

THE CULTURE OF COMPLIANCE: THE FINAL TRIUMPH OF FORM OVER SUBSTANCE IN SEXUAL HARASSMENT LAW

JOANNA L. GROSSMAN*

Introduction

Why does sexual harassment persist despite nearly three decades of attempts to eliminate it? While courts have developed a comprehensive set of legal rules governing workplace harassment, the incidence of harassment has not changed. That is true, in part, because the rules of employer liability for harassment are calculated to ensure that employers adopt basic policies and procedures with respect to workplace harassment, not, surprisingly, to ensure that they actually prevent it.

There is little evidence in the vast social science literature to support this emphasis on rule compliance. In fact, cookie-cutter sexual harassment policies and procedures do not seem to have any reliably negative effect on the incidence of harassment. Yet, Justice Kennedy declared in *Burlington Industries, Inc. v. Ellerth* that the very purpose of Title VII is “to encourage the creation of antiharassment policies and effective grievance mechanisms,”¹ signaling a victory for a misguided culture of compliance, one in which liability is measured not by whether employers successfully prevent harassment, but instead by whether they comply with judicially created prophylactic rules. In this regime, employers could conceivably insulate themselves from liability entirely without making a dent in the underlying problem. That this possibility represents a flaw in the legal system should be obvious.

* Associate Professor, Hofstra Law School. B.A., Amherst College; J.D., Stanford Law School. My thanks to Grant Hayden for his editing and Cindy Furuno, Allison Maue, and Jennifer Sharf for their excellent research assistance. An earlier version of this Article was presented at the 2002 Conference of the Association for the Study of Law, Culture, and the Humanities and at the 2002 Annual Meeting of the Law and Society Association. I thank participants at both conferences for their thoughtful questions and comments.

¹ 524 U.S. 742, 764 (1998). Justice O’Connor echoed this approach the following year in *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 545 (1999), declaring that law encourages employers “to adopt antidiscrimination policies and to educate their personnel on Title VII’s prohibitions.” Theresa Beiner has criticized courts for making voluntary compliance with prophylactic rules a central rather than collateral purpose of Title VII. See generally Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273 (2001) [hereinafter Beiner, *Sex, Science and Social Knowledge*] (reviewing literature on the training effect and victim response to harassment).

The law governing employer liability for sexual harassment was re-configured in 1998 by the Supreme Court's opinions in *Faragher v. City of Boca Raton* and *Ellerth*,² which together created a new legal regime composed of seemingly bright line rules for employers and victims of sexual harassment.³ The centerpiece of the liability scheme is a rule of automatic liability for hostile environment harassment by supervisors, softened by an affirmative defense that excuses employers from liability or damages if they take adequate preventative and corrective measures.⁴ The rules themselves continue to be developed and refined as lower courts struggle to apply them, and academic commentators continue to offer doctrinal praise and criticism.⁵ Meanwhile, outside courtrooms and law reviews, lawyers, consultants, and human resource professionals have formulated and disseminated advice to employers about responding and conforming to the new legal regime. Employers have taken their advice, by and large, adopting or updating procedures and training programs and implementing internal grievance procedures.

But do these measures actually work? Not necessarily, and certainly not as well or as automatically as many apparently believe. This fact has been virtually overlooked in both legal and extralegal discourse, in which little or no attempt has been made to connect the legal regime to the actual problem of harassment. Rules are developed and incentives are created with little or no attention paid to whether these legally mandated employer interventions are likely to prevent harassment or adequately redress the harm it creates when prevention fails.

This Article remedies this inattention by reevaluating the legal regime in light of an emerging body of social science literature addressing the causes of harassment, the effectiveness of various preventative measures, and the substantive and procedural adequacy of internal grievance procedures. The reevaluation demonstrates that the legal regime has overemphasized compliance with prophylactic rules at the expense of effecting real change in preventing the problem of sexual harassment in the workplace. Employers who play a significant role in maintaining a work environment that is either hostile or hospitable to sexual harassment are rewarded for paying lip service to the regime by enacting standard-

² See *Faragher*, 524 U.S. 775 (1998); *Ellerth*, 524 U.S. at 742. In *Kolstad v. American Dental Ass'n*, the Court supplemented the rules in *Faragher* and *Ellerth* by deciding that punitive damages could not be imposed against employers who have made good-faith efforts to comply with Title VII. See *Kolstad*, 527 U.S. at 545.

