questions. At the end of the interview, the researchers asked the subjects to write down “whatever came quickly and easily to mind” about the interview. Primed men wrote more words on physical attributes and the clothing of the interviewee and fewer words regarding qualifications for the job than did the control subjects.

In their study of sixty subjects, some of whom were shown a pornographic video and some of whom were shown a control video, McKenzie-Mohr and Zanna found that “[f]or gender schematic males, exposure to nonviolent pornography seems to influence the way they view and act toward a woman in a task-oriented (or ‘professional’) situation.” In this study, after the men viewed pornography, a female subject interviewed the men about their transition to college life. Those classified as masculine sex-types after taking the Bem Sex Role Inventory, which determined whether the subjects self-identified as masculine or feminine, were identified as gender schematic males. The behavioral differences included acting more sexually motivated, moving closer to the female subject and having faster and greater recall on the female subject’s appearance. Importantly, the gender schematic males also remembered less about what the female subject asked them. This led McKenzie-Mohr and Zanna to surmise that “intuitively, the implications appear grave. If a male manager views a female employee as a sexual object, information that is relevant to her work performance, her continuation in the position, or her promotion may be overlooked.” These studies have implications for employment generally and sexual harassment specifically.

151. Rudman & Borgida, supra note 146, at 503.
152. Id.
153. Id. at 503-04.
155. Id. at 300-01.
156. Id. at 299. Bem’s theory is that “some persons, termed gender schematic, are believed to have a generalized readiness to process information on the basis of sex-linked categories and will use this dimension in preference to all other possible bases of categorization.” Kay Deaux & Mary Kite, Gender Stereotypes, in PSYCHOLOGY OF WOMEN: A HANDBOOK OF ISSUES AND THEORIES 107, 119 (Florence L. Denmark & Michelle A. Paludi eds., 1993). For more on Bem’s theory, see Sandra L. Bem, The Measurement of Psychological Androgyny, 42 J. CONSULTING & CLINICAL PSYCHOL. 155, 156-59 (1974).
157. See McKenzie-Mohr & Zanna, supra note 139, at 305.
158. Id. at 304.
159. Id. at 306.
2. Employers and Local Norms

In addition, harassment is more likely to occur in workplaces where it appears to be permissible. For example, if harassment is tolerated, or is not properly punished, employees will receive the message that it is acceptable behavior.\footnote{Pryor, supra note 121, at 91 (describing a study he conducted in 1991 that revealed that female employees' ratings of managers' attitudes toward sexual harassment correlated with the incidence of certain types of sexual harassment on the job); Pryor et al., supra note 137, at 70 ("Potential harassers may perceive that they are free to harass if management tolerates or condones such behavior.").} The corresponding message to victims of harassment is that complaining is useless because nothing will be done about it. Also, if harassment is perpetrated by supervisors or other company executives, lower level employees will believe it is permissible for them as well.\footnote{See, e.g., Burns v. McGregor Elec. Indus., 989 F.2d 959, 965-66 (8th Cir. 1993).}

One particularly interesting study showed that men with a predisposition to harass will do so when given a "harassing role model," for example, when they observe a man doing the job they are assigned to do engage in harassing behavior.\footnote{Pryor et al., supra note 129, at 76-77. In that study, college students were asked to train a female participant to use a word processing program. Id. These students were "trained" by observing a graduate student who engaged in harassing conduct, for example, flirting, touching the woman's hair and shoulders and leering at her. Id. Those men with high LSH engaged in more sexually harassing conduct than low LSH men did. Id. Interestingly, men with high LSH who observed a more professional role model, for example, one who did not engage in any sexually harassing conduct, did not engage in such behavior. Id. "Thus, individual predispositions to sexually harass were acted upon only when the local social norms permitted." Id.}

This role model behavior fits with the establishment of what social scientists call "local norms."\footnote{KAY DEAUX ET AL., SOCIAL PSYCHOLOGY IN THE 90's, at 8 (6th ed. 1993) ("When role expectations are shared by a group of individuals, they are considered norms, more generalized expectations about behavior that are learned in the course of interactions with other members of a society.").} Social scientists and others have conducted a variety of studies in an attempt to assess how local norms of behavior factor into perceptions of harassment in the workplace. Some have explicitly identified what are known as "sexualized work environments." In these environments, "sexual jokes, comments, innuendos, and sexual or seductive dress are tolerated, condoned, or encouraged." The nature of the environment may desensitize supervisors to harassing situations.\footnote{See Wilkerson, supra note 125, at 1606-07.}

\footnote{Wilkinson, supra note 125, at 1606-07.}

\footnote{Barbara A. Gutke et al., Predicting Social-Sexual Behavior at Work: A Contact Hypothesis, 33 ACAD. MGMT J. 560, 565 (1990).}

\footnote{See Wilkerson, supra note 125, at 1807.
A study by the United States Department of Defense showed that a higher percentage of harassing incidents occurred in situations in which the commanding officer was deemed to encourage harassment. In this study, researchers ran a multiple regression analysis, revealing that the "more men at a location [who] saw the CO [commanding officer] as indifferent or neutral with regard to sexual harassment, the more women at that location were harassed." In addition, in a study of a large organization conducted in 1991, psychologists found that women who were sexually harassed in the last two years were more likely to view managers as negatively responding to allegations of harassment and less likely to believe that management made a positive response to their complaints. In this study, the researchers conducted a multiple regression analysis based on a different model. They discovered that the more men who agreed that "[the management has discouraged employees from complaining about sexual harassment . . . the more women in that office were sexually harassed."

In this second survey, employees also were asked about incidents of sexually explicit pictures or written materials, sexually oriented incidents at office parties, sexually explicit graffiti, sexually explicit software on company computers and gender segregated work-related parties. The researchers theorized that such incidents would affect local social norms and lead to a higher incidence of sexual harassment. They concluded that "interpersonal forms of sexual harassment such as uninvited sexual attention are more common in offices where the presence of pinups and other more impersonal sexual behaviors are part of the general sexual ambience."

A lack of gender diversity among workers seems to be a good predictor of sexually harassing activities. At least one survey has shown "that women working in male-dominated settings more often

167. See Pryor et al., supra note 137, at 71-72 (describing the study).
168. Id. at 72.
169. Id. at 71.
170. Id. at 73.
171. Id.
172. Id.
173. Id.
174. Id. Interestingly, they reached this conclusion by comparing the number of sex-related behaviors reported by men in the offices with the response of women having experienced uninvited sexual attention in the same office. Id. They found the two items significantly correlated. Id. For an example of a sexual harassment case in which sexually offensive pin-ups and comments were rampant and appeared to have this effect, see Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1493-99 (M.D. Fla. 1991).
reported experiencing a highly stereotyped workplace, with higher levels of unwelcome sexual overtures, than women working in settings with more equal numbers of women and men."\textsuperscript{175} Other studies indicate that routine contact with men on the job increases sexually harassing behavior.\textsuperscript{176} Indeed, social science evidence suggests that once a "critical mass" of non-traditional employees is present at a workplace, incidents of harassing behavior will decrease and the character of the workplace will change to incorporate these new employees as part of the local norm.\textsuperscript{177} In its extensive study of federal employees, the United States Merit Systems Protection Board (MSPB) found that "[v]ictims [of sexual harassment] are more likely than nonvictims to work exclusively or mostly with individuals of the opposite sex."\textsuperscript{178} Diversity in the workforce correlates with a reduction in harassment.

3. The Effects of Employer Training and Anti-Harassment Policies

It seems intuitive that sexual harassment training programs should have an effect on local norms. However, the effects of sexual harassment awareness training have yet to be extensively studied.\textsuperscript{179} Indeed, "[l]ittle empirical research has assessed the effects of training on potential harassers' knowledge, behaviors, or attitudes regarding sexual harassment."\textsuperscript{180}

\begin{itemize}
\item \textsuperscript{175} Murrell et al., \textit{supra} note 137, at 141; cf. Gutek & Morasch, \textit{supra} note 138, at 70 (noting in their study that none of the women in integrated work environments responded that sexual harassment was a "major problem at work").
\item \textsuperscript{176} James E. Gruber, \textit{The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment}, 12 \textit{GENDER & SOC.} 301, 302, 311-12 (1998) (citing other studies with similar results).
\item \textsuperscript{177} See \textit{id}. Gruber found that having a predominantly male work environment was a "significant predictor" of harassment in the form of physical threats or sexual materials. \textit{Id}. However, for other forms of harassing behavior, frequency of contact with men, rather than actual gender composition of the workplace, was a better predictor of the incidence of workplace harassment. \textit{Id}. at 312.
\item \textsuperscript{178} U.S. \textit{MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES} 17 (1994) [hereinafter MSPB].
\item \textsuperscript{180} Perry et al., \textit{supra} note 179, at 699. For a detailed discussion of the Court's use of training in the defense, see generally Susan Bisom-Rapp, \textit{An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law}, 22 \textit{BERKELEY J. EMP. & LAB. L}. \textit{1} (2001).
\end{itemize}
In a study of the effects of a training video on sexual harassment, Perry, Kulik and Schmidtke found that viewing a twenty minute training video did not affect participants' knowledge of sexual harassment or their propensity to touch a woman during a subsequent golf lesson.\textsuperscript{181} Although hampered by a rather small sample size,\textsuperscript{182} they did find that sexual harassment awareness training “appeared to be more effective” for high LSH men than for low LSH men.\textsuperscript{183} For example, high LSH men who viewed the video engaged in less inappropriate touching than those who had not viewed the video.\text superscript{184} Finally, they also found that viewing the video “was not effective in changing long-term attitudes and belief systems associated with the propensity to harass.”\textsuperscript{185} While this might not be all that surprising, it does suggest that employers should be hesitant to accept the use of mere training videos if they truly want to lessen and eradicate sexual harassment at their workplaces.\textsuperscript{186} A later study of the effect of written training materials showed that written training materials affected what men considered to be sexual harassment in a positive manner.\textsuperscript{187} Like the earlier study, a small sample size also hampered this study.\textsuperscript{188}

Employers who have policies aimed at addressing harassment are more likely to receive complaints about harassment than employers without such policies in place;\textsuperscript{189} therefore, they are more likely to have an opportunity to correct harassing behavior. The type of policy also appears to have an impact. In his study of nearly 2000 female Canadian workers, James Gruber found that “providing workers with information about sexual harassment does have a modest effect on reducing its occurrence, although proactive methods, such as official complaint procedures or training

\begin{footnotes}
\item[181] Perry et al., supra note 179, at 715.
\item[182] Id. at 718. The study only included thirty-six participants. Id. at 705.
\item[183] Id. at 716.
\item[184] Id. at 717.
\item[185] Id. at 716.
\item[186] See id. The authors suggest that more experience-based teaching methods, such as role playing and group discussion, would be more effective. Id.
\item[187] Moyer & Nath, supra note 179, at 344; see also Wilkerson, supra note 126, at 1611-12, 1617 (discussing a study of managers of a janitorial business). The janitorial study showed that prior sexual harassment training did not correlate with managers labeling a “weaker” factual scenario as sexual harassment. Id. They did, however, identify sexual harassment more frequently in a strong sexual harassment scenario. Id. In the “weaker” factual scenario, trained employees also endorsed directly confronting the harasser and formal complaint remedies more than untrained managers. Id.
\item[188] Moyer & Nath, supra note 179, at 341 (stating that the study had eighty-four participants: one half men, the other half women).
\item[189] Gruber, supra note 176, at 304.
\end{footnotes}
programs, are much more effective." In particular, the lack of proactive policies is a relatively strong predictor of environmental forms of harassment, such as "sexual categorical remarks and sexual materials." Proactive employer methods appear to change or influence local norms. Employers whose workplaces are male-dominated, or contain sections that are traditionally male, may have to adjust their training programs because of the differences in the phenomenon of harassment in these contexts.

These studies lead to the conclusion that harassment can be controlled by an employer's careful attention to the workplace environment and the creation of appropriate local norms. Although there is little research assessing what training programs have the most beneficial effects, preliminary studies indicate that sexual harassment training does affect at least the types of behavior people view as harassing.

Employers can also benefit from instituting an effective complaint procedure. Such a process could signal to employees that the employer takes sexual harassment complaints seriously and might lead to earlier resolutions of such complaints. Sexual harassment often leads to absenteeism, turnover and lowered productivity, therefore, the complaint procedures have the

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190. Id. at 312. Gruber described "proactive" methods as "indicat[ing] whether the organization used approaches that modified the work environment by creating official complaint procedures for sexual harassment problems or conducting training sessions on the issue." Id. at 309.

191. Id. at 314. Sexual categorical remarks are those remarks made about other women. Id. at 308.

192. Id. at 316.


194. See Gerald L. Blakely et al., The Effects of Training on Perceptions of Sexual Harassment Allegations, 28 J. APPLIED SOC. PSYCHOL. 71, 73, 77 (1998). Male students who had not watched a sexual harassment training video "rated the ambiguous sexually oriented work behaviors as significantly less harassing." Id. at 77.

195. See Gruber, supra note 176, at 304.

196. Louise F. Fitzgerald, Examining (and Eliminating) the Consequences of Sexual Harassment: An Integrated Model, in Sex and Power Issues in the Workplace, A Conference to Promote Men and Women Working Productively Together 61, 65 (1992); Rebecca A. Thacker, A Descriptive Study of Situational and Individual Influences upon Individuals' Response to Sexual Harassment, 49 HUM. REL. 1105, 1106 (1996); Rebecca A. Thacker & Stephan F. Gohmann, Emotional and Psychological Consequences of Sexual
potential to be a win-win situation for both the employer and the employee. An effective complaint process could help eliminate both the harassment and consequent workplace problems. One aspect of this may be that the employer will have to consider the status of the harasser, for example, supervisor or co-worker, in designing the complaint process itself.\footnote{Avoiding or eliminating sexually explicit or sexually demeaning materials, hiring a more diverse workforce and taking allegations of harassment seriously all appear to reduce harassment in the workplace.} Thus, although the courts are eager to find the employer's remedy sufficient for purposes of the \textit{Ellerth/Faragher} defense, there is little evidence in social science literature to support any specific remedy actually working. Absent a response that actually ends the harassment, the courts should be circumspect in assessing the employer's response.

\textbf{B. Person Factors: The Interaction with High LSH Men}

At the beginning of this section, I mentioned that sexual harassment was a function of both the person and the situation. The research discussed above focuses on the situation.\footnote{Social scientists have also attempted to identify the characteristics of men who are likely to sexually harass. To this end, John Pryor developed a self-report measure of men who are likely to sexually harass. This measure tests the likelihood that a person will engage in acts of quid pro quo sexual harassment.} The research discussed above focuses on the situation.\footnote{Social scientists have also attempted to identify the characteristics of men who are likely to sexually harass. To this end, John Pryor developed a self-report measure of men who are likely to sexually harass. This measure tests the likelihood that a person will engage in acts of quid pro quo sexual harassment.} Thus, although the courts are eager to find the employer's remedy sufficient for purposes of the \textit{Ellerth/Faragher} defense, there is little evidence in social science literature to support any specific remedy actually working. Absent a response that actually ends the harassment, the courts should be circumspect in assessing the employer's response.

\footnote{Thacker, \textit{supra} note 196, at 1106-07. It certainly seems logical that a victim of harassment would have more to fear in reporting harassment by a supervisor than in reporting harassment by a co-worker.}
\footnote{E.g., Gutek & Koss, \textit{supra} note 125, at 36 (noting a lack of research in this area).}
\footnote{See \textit{supra} notes 136-98 and accompanying text.}
\footnote{Pryor et al., \textit{supra} note 137, at 78.}
\footnote{See John B. Pryor, \textit{Sexual Harassment Proclivities in Men}, 17 SEX ROLES 269, 272-74 (1987); see also Pryor et al., \textit{supra} note 137, at 70 (explaining that "it is possible to identify \ldots characteristics of men who are more likely to sexually harass").}
\footnote{See Pryor, \textit{supra} note 201, at 273-74. Professor Pryor developed his scale to assess the likelihood of committing quid pro quo harassment because there is the greatest consensus that this is indeed a form of sexual harassment. \textit{Id.} at 272-73. The measure involves self-reported responses to ten hypothetical scenarios in which the subject is asked}
methodology developed to assess quid pro quo sexual harassment is "conceptually similar" to that developed to study rapists.\textsuperscript{203} Studies of high LSH men tend to show that these men, like rapists, link sexuality with power and dominance.\textsuperscript{204}

The connection between LSH and other forms of sex-related indicators has been studied as well and several patterns emerge.\textsuperscript{205} First, correlations between other types of sexual aggression scales reveal a relationship between LSH and other behaviors.\textsuperscript{206} This suggests that sexual harassment is another point in the continuum of "male-aggressive/ female-passive patterns of interaction."\textsuperscript{207} Second, "[t]he profile [of the LSH man] that emerges from these findings is that LSH is related to an identification with a stereotypic view of masculinity. High LSH men tend to view themselves as hypermasculine."\textsuperscript{208} In addition, "[o]ne thing apparently unrelated to the sexual motives characteristic of the high LSH man is any sense of seeking sex as a means to an emotional relationship with a woman."\textsuperscript{209} Given this, it is not surprising that one study has indicated that "high LSH men link thoughts about sexuality with thoughts about social dominance."\textsuperscript{210} Research supports this theory.\textsuperscript{211}
One controversy regarding LSH is the extent to which high LSH men are aware that their conduct is harassing. Bargh and Raymond argue that the majority of sexual harassers do not understand that their actions constitute harassment.\textsuperscript{212} As they explain:

We suggest that for men who are likely to sexually exploit or rape, the idea of power has become habitually associated with the idea of sex, such that when they are in a situation in which they have power over a woman, the concept or motive of sex will become active automatically—without their intention or awareness (i.e., non-consciously).\textsuperscript{213}

Research by Pryor, Giedd and Williams suggests a more conscious form of harassment. Their study of “reason-generation” suggests that high LSH men can readily construct a series of justifications for why they should sexually harass. [High LSH men] also seem well aware of situational constraints on such behavior. This seems to reflect a more deliberative process.\textsuperscript{214}

In her study comparing the reactions of high and low LSH men to harassing acts of a role model, LaVite found that after observing harassing acts by a role model, eighty-nine percent of high LSH men touched the confederate they were training, compared to only thirty-six percent of low LSH men.\textsuperscript{215} A study conducted by Rudman and Borgida suggests than even low LSH men will be more likely to harass if primed, for example, if they are shown suggestive pictures of women or if they witness others engaging in harassing behavior.\textsuperscript{216} The studies suggest that creating local norms by providing non-harassing role models may help reduce workplace harassment, even in high LSH men.\textsuperscript{217}

High LSH also has been linked to men’s judgments about the competency of women. In a study that asked male college students...
to rate the competency of a female interviewer, researchers found that "competency of the female interviewer was disparaged the higher the LSH level" of the interviewee. These studies have implications for any sort of intent analysis that might be applied to employment law, although it is unclear what role intent plays in actual cases. Instances of harassment are dismissed because "he didn't mean anything by it," however, studies of high LSH men discussed above suggest otherwise.

C. Victim Responses to Incidents of Sexual Harassment

When Anita Hill brought her allegations of sexual harassment against then Supreme Court nominee Clarence Thomas, the public and the Senate repeatedly asked three questions: (1) "Why didn't she come forward earlier?," (2) "How could she continue to work for him?" and (3) "Why did she remain friendly with him?" A review of social science studies on women's responses to sexual harassment

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218. Driscoll et al., supra note 211, at 567. The study by Rudman and Borgida did not find any differences in the rating of females based on LSH, although there was an effect for men who were primed to view women as sex objects. Rudman & Borgida, supra note 211, at 505-06. However, Driscoll has an explanation for that outcome based on the format of the study. Driscoll et al., supra note 211, at 582.

219. The Supreme Court, however, has intimated that intent is not relevant to sexual harassment analysis. As the Court stated in Ellerth, "[s]exual harassment under Title VII presupposes intentional conduct. While early decisions absolved employers of liability for the intentional torts of their employees, the law now imposes liability where the employee's 'purpose, however misguided, is wholly or in part to further the master's business.'" Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998) (quoting W. KEETON ETAL., LAW OF TORTS § 70, at 505 (5th ed. 1984)).