³ The rules of liability have been applied with equal force to harassment based on any prohibited characteristic, including race, national origin, color, religion, and sex. See, e.g., *Richardson v. N.Y. State Dep't of Corr. Servs.*, 180 F.3d 426, 436 (2d Cir. 1999) (holding that *Faragher* and *Ellerth* standards apply to racial harassment).

⁴ *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

⁵ See Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671 (2000) (criticizing the Supreme Court's and lower courts' interpretation of Title VII as too lenient with regard to employer liability and doctrinally inconsistent).

issue policies and procedures, regardless of whether those efforts actually reduce harassment or compensate victims. Thus, the triumph of form over substance in sexual harassment law occurs.

This Article is divided into three Parts. Part I briefly describes the continuing problem of sexual harassment and summarizes case law relating to employer liability for sexual harassment. It then describes the incentives the law creates for employers, victims, and harassers, and explains how each group responds to these incentives.

Part II explores whether the preventative measures spurred by the legal regime serve Title VII's goal of deterring harassment and preventing harm. It first identifies individual and organizational factors that cause or correlate with the level of harassment in order to develop theoretical connections between employer preventative measures and the underlying problem of harassment. It then explores empirical studies and surveys analyzing the efficacy of particular, testable measures to determine whether they are useful in combating harassment. Part III explores whether corrective measures induced by the legal rules adequately serve Title VII's companion goal of compensating victims for acts of discrimination.

The Article concludes with some suggestions for reform, designed to refocus legal rules and workplace norms around successful prevention of harassment and compensation of victims as opposed to simple, blind rule compliance. Specifically, it recommends that the affirmative defense presently adopted by the courts be abolished by Congress, resulting in a standard of pure automatic liability. Short of that, it suggests that punitive damages should be available regardless of an employer's good-faith efforts to prevent harassment, if, in fact, egregious harassment occurs on its watch. The Article also suggests that Title VII should be amended to permit individual supervisory liability for harassment. Taken together, these changes might give employers the incentive to aim higher than mere compliance and towards success. In addition, it suggests some non-doctrinal efforts that may also contribute to the reduction or elimination of workplace harassment.

I. THE NEW REGIME

A. *The Problem of Harassment*

That sexual harassment continues to plague the American workforce is beyond dispute. In survey after survey, many workers—mostly women—continue to report relatively high rates of harassment. In the first major systematic workplace study, conducted by the United States Merit Systems Protection Board (USMSPB) and published in 1981, four in ten female respondents reported experiencing at least one incident of harassment in the two years prior to the survey.⁶ Subsequent studies have revealed

⁶ U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE*: IS

similar or even higher rates of harassment.⁷ Studies estimate that Fortune 500 companies each lose \$6.7 million annually due to costs associated with sexual harassment.⁸

Most sexual harassment victims are women; most perpetrators are men.⁹ Verbal conduct such as jokes, sexual remarks, and sexual teasing are most commonly reported, followed by sexual touching.¹⁰ Demands or pressure for sexual favors constitute only a small percentage of complaints.¹¹ A majority of complaints involve co-worker, rather than supervisory, harassment.¹²

While survey results suggest that the level of harassment has stagnated for more than twenty years, harassment-related lawsuits and administrative charges have risen dramatically during the same period. The number of administrative complaints of harassment filed with the Equal Employment Opportunity Commission (EEOC) continues to grow both in

IT A PROBLEM? 36 (1981) [hereinafter USMSPB 1981].

⁷ See generally U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: AN UPDATE (1988) [hereinafter USMSPB 1988]; U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, AND CONTINUING CHALLENGES 13 (1995) [hereinafter USMSPB 1995] (updating surveys from 1981 and 1988); see also AMY L. CULBERTSON ET AL., ASSESSMENT OF SEXUAL HARASSMENT IN THE NAVY: RESULTS OF THE 1989 NAVY-WIDE SURVEY 10 (1992) (finding, based on Navy survey, that forty-two percent of enlisted women and twenty-six percent of female officers reported being sexually harassed during a one-year survey period); Grossman, *supra* note 5, at 673; see also *infra* text accompanying notes 9–13 (reviewing survey results).