221. Else K Bolotin, Understanding the Emotional Reactions to and Treatment of Sexual Harassment, in SEX AND POWER ISSUES IN THE WORKPLACE, A NATIONAL CONFERENCE TO PROMOTE MEN AND WOMEN WORKING PRODUCTIVELY TOGETHER 53, 54 (1992); cf. Davis & Wildman, supra note 4, at 1375-78 (analogyizing the skepticism associated with Professor Hill's testimony with treatment of blacks in the Old South). As commentators pointed out, Professor Hill's case involved more than sexual harassment; it involved sexual harassment of an African-American woman, a case requiring individual study. See id. at 1385-86; Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 139-40.
reveals that Professor Hill's reaction was typical of harassed women.222

Although the courts increasingly place the burden on the victim to report harassment,223 social science studies show that this requirement may not reflect reality. There is little doubt that sexual harassment is underreported, despite increased awareness of the problem.224 Some women do not report sexual harassment because they do not identify their situations as constituting harassment.225 Other women, and men, recognize behavior as harassment, but they fail to report it for a variety of reasons.226

1. Identifying Acts of Harassment

There appears to be a difference between what some women believe harassment to be in theory and how they apply that concept to their own situations.227 In other words, a woman may assess a particular behavior as sexually harassing, yet not perceive that particular behavior to be sexual harassment when she herself experiences it. Other women simply do not identify situations as involving harassment. The process of a victim's acknowledging sexual harassment is complicated.228 As one study showed, "large numbers of women who have experienced relatively blatant

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222. See, e.g., Bolotin, supra note 221, at 54-55 (describing, in psychological terms, the reason for this phenomenon).
223. See supra notes 81-118 and accompanying text.
224. See supra notes 81-118 and accompanying text.
225. See supra notes 81-118 and accompanying text.
226. See supra notes 81-118 and accompanying text.
227. See id. at 217 (noting that in a study of university faculty, students and staff, thirty-seven percent did not report harassing conduct because they "didn't know if the behavior was harassment").
instances of such behavior fail to recognize and label their experiences as [sexual harassment]." 229 The Kidder study, involving how women recall and reconstruct potentially harassing experiences, found that it was only upon reflection that women recalled experiences as harassing. 230 The women studied recalled feeling uncomfortable in the situations they were describing and often felt gullible, naive or ashamed for not foreseeing the harassing incident. 231 The authors of the study theorized:

Having the words, a name, a category (even if the category is flawed as any box or set of boxes must be) enables women to recognize and recall what happens to them with less shame, guilt, or embarrassment. A social context in which the telling does not shame or blame the teller makes telling more likely. 232

Like other social science research, this again suggests that the employer’s attitude toward harassment will have an effect on whether women report the harassment. If the employer creates an environment that encourages complaints and resolves them effectively, women are more likely to report harassment. Fitzgerald cites one study showing “that organizational factors were the best predictors of response when severity of harassment was controlled.” 233 In general, the “frequency of reporting [harassment] can be expected to rise in the wake of increasing sensitivity to this issue and there is some evidence that it has begun to do so.” 234 Obviously, sexual harassment policies should encourage victims to report; however, the policy must be structured so women will actually use it. Professor Stephanie Riger suggests that many policies fall short of meeting the needs of female victims because of such policies’ inherent gender biases. 235 Not all policies will be effective. Making employees aware of the policy is important, as is

229. Louise F. Fitzgerald et al., The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace, 32 J. VOCATIONAL BEHAV. 152, 171 (1988); see also Rogers & Hanson, supra note 138, at 231-32 (describing how temporary workers downplayed the significance of harassing incidents and often failed to label them as sexual harassment).


231. Id.

232. Id. at 62.

233. Fitzgerald et al., supra note 137, at 122 (citing study by J.E. Gruber & L. Bjorn, Women’s Responses to Sexual Harassment: An Analysis of Socio-Cultural, Organizational, and Personal Resource Models, 67 SOC. SCIENCE Q. 814 (1986)).

234. Fitzgerald et al., supra note 137, at 121.

ensuring that the company drafts the policy with sensitivity for harassment victims.

This disconnect between recognizing particular behavior as sexual harassment and calling that same behavior sexual harassment when it happens to oneself is supported by several studies. A study of university students, faculty, administrators and staff found that only five to ten percent of those surveyed classified harassing incidents as sexual harassment, even though almost thirty percent of the sample had experienced harassing incidents. 236 A study of nurses conducted by Patricia Hanrahan yielded similar results. 237 Hanrahan interviewed nurses about sexual harassment on the job. 238 Although the nurses identified certain acts as harassment, they did not agree that these acts constituted harassment when directed toward them. 239 As Hanrahan explains:

This . . . is further substantiated by the consistent evidence that the nurses felt that their job mandated the kind of treatment they were subject to. Theoretically, the behaviors they encountered “fit” under the sexual harassment rubric. The characteristics they cited as defining a sexually harassing act were the same kinds of things they experienced—ongoing, controlling actions that embarrassed or humiliated them. Nonetheless, something prevented them from applying the term to their own experiences. 240

Other studies found a similar phenomenon. One involved temporary workers, 241 another examined employees of a large northwest employer and a midwestern university 242 and a third studied female graduate students. 243 In addition, many of the nurses in the Hanrahan study mentioned that they felt disrespected

236. See Fitzgerald et al., supra note 229, at 171.
237. See generally Patricia M. Hanrahan, “How Do I Know if I’m Being Harassed or if This Is Part of My Job?” Nurses and Definitions of Sexual Harassment, NAT’L WOMEN’S STUD. ASS’N J., Summer 1997, at 43 (describing the confusion and lack of consensus as to what constitutes sexual harassment).
238. Id. at 46.
239. See id. at 54, 56.
240. Id. at 56. However, a study of doctors and nurses demonstrated that they saw sexual banter as an effective way to relieve job-related stress. See Christine L. Williams et al., Sexuality in the Workplace: Organizational Control, Sexual Harassment, and the Pursuit of Pleasure, 25 ANN. REV. SOC. 73, 86 (1999).
241. Rogers & Hanson, supra note 138, at 231-32.
242. Schneider et al., supra note 224, at 406-07.
243. Fitzgerald et al., supra note 229, at 152-53 (finding that of twenty percent of female graduate students who had experienced unwelcome sexual behavior, less than eight percent stated that they had been sexually harassed).
generally and complained of ill-treatment by doctors, patients and hospital administration.244 Interestingly, neither Hanrahan nor the nurses labeled this other behavior as a form of harassment, which it certainly is, especially after the Supreme Court’s decision in Oncale v. Sundowner Offshore Services, Inc.245

The reaction, or lack thereof, of nurses to incidents of harassment may well reveal deeper cultural norms that reflect society’s view of male and female sexuality. Peggy Crull has suggested this:

In our culture sexual aggression is seen as an important element of masculinity. Men are thought to have a right and even responsibility to pursue a woman aggressively. The woman who directly refuses or complains about the sexual advances appears to be challenging this right. Sensing that the harasser could fight back through work harassment, she hesitates to take this course. On the other hand, the woman who tried to save the harasser’s ego and her job by ignoring or politely handling the advances may be trapped by a related cultural norm which says that women are supposed to show their interest in men in an indirect manner. Harassers often interpret the woman’s attempts to be diplomatic as a discreet “yes” or as an invitation to try harder.246

Research shows that “people tend not to identify some situations that meet legal criteria as ‘sexual harassment’ . . . and that individuals, in general, and managers, in particular, feel the issue of sexual harassment is exaggerated.”247 Women may not report harassment because they may not comprehend that the behavior directed at them might meet the definition of sexual harassment. This has led some researchers to suggest education programs for women that not only define what constitutes sexual

244. Hanrahan, supra note 237, at 47.
245. 523 U.S. 75 (1998). Justice Scalia, writing for the majority, stated that: 
Harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. 
Id. at 80; see also Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683, 1769-74 (1998) (arguing that harassment need not be “sexual” in nature to be actionable).
247. Murrell et al., supra note 137, at 146.
harassment, but also instruct women on how to handle harassing incidents when they occur.\textsuperscript{248}

Determining why women do not perceive their situations as involving sexual harassment is difficult and complex.\textsuperscript{249} Stockdale, Vaux and Cashin attempted to assess the correlation between various factors and a victim's acknowledging an experience as harassment.\textsuperscript{250} The Stockdale study, using university students, faculty and staff as subjects, found that a victim was more likely to acknowledge an incident as harassment if he/she "had experienced unwanted sexual attention, such as sexual looks, gestures, or touching, if (a) the offense[was] frequent and pervasive, (b) negative affect resulted, (c) the respondent was harassed by a higher status perpetrator, and (d) the respondent was a woman."\textsuperscript{251} These researchers found that "[t]he higher the occupational status of the perpetrator in relation to the respondent the more likely was the respondent to acknowledge being sexually harassed."\textsuperscript{252} Studies also have shown that younger women are less likely to label their experiences as "sexual harassment."\textsuperscript{253} Barbara Gutek and Bruce Morasch argue that women fail to see behavior as harassing because harassment on the job may be the norm, resulting in sexual harassment being underreported in female-dominated jobs.\textsuperscript{254} In addition, studies show that employers can create sexualized working environments by, for example, requiring waitresses to wear revealing uniforms.\textsuperscript{255} Workers in these environments may not consider their experiences sexually harassing.\textsuperscript{256}

Giuffre and Williams posit another explanation for the failure of victims to label their experiences as sexual harassment. They

\begin{itemize}
\item 249. See generally Stockdale et al., \textit{supra} note 228 (examining five separate models to determine why women do not perceive sexually harassing behavior as sexual harassment).
\item 250. \textit{Id.} at 493-94.
\item 251. \textit{Id.} at 493.
\item 252. \textit{Id.} at 492.
\item 253. Cochran et al., \textit{supra} note 225, at 223.
\item 254. Gutek & Morasch, \textit{supra} note 138, at 71-72.
\item 255. See Patti A. Giuffre & Christine L. Williams, \textit{Boundary Lines: Labeling Sexual Harassment in Restaurants}, 8 GENDER & SOC'Y 378, 386 (1994) (describing the impact of "the employers' prerogative to exploit the workers' sexuality, by dictating appropriate 'sexy' dress").
\item 256. See Welsh, \textit{supra} note 126, at 174-75 (recounting a variety of studies suggesting this phenomenon); see also Ingeljorg S. Folgero & Ingrid H. Fjeldst, \textit{On Duty-Off Guard: Cultural Norms and Sexual Harassment in Service Organizations}, 16 ORG. STUD. 299, 311 (1995) ("[i]n a cultural setting where sexual harassment is generally accepted as part of the job, feelings of harassment may be suppressed to a degree where the victim actively denies that the problem exists.").
\end{itemize}
argue that sexual interaction between co-workers of the same race and sexual orientation is viewed as less problematic because of pervasive heterosexual norms. Once sexual interaction crosses race, sexual orientation or power levels, victims are more likely to label their experiences as sexual harassment.

2. The Phenomenon of Not Reporting Harassment

Even when women and men believe they are being harassed, more often than not they do not report it. Data from the 1994 MSPB study of federal employees reveals that of the forty-four percent of women and nineteen percent of men who reported being harassed, only twelve percent reported such behavior to a supervisor or other official. The most frequent response of the forty-four percent who were harassed was to ignore it or do nothing. Thirty-five percent reported asking the harasser to stop, twenty-eight percent avoided the harasser, fifteen percent made a joke of it, seven percent went along with the behavior and ten percent threatened to tell or told other people (not supervisors). These responses are consistent with what social scientists have found regarding responses to harassment as well as the ramifications of those responses.

In some cases, adopting these coping strategies may be wiser than reporting a single incident of harassment. They may allow women and men to minimize the impact of harassment by seeming to ignore it or taking steps to avoid harassers. Studies show that job loss and demotion are potential outcomes for sexually harassed employees. If some form of retaliation is possible, the

257. See Giuffre & Williams, supra note 255, at 397.
258. Id. at 389-96.
259. MSPB, supra note 178, at 30; see also Gutek & Koss, supra note 122, at 37 (recounting a study of automobile assembly line workers that indicated that twenty-three percent of women ignored harassment and twenty-two percent responded "mildly" to the harassment).
261. Id.
262. See Sharyn A. Lenhart & Diane K. Shrier, Potential Costs and Benefits of Sexual Harassment Litigation, 26 PSYCHIATRIC ANNALS 132, 132-33 (1996) (finding that "substantially less than ten percent of the women who are harassed file a formal complaint or seek legal help").
263. Sev'er, supra note 133, at 478.
264. Cochran et al., supra note 226, at 222-23.
265. Fitzgerald, supra note 129, at 63; Gutek & Koss, supra note 125, at 31-32 (indicating that ten percent of women harassed leave their jobs either by quitting or being fired or transferred); Thacker, supra note 196, at 1116.
choice not to report the harassment is rational. However, ignoring harassment or avoiding harassers has implications for the victim. Avoiding harassers can interfere with and disrupt the victim's job performance as he/she rearranges his/her job to avoid the harasser.