⁸ Gerald L. Blakely et al., *The Effects of Training on Perceptions of Sexual Harassment Allegations*, 28 J. APPLIED SOC. PSYCHOL. 71, 72 (1998) (citing R. Sandroff, *Sexual Harassment in the Fortune 500*, 13 WORKING WOMAN 69 (1988)).

⁹ One survey found that 81% of complaints involve female complainants and male perpetrators, 9% the opposite, and 10% involve same-sex harassment. See SOC'Y FOR HUMAN RES. MGMT., SEXUAL HARASSMENT SURVEY 5 (1999) [hereinafter SHRM SURVEY]. The percentage of federal administrative charges involving female complainants reflects a similar pattern: 86% of the charges filed with the Equal Employment Opportunity Commission (EEOC) in 2001 involved female complainants (down from 90% in 1992). See EEOC, SEXUAL HARASSMENT CHARGES EEOC AND FEPAS COMBINED: FY 1992-2001, [hereinafter EEOC CHARGE STATISTICS], at <http://www.eeoc.gov/stats/harass.html> (last modified Feb. 6, 2003); see also Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 560 (2001) (finding, based on analysis of all published sexual harassment cases between 1986 and 1995, that only 5.4% of lawsuits were brought by men).

¹⁰ See USMSPB 1995, *supra* note 7, at 16; SHRM SURVEY, *supra* note 9, at 6; CULBERTSON ET AL., *supra* note 7, at 10.

¹¹ See SHRM SURVEY, *supra* note 9, at 6 (seven percent); USMSPB 1995, *supra* note 7, at 16 (two percent); see also Juliano & Schwab, *supra* note 9, at 565 (finding, based on a study of published sexual harassment opinions, that quid pro quo claims are significantly less common than hostile environment claims).

¹² See SHRM SURVEY, *supra* note 9, at 5 (reporting that 51% of complaints involve co-workers, while only 24% involve supervisors); USMSPB 1995, *supra* note 7, at 18 (finding that victims were harassed by co-workers more than twice as often as they were harassed by supervisors). A study of published sexual harassment cases found that a greater proportion of claims involved supervisory rather than co-worker harassment. See Juliano & Schwab, *supra* note 9, at 564 (finding that 59% of cases between 1986 and 1995 named only supervisors as the harasser, and an additional 20% named supervisors and co-workers). This surprising result almost certainly reflects a selection bias by plaintiffs, who are more likely to believe (probably correctly) that claims against supervisors will be successful.

absolute numbers and as a percentage of the total complaints processed.¹³ Internal reports of harassment have increased somewhat, although they still remain low compared to the rates of harassment reported in surveys.¹⁴

B. The Basic Legal Regime

In the landmark case of *Meritor Savings Bank v. Vinson*,¹⁵ the Supreme Court recognized that sexual harassment is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.¹⁶ The Court left open the question of employer liability, however, stating only that a rule of automatic liability was too harsh for employers while a rule requiring actual notice to the employer as a precondition to liability was too harsh for victims.¹⁷ The Court instead directed lower courts to examine agency principles to analyze whether and when employers could be held liable under Title VII for sexual harassment in the workplace.¹⁸ Lower courts struggled with this mandate, disagreeing about how much weight to give an employer's sexual harassment policy in determining liability¹⁹ and whether to penalize plaintiffs who failed to make use of available policies and grievance procedures.²⁰

¹³ The number of administrative sexual harassment charges filed rose from 10,532 in 1992 to 15,836 in 2000, a 50% percent increase, as compared to a 3.2% increase in overall charges filed during the same period, from 77,444 to 79,896. See EEOC CHARGE STATISTICS, *supra* note 9. The monetary payouts secured solely through EEOC proceedings, rather than litigation, rose from \$12.7 million to \$54.6 million during the same period. *Id.*

¹⁴ See *infra* text accompanying notes 126–130.

¹⁵ 477 U.S. 57 (1986).