Psychologists Louise Fitzgerald, Suzanne Swan and Karla Fischer noted that the public perception of the manner in which harassment victims should respond to such incidents and the manner in which they actually respond are quite different. There are a variety of reasons why women might not report harassment:

- The question most commonly asked concerning victim response is, “Why didn’t she just report him?” Faced with this question, women give a variety of answers. They believe that nothing can or will be done, and many are reluctant to cause problems for the harasser. The most common reason, however, is fear—fear of retaliation, of not being believed, or hurting one’s career, or of being shamed and humiliated.
- As a last ditch effort, women complain through official channels when other responses, such as ignoring the harassment, have failed.
- In her study of nurses, Professor Hanrahan explains that women often go into “avoidance” when confronted with actionable harassment.

[It appears that the nurses did not necessarily take the sexual advances seriously. Comments such as “I joked it off,” “I gave it back,” or “I said, ‘Your’s [sic] is not so special’” (in response to patients exposing themselves) were repeated throughout their anecdotes. These strategies of joking and dismissal are evidence that the nurses were accustomed to inappropriate sexual behavior, and that they viewed this behavior as something that must be dealt with in the context of their work.

266. See Sev'er, supra note 133, at 478. A study of military personnel found that men likewise do not report harassment. Cathy L.Z. DuBois et al., An Empirical Examination of Same- and Other-Gender Sexual Harassment in the Workplace, 39 Sex Roles 731, 740 tbl. 3 (1998). Of the men surveyed who experienced same-gender harassment, only 7.8% took formal action. Id. Of the men who experienced other-sex harassment, only three percent took formal action. Id. By far the most prevalent reason given for not reporting other-gender harassment was that the victim “saw no need to report it.” Id.
267. Cochran et al., supra note 226, at 222-23.
268. Fitzgerald et al., supra note 137, at 119.
269. Id. at 122 (citations omitted).
In general, the nurses I surveyed tended to minimize the significance of sexualized encounters on the job. Staff-originated sexual acts were typically handled in ways that downplayed them as sexual actions. Walking away or ignoring something may be an effective way of escaping from the behavior, but it only indirectly communicates one's displeasure. Calling something a joke has the same effect—the action itself is now constructed as only something to laugh about, minimizing its unwantedness. Likewise, the notion of overreaction is a corollary of minimization. In leveling the charge "You are overreacting," perpetrators imply that one's emotional response is somehow not commensurate with the experience one has undergone. At the very least, such a charge calls her actual reaction into question.271

The nurses appeared to be socialized to accept a certain level of harassment as a normal part of their jobs.272 Likewise, in his 1989 review of studies assessing women's responses to sexual harassment, James Gruber noted that avoidance was the most frequent response, whereas confrontational strategies, such as confronting the harasser or reporting him, were the least frequent responses.273 However, Gruber notes some difficulties with these studies.274

The 1994 MSPB study suggests a different reason for why victims fail to report harassment. Fifty percent of the respondents did not think the harassment was serious enough to report;275 this reaction could be the result of being accustomed to such behavior or avoiding such behavior. It also could be simply that the incidents were too insignificant to the employee to warrant a complaint. Table 1 below shows various reasons victims of harassment in the 1994 MSPB study gave for not reporting it.

271. Hanrahan, supra note 237, at 52.
272. See Wendy Patton & Mary Mannison, Beyond Learning to Endure: Women's Acknowledgement of Coercive Sexuality, 21 WOMEN'S STUD. INT'L F. 31, 32 (1998) (noting that some have theorized that harassment is a function, in part, of socialization based on traditional masculine and feminine norms).
273. Gruber, supra note 270, at 5.
274. In particular, he is concerned about the lack of data regarding the relationship between the severity of the harassment, the atmosphere at the victim's workplace and the victim's response. Id. at 5-6.
275. MSPB, supra note 178, at 35.
Table 1: Why Victims are Reluctant to Take Formal Action

<table>
<thead>
<tr>
<th>Why Victims Feel Reluctant to Report</th>
<th>Percentage Who Agreed With Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not think it was serious enough</td>
<td>50</td>
</tr>
<tr>
<td>Other actions resolved the situation satisfactorily</td>
<td>40</td>
</tr>
<tr>
<td>Thought it would make my work situation unpleasant</td>
<td>29</td>
</tr>
<tr>
<td>Did not think anything would be done</td>
<td>20</td>
</tr>
<tr>
<td>Thought the situation would not be kept confidential</td>
<td>19</td>
</tr>
<tr>
<td>Did not want to hurt the person who had bothered me</td>
<td>17</td>
</tr>
<tr>
<td>Thought it would adversely affect my career</td>
<td>17</td>
</tr>
<tr>
<td>Was too embarrassed</td>
<td>11</td>
</tr>
<tr>
<td>Thought I would be blamed</td>
<td>9</td>
</tr>
<tr>
<td>Did not think I would be believed</td>
<td>8</td>
</tr>
<tr>
<td>Supervisor was not supportive</td>
<td>6</td>
</tr>
<tr>
<td>Did not know what actions to take or how to take them</td>
<td>5</td>
</tr>
<tr>
<td>Would take too much time or effort</td>
<td>5</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
</tr>
</tbody>
</table>

As is obvious from the percentages, some respondents gave more than one reason why they did not report harassment. This information is particularly interesting because the United States

276. Id. at 35 tbl.11. This table is reproduced directly from the MSPB Report.
government has made significant efforts to inform its employees about its sexual harassment policy and complaint procedure. Indeed, the 1994 MSPB survey suggests that the vast majority of federal employees were aware of the government's anti-harassment policies.

The government survey supports what other researchers have found regarding the severity of the harassment and the victim's response. The MSPB study shows that many do not report harassment because they do not think it serious enough. Generally, researchers note that the more severe the harassment, the more assertive the victim's response. For example, the Baker study found, in a study of student subjects, that the severity of the harassment "had a relatively strong effect on the individuals' reactions." However, other studies suggest that a variety of variables, such as frequency of the offensive behavior, perceived offensiveness and feminist ideology of the victim, affect whether women will report harassment.

Jensen and Gutek studied whether victims of harassment might experience self-blame, which could lead to less reporting of harassing incidents. Of the 135 victims they studied, the majority did not appear to experience self-blame; however, approximately twenty-one to twenty-nine percent did. Those who acknowledged some self-blame for the harassing incidents were less likely to report it. Also, women holding traditional beliefs about

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277. MSPB, supra note 178, at viii.
278. Id. The survey indicated that eighty-seven percent of federal supervisors and seventy-seven percent of non-supervisory employees were trained in the area of sexual harassment. Id. Seventy-eight percent of employees reported knowing the channels to follow in order to report harassment. Id. Overall, ninety-two percent were aware that there was a sexual harassment policy. Id.
279. Id. at 21.
280. See Daniel A. Thomann & Richard L. Weiner, Physical and Psychological Causality as Determinants of Culpability in Sexual Harassment Cases, 17 SEX ROLES 573, 574 (1987) ("In general, these studies suggest that an incident is more likely to be considered harassment when it... involves imposing behaviors, i.e., physical contact or threat and coercion, as opposed to less flagrant socio-sexual actions.").
281. Douglas D. Baker et al., The Influence of Individual Characteristics and Severity of Harassing Behavior on Reactions to Sexual Harassment, 22 SEX ROLES 305, 318 (1990). They also opined that "it seems that the more individuals perceived incidents to be harassment, the more assertive the reactions." Id.
282. See, e.g., Linda Brooks & Annette R. Perot, Reporting Sexual Harassment, 15 PSYCHOL. WOMEN Q. 31, 42-43, 45 (1991) ("Feminist ideology and frequency of behavior showed direct effects on perceived offensiveness, which in turn directly predicted reporting.").
284. Id.
285. Id. at 128.
the role of women were more likely to assign greater responsibility to the victim.\textsuperscript{286}

The Baker study also found that the gender of the victim made a difference in what types of harassment victims would report or ignore. As they explained:

[A] disproportionately high percentage of women said that they would physically or verbally resist being fondled . . . , propositioned with a job enhancement . . . , or propositioned with no strings attached. Conversely, a disproportionately high percentage of women said that they would ignore wolf-whistles . . . or directed gestures . . . , indicating that the situation and gender interacted to affect reactions.\textsuperscript{287}

Being more assertive, however, may not help the harassment victim. In her analysis of data from the 1988 MSPB study, Margaret Stockdale, while noting that the effects were small, found that the “use of confrontive coping strategies tended to exacerbate negative consequences, especially for men.”\textsuperscript{288} This has led Stockdale to question the current emphasis on reporting harassing behavior.\textsuperscript{289} She suggests that other strategies be developed to help victims of harassment both cope with and address harassment in the workplace.\textsuperscript{290}

3. The Effects of Sexual Harassment on the Victim and Its Effect on Reporting

It could well be that many victims of harassment do not report sexual harassment due to fear that they will lose their jobs, not be believed or simply because it will not help their situations. In a study of the impact of potential outcomes on whether someone reports harassment, Ormerod found that fear of negative outcomes was the most powerful predictor of a victim’s response to sexual harassment.\textsuperscript{291} In this study, Ormerod found that “[o]nly in

\textsuperscript{286} Id. at 132.

\textsuperscript{287} Baker et al., supra note 281, at 318-19.

\textsuperscript{288} Margaret S. Stockdale, The Direct and Moderating Influences of Sexual-Harassment Pervasiveness, Coping Strategies, and Gender on Work-Related Outcomes, 22 PSYCHOL. WOMEN Q. 521, 531 (1998).

\textsuperscript{289} Id. at 531-32.

\textsuperscript{290} Id. at 532.

\textsuperscript{291} See Fitzgerald et al., supra note 137, at 126 (discussing J. A. Ormerod, The Effect of Self-Efficacy and Outcome Expectations on Responses to Sexual Harassment (unpublished M.A. thesis, University of Illinois, Champaign); Gutek & Koss, supra note 125, at 34 (citing study that indicated that among a group of 488 women who had been sexually harassed, fifty-
situations involving explicit sexual coercion did the expectation of stopping the behavior outweigh the fear of retaliation.\(^2\) While "[c]arefully controlled studies of effects of harassment have not been done,"\(^2\) information is available about some of the effects of sexual harassment on both victims and organizations.\(^2\) The impact on victims is difficult to study because it is multi-dimensional, including impacts on both physical and mental health, as well as "work variables including attendance, morale, performance, and impact on career track."\(^2\)

Beginning with work effects, several studies have examined work-related outcomes of sexual harassment. The Murrell article recounted many studies showing the downsides to reporting harassment:

One of the frequent responses to harassment is to quit one's job. Women who do complain are often fired or are not able to work in their field because of bad references. This fear of job loss can cause women to be afraid to report the harassment. For women who remain on their job, sexual harassment affects women's satisfaction with the job and the way they think about their organization. Declines in work productivity and quality are also common. Thus, women who experience harassment at work may experience low satisfaction and commitment. Less is known about the impact of discrimination. Women who experience both may be particularly prone to experience negative career outcomes in terms of leaving the organization (quitting or being fired) or, perhaps, of having fewer promotions as a result of these negative experiences at work.\(^2\)

In addition, Gutek and Koss also report many downsides.\(^2\) Coles' study of eighty-eight formal sexual harassment complaints with the Fair Employment and Housing Department in California found that nearly half of those complaining were fired and nearly twenty-five percent resigned due to the harassment or the complaint process.\(^2\)

\(^{292}\) See Fitzgerald et al., supra note 137, at 126 (footnote omitted).
\(^{293}\) Gutek & Koss, supra note 125, at 31.
\(^{295}\) Gutek & Koss, supra note 125, at 30.
\(^{296}\) Murrell et al., supra note 137, at 141 (citations omitted).
\(^{297}\) Gutek & Koss, supra note 125, at 31-32.
\(^{298}\) Frances S. Coles, Forced to Quit: Sexual Harassment Complaints and Agency
Other researchers have documented a reduction in job satisfaction from women experiencing harassment. In addition, experiencing or observing sexual harassment by male co-workers or supervisors correlated positively with the intention of women to quit their jobs and actually increased that intent by more than twenty-five percent.

There are also negative consequences to litigating a harassment claim that affect women's lives outside the courtroom. A recent study of thirty-one women who had experienced harassment on the job showed that fear of its effect on their loved ones dissuaded many women from litigating. As Professor Morgan explained, "[f]or most the decision to sue rested upon assessments of their abilities to do so while also being good mothers, wives, and daughters." However, the women seriously considered litigation if it would make life better for their families. Professor Morgan's description of the women's experiences shows the financial, familial and emotional strain they endured during the course of deciding whether to sue and during the actual lawsuits. She concluded, "[a]s their stories show, for the relationally oriented, parental responsibility, spousal commitment, and insufficient moral and emotional support are not minor details but major stumbling blocks in the quest for legal justice." Because the effects of harassment extend well beyond the workplace and also invade the employee's home life, some therapists recommend family therapy to help the victim and her family cope with the ramifications of harassment.

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299. E.g., David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594, 602 (1998) (concluding, among other things, that "women who feel they have been harassed have lower job satisfaction").

300. *Id.* Interestingly, they found that harassment by clients did not positively correlate with an intention to quit. *Id.* at 605-06.


302. *Id.*

303. *Id.*

304. *Id.* at 75-85.

305. *Id.* at 88.

Court action is a victim's least likely response to sexual harassment, and with good reason. Whether this is due to the low success rates in court, the lack of lawyers willing to take such cases or a combination thereof is debatable. Of those who file lawsuits, only somewhere between one-third to one-half are successful in those suits. One study found that less than one-third of cases that result in judgments favor the plaintiff. The Bureau of Justice Statistics recently released a study of claims brought in 1998 that indicated only five percent of employment-related civil rights complaints were disposed of by trial; however, plaintiffs won in thirty-five and a half percent of them.

A variety of emotional costs also may discourage women from pursuing litigation. The psychological effects of sexual harassment have led researchers to develop the term Sexual Harassment Trauma Syndrome. The syndrome includes five categories of psychological problems/reactions to sexual harassment: emotional and physical reactions; changes in self-perception; social, interpersonal relatedness; sexual effects; and career effects. These symptoms are similar to those associated with post-traumatic stress disorder. In particular, studies show that sexual

307. Fitzgerald et al., supra note 137, at 123. Only one percent of those filing charges of harassment with government agencies resort to lawsuits. Id.

308. Barbara A. Gutek, Responses to Sexual Harassment, in GENDER ISSUES IN CONTEMPORARY SOCIETY 197, 206 (Stuart Oskamp & Mark Costanzo eds., 1993) (noting that "[a]mong lawyers who handle sexual harassment cases, many say they turn down more than 90% of people who come to them").

309. Fitzgerald et al., supra note 137, at 123; Lenhart & Shrier, supra note 262, at 132-33 (stating that "less than half are decided in favor of the individual alleging harassment").


312. Id. at 9 tbl. 9. Since 1990, the range of plaintiffs winning at trial has been from 23.8% in 1990 to a high of 35.5% in 1998. Id. These statistics are for all employment-related civil rights claims, and do not distinguish between sexual harassment claims and other types of employment-related discrimination claims. Id. It is not unreasonable to expect this data to give a rough estimate of how plaintiffs have fared in sexual harassment cases. The report also reviewed a 1996 study of state employment discrimination cases that indicated plaintiffs in employment cases were successful in state court forty-eight percent of the time in jury trials and twenty-six percent of the time in bench trials. See id. at 10.


315. See Gutek & Koss, supra note 125, at 33 (citing many studies describing the various physical, mental and emotional effects sexual harassment has on victims). There are "four criteria required to qualify for the PTSD diagnosis: exposure to a stressor outside the realm of normal human experience, re-experiencing of the trauma, heightened arousal, and avoidance of people and interests that remind the victim of the trauma." Id. at 33.
Sexual harassment can negatively affect a victim's self-esteem and life satisfaction.\textsuperscript{316} The stress of the harassing situation can lead to both psychological and physical harm.\textsuperscript{317} Although litigation may serve to compensate and validate the harassment victim, it also can exacerbate psychological consequences, causing more trauma to the victim.\textsuperscript{318} Also, there can be severe career consequences to pursuing a claim in court, including termination, demotion, loss of productivity and "blackballing."\textsuperscript{319} Clinical Professor Sarah Burns opines that, because credibility plays such a central role in harassment lawsuits, delays in reporting harassment often negatively affect female plaintiffs.\textsuperscript{320} The emotional and financial costs of this type of litigation, combined with poor success rates might well explain why sexual harassment victims choose litigation least.\textsuperscript{321}

Sexual harassment also affects the organization. The MSPB explored outcomes and effects of sexual harassment on the federal workplace.\textsuperscript{322} In its 1994 study, the MSPB found that harassment cost the government an estimated $327 million between April 1992 and April 1994.\textsuperscript{323} This figure is based on the impact of sexual harassment on federal government employees.\textsuperscript{324} Specifically, eight percent reported using sick leave, eight percent reported using annual leave, one percent took leave without pay, three percent sought medical or emotional help, seven percent "would have found

\begin{itemize}
  \item \textsuperscript{316} See id. at 32-33.
  \item \textsuperscript{317} See id. at 33.
  \item \textsuperscript{318} Lenhart & Shrier, supra note 262, at 134.
  \item \textsuperscript{319} Id. at 137-38.
  \item \textsuperscript{321} In her study of fifteen women's experiences pursuing sexual harassment claims, Phoebe Morgan Stambaugh recounts the story of one woman, Zoie, who described how the litigation affected her life:
    \begin{itemize}
      \item I've become completely alienated from my husband since the lawsuit. And my kids too. When I come home [from a deposition], all I want is to be left alone.
      \item I suppose they wonder where their mother went. To them, it probably feels like I went to the EEOC one day and never came home again.
    \end{itemize}
  \item \textsuperscript{322} MSPB, supra note 178, at 23-27.
  \item \textsuperscript{323} Id. at 23. The study indicated that, with the money spent on the direct and indirect costs of sexual harassment by the United States Army in 1994 alone, the Army could have purchased seventy-eight Black Hawk helicopters or 888 Army Tactile Missile Systems. Deborah Erdos Knapp & Gary A. Kustis, The Real "Disclosure:" Sexual Harassment and the Bottom Line, in Sexual Harassment in the Workplace: Perspectives, Frontiers, and Response Strategies 199, 209 (Margaret S. Stockdale ed., 1996).
  \item \textsuperscript{324} MSPB, supra note 178, at 23-24.
\end{itemize}
medical or emotion[al] help beneficial,"\(^{325}\) two percent were reassigned or fired, two percent were transferred to a new job and twenty-one percent reported a decline in productivity.\(^{326}\) Very few—only 0.1%—quit without a new job.\(^{327}\) Unlike Coles' California study of victims who filed complaints with the state Fair Employment and Housing Department,\(^{328}\) far fewer federal employees lost their jobs due to sexual harassment.\(^{329}\) These responses, however, encompassed many employees who took no formal action to address the harassment.\(^{330}\) Therefore, the difference between the two studies might well be that the effects of filing a formal complaint are far more detrimental to the victim's career than using the various coping strategies federal employees reported using.\(^{331}\) Thus, to ignore rather than report harassment might be a rational response, given the potential for negative job outcomes.

Fitzgerald and her colleagues suggest a new framework for assessing harassment that mirrors standards established by the Supreme Court.\(^{332}\) They argue for the use of a psychological explanation, based on the manner in which people respond to stressful situations, for the response (or lack thereof) of harassment victims.\(^{333}\) In particular, they argue that "such things as frequency, duration, and perceived offensiveness, as well as individual factors (e.g., previous victimization, perceived threat, economic vulnerability) are involved in any determination of the psychological severity of a harassing situation."\(^{334}\) The Supreme Court includes some of these factors in its standard for assessing whether behavior is sufficiently severe or pervasive to alter the terms or conditions of employment, thereby creating an abusive work environment.\(^{335}\)

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\(^{325}\) Id. at 26.

\(^{326}\) Id. Interestingly, these numbers have declined subsequent to the government's 1987 study, in most categories, with the exception of decreased productivity, which has risen from fourteen percent to twenty-one percent. Id.

\(^{327}\) Id.

\(^{328}\) Coles, supra note 298, passim.

\(^{329}\) Compare MSPB, supra note 178, at 26 (finding that only two people surveyed were reassigned or fired in 1994 as a result of sexual harassment), with Coles, supra note 298, at 89 (finding that over fifty percent of those surveyed either resigned or were fired).

\(^{330}\) MSPB, supra note 178, at 29.

\(^{331}\) See supra text accompanying notes 259-62.

\(^{332}\) Fitzgerald et al., supra note 137, at 123-24.

\(^{333}\) Id.

\(^{334}\) Id. at 124.

\(^{335}\) Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). The Court noted that all the "circumstances" must be considered in assessing harassment, including:

[T]he frequency of the discriminatory conduct; its severity; whether it is
Fitzgerald and her colleagues also believe that the law has focused too much on the behavior of the sexual harassment victim, due at least in part to the use of a "welcomeness" standard. As they explain:

Despite the Vinson court's direction to consider the "totality of the circumstances," courts repeatedly focus disproportionately on the victim's behavior, constructing it in a particular way and ignoring other, equally likely, meanings. As long as the welcomeness inquiry remains central to Title VII claims, women's behavior will continue to be scrutinized and found wanting, much as women's "resistance" remains the focus of rape trials even today.

Sarah Burns makes a similar criticism, arguing that the focus on welcomeness in the context of hostile environment cases makes little sense. She asserts that a better understanding of the circumstances under which relationships in the workplace can truly be termed consensual is necessary due to power imbalances.

The research described above, concerning responses to sexual harassment, suggests several potential modifications to the current framework used by the courts. Part IV discusses these potential modifications in more detail.

IV. CHANGES IN THE ELLERTH/FARAGHER LEGAL STANDARD BASED ON SOCIAL SCIENCE

Social science research on sexual harassment reveals several gaps between how the courts evaluate sexual harassment cases and the manner in which harassment occurs in the workplace. This is especially true with the defense articulated in Faragher and Ellerth. Although, at first glance, the defense may seem to place a significant burden on the employer, in actuality, it places an
implicit burden on the harassed employee to explain his/her inaction—or failure to report—in the face of harassment. In addition, the Ellerth/Faragher defense does not sufficiently consider the significant role the employer plays in creating, condoning or refuting an environment that could result in more or less harassment.

These anomalies result from the Supreme Court’s over-emphasis on encouraging employer compliance. It is time to take a close look at the defense and suggest changes to make sexual harassment laws more effective. Although encouraging compliance is one of the collateral purposes of Title VII, it is clear that this is not the only purpose of the statute. Lower courts’ use of the Ellerth/Faragher defense hinders several other goals of Title VII.

Before addressing what changes should be made to sexual harassment law, it is important to consider who should make these changes. Several potential decision-makers within the legal system could implement change. The first are jurors, with the help of the trial judge. For example, it is possible for an expert witness, either a sociologist, psychologist or psychiatrist to testify about how women react to harassment in an effort to show that the plaintiff’s failure to use a reporting system was reasonable.

Allowing jurors to consider social science evidence in this manner, however, can cause several problems. First is the risk of changing the role of the jury from fact-finder to policy-maker. It is generally the legislature and, in some instances, the courts that consider the policy implications of creating a new rule of law. Second, jurors often have trouble discerning which expert information is well-grounded. Although the initial gatekeeping function is in the hands of the trial judge after the Supreme Court’s scientific evidence decisions in Daubert v. Merrell Dow

340. See supra notes 72-115 and accompanying text.
341. See discussion supra Parts III.A.2 and III.B.
342. See McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352, 358 (1995) (“Deterrence is one objective of these statutes. Compensantion is another.”).
343. See infra notes 396-413 and accompanying text (discussing the purposes of Title VII).
344. Used in this sense, social science would bear on what have been called “adjudicative facts,” or facts that bear on a factual issue between the parties. Kenneth Culp Davis, Judicial Notice, 55 Colum. L. Rev. 945, 952, 957-58 (1955). This is in contrast to “legislative facts,” or facts that are used to develop a general legal rule that would be applicable to all cases involving the particular issue at hand. Id. Put more simply, it is the difference between issues of fact and issues of law and/or policy.
345. See Faigman, supra note 122, at 1086-87.
346. See Davis, supra note 344, at 957-58.
347. Faigman, supra note 122, at 1088-89.
Drug Manufacturers, Inc. and its progeny, this does not mean that juries will be able to easily assess the opinions of two competing experts. Rather than focusing on the validity of the experts' conclusions, the juries could be influenced by the persuasiveness of the particular expert. Although this seems to be a problem with any proffer of expert testimony, it is especially problematic in the social sciences, in which issues of causation are difficult to assess and individual differences in people are not necessarily accounted for in the studies. Nevertheless, there is no doubt that such information could be helpful in assessing, for example, the reasonableness of a particular plaintiff's action or inaction. Further, if a judge does a proper Daubert assessment of the evidence, it should have enough reliability to be considered by the jury.

Notwithstanding the usefulness of social science to a jury, the best way to make the changes discussed infra may well be through either Congress or the appellate courts, both of which have more policy-making authority than juries. Even though the ability of courts to consider information on appeal that was not part of the record at trial is somewhat controversial, courts routinely do

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350. See Faigman, supra note 122, at 1086-87, 1089. Much of Professor Faigman's criticism, however, is a result of the era in which he was writing, during which the test established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), was the main method for evaluating expert testimony. Under Frye, if "the proffered evidence—including the conclusions reached—was generally accepted in a relevant community of experts," that testimony would be admissible at trial. Erica Beecher-Monas, Blinded by Science: How Judges Avoid the Science in Scientific Evidence, 71 TEMP. L. REV. 55, 59 (1998). Under Daubert, on the other hand, the Court required "the trial judge to conduct an independent inquiry into the scientific validity, scientific reliability, and relevance of the proposed testimony." See id. at 62. For more on the differences between these two tests, as well as lower court interpretations of them, see id.
351. Faigman, supra note 122, at 1089 (stating that if judges make a good threshold determination regarding validity, social science poses fewer problems for the jury). A final problem with this proposal is that those who cannot afford experts "lose their right of representation." Id. at 1087. Another advantage to introducing such evidence at the trial court level is that it allows the opposing side to respond to it. The Supreme Court has been known to consider facts from studies for the first time on appeal. See Kenneth Culp Davis, Facts in Lawmaking, 80 COLUM. L. REV. 931, 934 (1980). Worse yet, the Supreme Court will assume facts that are capable of empirical validation. See id. at 934-35.
352. Faigman, supra note 122, at 1088 ("However sensible an expert's conclusion might appear as a matter of policy, the proper forum for changing legal rules remains in the legislature or before judges, not on a case-by-case basis before juries."); Davis, supra note 344, at 953. But see Ronald Dworkin, Hard Cases, 88 HARV. L. REV. 1057, 1061 (1975) (criticizing judges as policy-makers).
353. See O'Brien, supra note 122, at 15 (describing the use of social science statistics by courts); see also Davis, supra note 351, at 932-33 (discussing whether, and in what circumstances, factual materials should be supported and available for pre-disposition
Commentators have criticized courts' use of social science evidence, both generally and in specific contexts, on a variety of grounds. However, it seems more reliable for the courts to consider this data than to do what they appear to do currently in the area of sexual harassment: make assumptions about the manner in which people behave in this context. As one commentator put it, "the formulation of law and policy, both in the judicial process and in the administrative process, obviously gains strength to the extent that information replaces guesswork or ignorance or intuition or general impressions." Some information, which in many cases will not be perfect, is better than guesswork. Many of the changes I am suggesting would benefit from court-wide application, thus a definitive interpretation by the Supreme Court or a statutory amendment by Congress would be the best way to implement these suggestions. However, it is not unreasonable for a trial court to consider them as well in the appropriate case.

A. Re-evaluating the First Prong: "Whether the Employer Exercised Reasonable Care to Prevent and Correct Promptly Any Sexually Harassing Behavior"

The first prong of the Ellerth/Faragher defense has two components: (1) the employer must exercise reasonable care to prevent harassment from occurring and (2) the employer must exercise reasonable care to correct harassment after becoming aware of it. If the employer's factual showing fails under either component, the employer should not take advantage of this defense. I will use two facets of social science to re-evaluate the first prong of the Ellerth/Faragher defense. One is the effect that the employer has by setting a local norm that will discourage, and

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challenge); Davis, supra note 344, at 952 (noting the need for courts to rely on legislative facts, whether in the record or not, in the creation of law or policy); Dworkin, supra note 352, at 1060 (arguing that judicial decisions should be based on principle, not policy).

354. See Frederick Schauer & Virginia J. Wicke, Legal Positivism as Legal Information, 82 CORNELL L. REV. 1090, 1108 app. (1997) (describing increased use of non-legal materials in Supreme Court cases); see also cases cited supra note 130 (citing cases in which the Supreme Court has relied on social science evidence).

355. See, e.g., Faigman, supra note 122, at 1008-09; Greeley, supra note 122, at 34.

356. Davis, supra note 344, at 953; see also O'Brien, supra note 122, at 10-13 (discussing an article by Peter W. Sperlich, in which he argues that the judiciary should use social science evidence in a competent manner).


358. Id. at 756.
thereby prevent harassment. The second is the use of training programs as a means to either preventing or correcting harassment.

The Ellerth/Faragher defense obligates employers to prevent harassment. Although the Court in Ellerth suggested that a sexual harassment policy would provide a sufficient showing on this prong, social science reveals that more is required. First, given the employer's potential positive or negative effect on the work environment, evidence related to the employer's general efforts, or lack thereof, to raise awareness about and to curb harassing behavior should be admissible. The employer should be required to make a factual showing of what it has done to prevent harassment. Whether the employer has exercised reasonable care in this regard should be evaluated by considering the totality of the circumstances with respect to the working environment. Courts already look at the totality of the circumstances in deciding whether an environment is severe or pervasive enough to trigger harassment liability. Examining the employer's actions would merely extend that principle to aid in assessing the environment created by the employer for its employees. Along with showing that it has an effective anti-harassment policy in place, the employer should be required to submit evidence on the local norm in the workplace.

The prevalence of pin-ups, the manner in which the employer handled other harassing incidents and attitudes of supervisors should be relevant to this analysis, regardless of their direct relevance to the particular incident of harassment. Social science suggests that if an employer allows other harassing incidents to occur in the same employment area, they could have the effect of creating a local norm in which harassment is viewed as being "normal," "okay" or "no big deal." Therefore, although merely

359. Id. at 765.
360. See supra notes 136-78 and accompanying text.
361. See supra notes 139-98 and accompanying text.
363. See Hurley v. Atlanta City Police Dept, 174 F.3d 95, 110 (3d Cir. 1998). The Third Circuit approved admission of such evidence by the plaintiff in spite of a challenge under Federal Rules of Evidence 401 and 403. Id. at 109-10. Evidence of sexual harassment of other female police officers, as well as evidence of comments made between only male officers was held admissible in part because "evidence of other acts of harassment is extremely probative as to whether the harassment was sexually discriminatory and whether the [defendant] ACPD knew or should have known that sexual harassment was occurring despite the formal existence of an anti-harassment policy." Id. at 111. It was also used to determine whether the sexual harassment policy was effective. Id. The plaintiff was unaware of the existence of male officers' statements and that other women had been harassed until the discovery phase of the case. Id. at 107-08. For a discussion of local norms and their effects on incidents of sexual harassment, see supra notes 160-78 and accompanying text.
364. See supra notes 160-78 and accompanying text.
having an anti-harassment policy will be relevant to this inquiry, it should not be enough standing alone, unlike lower courts’ suggestions.\textsuperscript{365} Instead, the employer should be required to show that it disseminated its policy, took it seriously and conscientiously handled complaints falling within the policy.

Although the courts usually protect employee records from disclosure during the course of a court proceeding,\textsuperscript{366} employee records could be very helpful evidence in demonstrating the local norms of the workplace. Tools like redaction and in camera review could be used to protect other employees while allowing relevant evidence to be admissible.\textsuperscript{367} This necessarily involves evidence that goes well beyond the alleged harassing incidents directed at a particular plaintiff. Given the social science data on this point, however, such additional evidence—including the handling of harassment directed at other employees, the prevalence of sexually-demeaning material, etc.—is relevant to the determination of whether the employer “exercised reasonable care to prevent . . . any sexually harassing behavior.”\textsuperscript{368} This will allow courts to assess the totality of the circumstances without invading the right of privacy that other personnel records might have in their personnel records.\textsuperscript{369}

\begin{footnotesize}
\textsuperscript{365} See, e.g., Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999); Shaw v. AutoZone, Inc., 180 F.3d 806, 811-12 (7th Cir. 1999); see also supra Part II.B (discussing lower court interpretations of the Ellerth/Faragher defense).

\textsuperscript{366} See, e.g., Brooks v. Gas Co., No. C.A.9 (Cal.), 1998 WL 856525, at *1 (9th Cir. Nov. 19, 1998) (protecting employee records from discovery in Title VII case); Burks v. Okla. Publ’g Co., 81 F.3d 975, 981 (10th Cir. 1996) (same); Gehring v. Case Corp., 43 F.3d 340, 342 (7th Cir. 1994) (protecting employee records from discovery in ADEA cases); Miller v. Fed. Express Corp., 185 F.R.D. 376, 384 (W.D. Tenn. 1999) (“Personnel records, because of the privacy interests involved, should not be ordered produced except upon a compelling showing of relevance.”).

\textsuperscript{367} E.g., Wimmer v. Suffolk County Police Dep’t, 176 F.3d 125, 133, 138 (2d Cir. 1999) (employing in camera review). But see Makar-Wellbon v. Sony Elec., Inc., 187 F.R.D. 576, 577 (E.D. Wis. 1999) (denying stipulated request for protective order because of insufficient showing).


However, the courts rarely find such arguments meritorious. E.g., Tindle v. Caudell, 56 F.3d 966, 971 (8th Cir. 1995); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 884 n.89 (D. Minn. 1993); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534-37 (M.D.}
Robinson, Amendment, Architecture of the First Amendment and the Case of Workplace Harassment,
of proving that the bribery occurred. Likewise, it seems reasonable to admit evidence of
regarding the terms of the bribe. Yet, those discussions are clearly admissible in the context
For example, a political bribery case will no doubt involve speech—including discussions
of proving elements of criminal or even civil wrongdoing.
work environment. Thus, it is no longer discrimination in thought, but has become
discrimination in action—having a direct effect on the plaintiff's ability to work.
plaintiff still must show that the harassment was sufficiently severe or pervasive to alter her
norm itself. Instead, the local norm is useful in helping explain whether the employer took
better explain their meaning and genesis. The employer is not being held liable for the local
that has raged since Kingsley Browne published an article in 1991, and many learned
scholars have published on the subject. See Browne, supra; e.g., Cynthia L. Estlund, The
Architecture of the First Amendment and the Case of Workplace Harassment, 72 NOTRE DAME
L. REV. 1361, passim (1997); Juan F. Perea, Strange Fruit: Harassment and the First
Amendment, 29 U.C. DAVIS L. REV. 875, 877-78, 884-86 (1996); Clougherty, supra; see also
Theresa M. Beiner & John M.A. DiPippa, Hostile Environments and the Religious Employee,
19 U.A. LITTLE ROCK L.J. 577, 631 n.355 (1997) (citing numerous articles discussing First
Amendment implications of harassment law). Therefore, my treatment of the issue will be
brief.
In reality, the First Amendment implications of my proposal are minor. First, a
finding of harassment generally includes at least some acts not protected by the First
Amendment. See Browne, supra, at 483 ("With only one apparent exception no reported
harassment decision has imposed liability solely on the basis of arguably protected
expression.") (footnote omitted). Even the most avid First Amendment advocates concede
that quid pro quo harassment, see, e.g., Browne, supra, at 515, and harassing acts that fit
into other categories of unprotected speech do not warrant First Amendment protection. See,
e.g., id. at 513-31. One example is fighting words. See R.A.V. v. City of St. Paul, 505 U.S.
on Free Speech and Sexual Harassment, 68 NOTRE DAME L. REV. 1003, 1006-07, 1015-16
(1993). Other First Amendment exceptions such as labor speech, speech directed at captive
audiences, time, place and manner regulations, defamation, obscenity and indecency and
privacy, see Browne, supra, at 513-31, are arguably applicable in the right hostile
environment fact pattern. See Oppenheimer, supra, at 322-25 (arguing that harassment
often constitutes fighting words, is directed at a captive audience or constitutes a tort). But
see Browne, supra, at 516-20 (arguing that the Court's captive audience cases do not reach
as far as the workplace). In addition, others argue that when harassment is directed at a
particular employee (which it often is) it is not entitled to First Amendment protection. See
Robinson, 760 F. Supp. at 1535-36; Beiner & DiPippa, supra, at 632; Eugene Volokh,
Comment, Freedom of Speech and Workplace Harassment, 39 UCLA L. REV. 1791, 1863-67
(1992). Others suggest establishing a new subcategory of speech that is unprotected or is
titled to a lesser amount of First Amendment protection. See, e.g., Richard Delgado, Words
That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-
C.L. REV. 133, 172 (1982); Estlund, supra, at 1381.
Evidence of local norms simply places the harassing incidents in a context that might
better explain their meaning and genesis. The employer is not being held liable for the local
norm itself. Instead, the local norm is useful in helping explain whether the employer took
seriously or condoned behavior that could be considered or escalate into harassment. The
plaintiff still must show that the harassment was sufficiently severe or pervasive to alter her
work environment. Thus, it is no longer discrimination in thought, but has become
discrimination in action—having a direct effect on the plaintiff's ability to work.
Second, there is much speech that would be "protected," but admissible in the context
of proving elements of criminal or even civil wrongdoing. See Oppenheimer, supra, at 325.
For example, a political bribery case will no doubt involve speech—including discussions
regarding the terms of the bribe. Yet, those discussions are clearly admissible in the context
of proving that the bribery occurred. Likewise, it seems reasonable to admit evidence of
Training programs also have implications for this component of the defense. Employers may use training programs as evidence that they took reasonable care to prevent harassment. Committing the time and effort necessary to train employees about sexual harassment could indicate that the employer is trying to create a local norm in which harassment is not tolerated. However, given the few studies on what forms of training are effective, the courts need to look closely at how seriously the employer takes such training and how effective that training is likely to be. Indeed, if the employer has done little else to curb harassment, a token video training program is not likely to have much effect. Training programs during which employees do not pay attention or complete crossword puzzles are common. That is why interactive programs, requiring employee participation, are likely more effective. As a result, courts should not simply accept that the employer provided training. They must examine the nature of the training to determine its effects on local norms and employees who are likely to sexually harass. A half-hearted attempt at training should not satisfy the first prong of the Ellerth/Faragher defense because it is not enough to show that the employer made a reasonable effort to prevent sexual harassment.

B. Re-evaluating the Second Prong: "[T]hat the Plaintiff Employee Unreasonably Failed to Take Advantage of Any Preventive or Corrective Opportunities Provided by the Employer or to Avoid Harm Otherwise"

There are two problems with the second prong of the Ellerth/Faragher test. First, the holding that the employee must "fail to avoid harm otherwise" is so vague as to be unworkable and should be eliminated entirely. This phrase is open for any meaning the courts wish to give it. Indeed, the lower courts already have begun to interpret this prong with very perverse results.

workplace norms to help show that a hostile environment was created.

370. See supra notes 179-88 and accompanying text.
371. See supra notes 179-88 and accompanying text.
372. See Perry et al., supra note 179, at 701.
374. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
375. See, e.g., Brown v. Perry, 184 F.3d 388, 397 (4th Cir. 1999) (granting summary judgment where plaintiff "failed to avoid harm otherwise" because she should have anticipated second attack by supervisor).
Second, this prong fails to take into account the most common employee reactions to harassment, which is initially, at least, to avoid the situation.\textsuperscript{376} Courts simply have not proven to be in the best position to understand the victim's perspective, especially at the summary judgment stage, where many of these cases are decided.\textsuperscript{377} Harassment victims should not be summarily dismissed for initially failing to report or delaying reporting until the incidents are repeated or become more severe.\textsuperscript{378} Indeed, expecting immediate reporting is counter-intuitive, especially given that the sexual harassment might not yet have reached an actionable level or a level that the victim believes she can no longer handle. Thus, the victim of harassment is caught in a difficult catch twenty-two. If she does not report minor incidents of harassment, she risks providing support for the employer's showing on the second prong of the \textit{Ellerth/Faragher} defense. If she does report these minor incidents, she may risk losing her job, disrupting her workplace unnecessarily (if the harassment doesn't persist or escalate) or other bad outcomes.\textsuperscript{379} Courts also want to give the employer the earliest opportunity to correct harassment, preferably before it reaches an actionable level. It seems that some sort of balance must be struck between forcing employees to report every minor incident and letting employers defend based on an employee's failure to report these minor or initial incidents. Indeed, one easily could envision a workplace coming to a standstill if every minor incident of harassment were reported.

\textbf{C. A Reasonable Solution: Punitive Damages}

A reasonable solution that resolves this dilemma and furthers the underlying purposes of Title VII is to encourage the employer's preventive and corrective efforts through the use of punitive damages. After the passage of the Civil Rights Act of 1991,\textsuperscript{380} it is clear that punitive damages are available to plaintiffs in sexual

\textsuperscript{376} See \textit{supra} notes 259-90 and accompanying text.


\textsuperscript{379} For a discussion of these potentially bad outcomes, see \textit{supra} notes 291-335 and accompanying text.

harassment cases if the employer engages in a “discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” In addition, compensatory damages are available in all cases of intentional discrimination. Depending on what the employer has done with respect to preventing and correcting harassment, the employer may or may not be liable for punitive damages. Regardless, the employee should be entitled to compensatory damages for the injuries she sustained from the harassment. This solution is consistent with the language of both Faragher and Ellerth, as well as with the policies behind the Civil Rights Act of 1991.

For purposes of the Ellerth/Faragher defense, acts relevant to liability for harassment occur at several stages. First, the employer must establish an effective program to prevent harassment. Second, the program must include a procedure for dealing with complaints that effectively ends the harassment once the employee reports it or once the employer becomes aware of it. Depending on what the employer has done to prevent and correct the harassment, it may or may not be liable for punitive damages. In this manner, the Ellerth/Faragher defense would not preclude liability entirely; it would simply preclude liability for punitive damages. The employer would still be liable for compensatory damages. An employee should not be responsible for the costs incurred and injuries sustained due to harassment, such as the fees for treatment by psychiatrists and other medical professionals, as well as emotional distress. This solution strikes a balance between the compensatory nature of Title VII and the policy of encouraging employers to address and prevent sexual harassment. For reasons I will explain below, the employer should bear the cost to the employee.

381. Id. § 1981(a)(1). These damages are capped, depending on the size of the employer. Id. § 1981(a)(3).
382. Id. § 1981(a)(1).
383. See Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (noting that the defense may raise an affirmative defense to liability or damages).
384. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (noting that the defendant may raise an affirmative defense to liability or damages).
385. See infra notes 393-409 and accompanying text.
386. See Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807 (1998). The only exception alluded to by the Court was in the case of smaller employers. In Faragher, the Court explained that smaller employers might be in the position to prevent harassment informally and, therefore, not need an official policy. Id. at 808-09.
387. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
There are several ways the damages solution could work in practice. If the employer can prove that it has an effective training program in place and a clear and effective policy for redressing sexual harassment, it should not be liable for any punitive damages for acts of harassment that occur prior to the employer's becoming aware of the harassing behavior. However, if the employer has made no effort to prevent harassment and, perhaps, has even encouraged it as evidenced by the local workplace norm, the plaintiff should be eligible for punitive damages from the employer because this lack of effort by the employer amounts to "reckless indifference to the federally protected rights" of employees.388

Another approach would be to reform the standard at a more fundamental level. If Title VII is really meant to deter harassment, it seems that the most effective way to do so is to presume that training programs are ineffective if harassment occurs. In this way, the courts would encourage employers to adopt training programs that actually work—that actually prevent harassment in the workplace. Intuitively, if a training program were truly effective, supervisors would not be sexually harassing subordinates. If a supervisor sexually harasses a subordinate after training, the court should presume that the training program was ineffective and should not be used as a shield by employers to avoid punitive damages. Using this current standard, the training would not constitute a "reasonable effort to prevent" harassment. This presumption could be rebutted by a showing that the program was effective and that, for some reason, the particular supervisor involved was an aberration. Without such a showing, the employer would be required to pay punitive damages.

Awarding punitive damages to harassed employees under such circumstances would encourage employers to adopt truly effective training programs because ineffective programs would not insulate them from liability by virtue of their mere existence. Yet, an employer would still have an incentive to adopt a training program because if it does work, it will prevent most harassment and any resulting liability to the employer as well as liability in the rare circumstance in which the harassment occurs despite effective training. Thus, it would prevent most future discrimination—for which the Court is currently aiming—in a manner that should be more effective than simply allowing an employer to maintain the defense by putting a simple training program in place.389

389. This could conceivably have another beneficial effect. It could encourage those who provide and develop such training programs to develop programs that actually work, rather
Likewise, if an employer unreasonably fails to correct harassing behavior after an employee's complaint, it has effectively engaged in a discriminatory practice with "malice or with reckless indifference to the federally protected rights of an aggrieved individual"\(^{390}\) and should be liable for punitive damages. If the employer ends the harassment, however, it might not be liable for punitive damages (depending also on the effectiveness of its preventive efforts), but instead would be liable only for compensatory damages for the harassment that actually occurred.

Although not entirely clear from the policy explanations in *Faragher*\(^ {391}\) and *Ellerth*,\(^ {392}\) such an approach is consistent with the purposes of Title VII and the Civil Rights Act of 1991. The primary objective of Title VII is to eradicate discrimination in the workplace.\(^ {393}\) To help eliminate discrimination, the Court has emphasized deterrence and compensation of victims.\(^ {394}\) The Supreme Court, as well as lower courts, recently have shifted their focus to a latent purpose of Title VII: encouraging voluntary compliance.\(^ {395}\) In emphasizing compliance, courts have given little weight to the usefulness of damages to deter discriminatory conduct. For example, the Supreme Court stated in *Ellerth*:

\[
\text{Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context . . . . To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.}\(^ {396}\)
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Likewise, in *Faragher*, while acknowledging that "Title VII seeks to make persons whole for injuries suffered on account of unlawful

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394. *See id.* at 358.
395. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) (labeling encouragement of voluntary compliance as a latent objective, whereas the "more general objective" was "to root out discrimination in employment").
employment discrimination," the Court stated that "its [Title VII's] 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm."

By overemphasizing preventive efforts, the Court ignores deterrence through damages and compensation (making victims whole) as other important goals of Title VII. If interpreted as a complete defense, the Court's holding in Faragher and Ellerth will prevent victims from being compensated for injuries they incurred due to harassment. For example, the employer would not be liable for any resulting medical expenses, including psychiatric or medical visits, that the harassed employee incurred. In addition, cutting off damages does not encourage employers to raise awareness regarding harassment and engage in more effective prevention efforts. The result is less deterrence than might be gained if the employer knew it would be liable for at least compensatory damages.

Compensation is a significant policy underlying Title VII that the Court has devalued. As the Court explained in McKennon v. Nashville Banner Publishing Co., a private litigant furthers both the "deterrence and the compensation objectives" of the anti-discrimination laws. Providing complete defenses to employers deters litigants and attorneys from bringing sexual harassment cases, further undermining the deterrence and compensation purposes of Title VII.

Notwithstanding the Court's suggestion that the Civil Rights Act of 1991 leaves Meritor's discussion of imputing liability "intact," the legislative history of the Act reveals a lot about the purposes of Title VII. In the Act, Congress made the "make whole" aspect of Title VII explicit by providing for compensatory and punitive damages from employers for intentional discrimination. In the legislative history surrounding that law,

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399. Id. at 358.
400. Commentators and courts alike have acknowledged the access problems that victims of employment discrimination have. One significant problem is that these cases, at least prior to the Civil Rights Act of 1991, did not bring in enough damages to justify a contingent fee arrangement with attorneys who might represent victims. The result, as Congress recognized in the Civil Rights Act of 1991, was that harassment victims were unable to seek effective redress in the court system. See H.R. REP. NO. 102-40(I), at 70 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 608.
401. See Faragher, 524 U.S. at 804 n.4.
402. See infra notes 404-09 and accompanying text.
Congress was emphatic that its purpose in enacting section 1981a was to compensate victims in a more meaningful manner, particularly in harassment cases, as well as to further the deterrent effect of Title VII by creating higher damages that would force employers to take harassment more seriously. As the House Report explained:

Strengthening Title VII's remedial scheme to provide monetary damages for intentional gender and religious discrimination is necessary to conform remedies for intentional gender and religious discrimination to those currently available to victims of intentional race discrimination. Monetary damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity. Such relief is also necessary to encourage citizens to act as private attorneys general to enforce the statute. Monetary damages simply raise the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to prevent intentional discrimination in the workplace before it happens.

The House Report uses as examples victims of sexual harassment not being fully compensated. Furthermore, the House explicitly linked the use of damages to deterring intentional discrimination. Even members of industries that were affected by this Act admitted "that under Title VII's current remedial scheme, 'there is little incentive to set up the kinds of internal controls that companies need to set up.'"

While considering the Civil Rights Act of 1991, Congress contemplated the effect of damages on conciliation efforts and concluded there was no evidence supporting a negative effect. In this context, Congress discussed the goal of encouraging voluntary settlement. It did not appear directly to contemplate, or even be concerned with, the effect this might have on an employer's voluntary compliance with Title VII. This is not surprising because

404. See infra notes 406-09 and accompanying text.
405. See infra notes 406-09 and accompanying text.
407. See id. at 66-69.
408. Id. at 65.
409. See id. at 69 (quoting William C. Burns, testifying on behalf of Pacific Gas & Electric Co.).
410. See id. at 73-74.
411. Id. at 73.
damages can only serve to encourage voluntary compliance. Thus, tying an employer's efforts to prevent and correct sexually harassing behavior to the ability of the plaintiff to collect punitive damages is a fair compromise that furthers many of the purposes of Title VII and the Civil Rights Act of 1991.

The only possible stumbling block to the use of punitive damages in this manner is the Court's recent decision in *Kolstad v. American Dental Association.* However, a careful review of that case in light of the Court's language in *Faragher* and *Ellerth* reveals that the use of punitive damages is consistent with both the language of section 1981a and the Kolstad decision. In *Kolstad,* the Court based liability for punitive damages on "the employer's knowledge that it may be acting in violation of federal law." Given the Court's acknowledgment in *Faragher* that "it is by now well recognized that hostile environment sexual harassment by supervisors... is a persistent problem in the workplace," and the Court's declaration of its illegality in *Meritor* in 1986, it would be unusual for an employer not to know that sexual harassment by a supervisor is prohibited by Title VII. It no longer can be considered a novel theory in that sense. For example, if an employer refuses to take action in the face of an employee complaint of harassment, or if a large employer refuses to provide a policy for addressing harassment on the job, it is reasonable for a court to find that the employer has acted with "malice or with reckless indifference to the federally protected rights of an aggrieved individual"—which is the standard set for punitive damages by Congress under section 1981a.

Beyond this, there is still the Court's language in *Kolstad* that states that "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'" My solution and this aspect of *Kolstad* can be read consistently. The Court's use of the word "may"

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413. Id. at 535.
415. Lower courts acknowledged the illegality of sexual harassment well before this case. *E.g., Henson v. City of Dundee,* 682 F.2d 897, 902 (11th Cir. 1982).
416. I qualify this with the term "large employer" because the Court in *Ellerth* seems to suggest that if the employer is small enough, there may not be a need for a formal policy in order for an employee to have an effective means to complain about harassment. *See Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 765 (1998).
suggests that it did not mean that in every case the employer would not be liable based on good faith efforts to prevent harassment. I would submit that the use of the word “may” indicates that lower courts should look critically at an employer’s alleged “good faith” efforts. Given the paucity of evidence about the usefulness of training and the tendency of employers to simply put an anti-harassment policy into place and assume it will work, the courts should be skeptical of an employer’s “good faith” efforts. The courts need to look critically at the employer’s efforts to prevent and correct harassment to make certain they are effective before deciding its training and anti-harassment policies meet the “good faith” standard. This is consistent with my proposal to award punitive damages to employees where the employer has not taken adequate preventive measures. In such a case, the courts could deem the employer’s actions as lacking the requisite “good faith.”

V. CONCLUSION

The complexity of sexual harassment has proven a challenge for both the courts and social science researchers. It is clear that social scientists have information that is valuable to the courts in developing standards to use in sexual harassment cases. In particular, the courts do not seem to understand the impact that employers have on condoning, encouraging or preventing harassment by simply paying attention to their workplace environments. Further, the courts’ emphasis on making victims report does not comport with the reality of working Americans’ lives—lives that include a fundamental need for employment that will lead them to ignore, reinterpret and/or tolerate workplace harassment. A careful look at the standard set out by the Supreme Court in the Ellerth and Faragher cases, in light of what social science reveals, leads to a different approach. This approach will hopefully more adequately meet the goals of Title VII: to compensate and make victims whole, as well as to deter discrimination, while encouraging employers to curb and address harassment in the workplace.

I have suggested two solutions in this Article. One is for the courts to pay careful attention to the workplace environment in assessing the “totality of the circumstances” that made the harassment of the victim possible. The other is for courts to use

419. See, e.g., Faragher, 524 U.S. at 808 (holding that the employer’s failure to disseminate its anti-harassment policy precluded its use of the defense).
punitive damages in a creative manner to punish employers who do not take harassment seriously, while rewarding those who seek to actively address harassment by not awarding punitive damages. These solutions provide a key to furthering all of Title VII's purposes, while addressing harassment in the workplace in a manner that acknowledges the complexity of the phenomenon. It is my hope that use of these solutions will lead to more productive workplaces for both the employer and employee.