¹⁶ Title VII provides, in relevant part:

[I]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1994). The protection against sexual harassment is drawn from the language about discrimination in the terms or conditions of employment. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); *Meritor*, 477 U.S. at 64.

¹⁷ *Meritor*, 477 U.S. at 72.

¹⁸ The Supreme Court has interpreted Title VII, under which the term “employer” is defined to include “agents,” to require this analysis. *Id.* (interpreting 42 U.S.C. § 2000e(b) (1994)); see also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998).

¹⁹ Compare *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1450 (10th Cir. 1997) (noting the importance of an employer's sexual harassment policy when determining liability), with *Kracunas v. Iona Coll.*, 119 F.3d 80, 89 (2d Cir. 1997) (noting that the existence of a sexual harassment policy with reasonable complaint procedures does not insulate an employer from liability).

²⁰ Compare *Ellerth v. Burlington Indus., Inc.*, 912 F. Supp. 1101, 1118 (N.D. Ill. 1996) (holding that the “failure to utilize the equal employment opportunity procedures” was grounds for granting summary judgment to the employer), and *Ridley v. D.C.*, 945 F. Supp. 333, 340 (D.D.C. 1996) (finding plaintiff's failure to complain to be “fatal”), with *Salazer v. Church's Fried Chicken, Inc.*, No. V-84-28, 1989 U.S. Dist. LEXIS 6349, at *3 (N.D. Ohio Mar. 22, 1989) (plaintiff's failure to invoke procedure does not “automatically insulate the employer from liability”).

The Supreme Court addressed these issues directly in 1998, issuing two important opinions concerning employer liability. In *Faragher* and *Ellerth*, the Court jointly held that for supervisory harassment culminating in a tangible employment action, employers are automatically liable.²¹ But for supervisory harassment without such a consequence, employers may assert a two-prong affirmative defense, which operates as a bar to liability or damages.²²

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.²³

The Court in these cases also approved the lower court consensus that claims involving co-worker rather than supervisory harassment should be governed by a negligence standard, holding employers liable only when they knew or should have known of the harassment, but failed to take prompt and effective remedial action.²⁴

The affirmative defense, which carves out an exception to a general rule of automatic liability, shapes employers' conduct. This Section explores the messages given to employers, the means through which those messages are transmitted, and the likely responses of the recipients.

²¹ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Ellerth*, 524 U.S. at 765. A tangible employment action is one that constitutes "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.

²² Whether an employer who makes out the affirmative defense escapes liability altogether or simply avoids paying damages is a matter of dispute. I have argued in an earlier piece that the affirmative defense should not operate to bar liability, but only to reduce damages. See Grossman, *supra* note 5, at 704–09. Some courts, however, have construed the defense quite broadly as a complete defense to liability. See *id.* at 709 (describing implementation of affirmative defense by lower federal courts).

²³ *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Several courts have quite inexplicably eliminated the second prong of the affirmative defense entirely. See Grossman, *supra* note 5, at 711 (describing cases following such an approach); see also *Jaudon v. Elder Health, Inc.*, 125 F. Supp. 2d 153, 164 (D. Md. 2000) (holding that the employer need not prove the second prong of the affirmative defense when the first prong is satisfied); *Brown v. Henderson*, 155 F. Supp. 2d 502, 512 (M.D.N.C. 2000) (same).

²⁴ See *Faragher*, 524 U.S. at 799 (noting that lower courts have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard"); see *supra* note 23 (collecting cases); see also 29 C.F.R. § 1604.11(d) (2002).

C. *Employers: Incentives, Communication, and Responses*

1. *Employer Incentives*

The advice employers receive is the product of the *Faragher* and *Ellerth* opinions, as well as the considerable body of law already developed in their wake. The law—transmitted to employers through the mechanisms described below—creates some basic incentives for employers.²⁵ These incentives fall into two categories: measures to prevent harassment and measures to remedy harassment once it occurs.

a. *Prevention*

The incentive for employers to prevent harassment comes from two legal rules. First, employers are automatically held liable when, as a result of harassment, a tangible employment action is taken against the victim-employee.²⁶ Sometimes referred to as *quid pro quo*,²⁷ this type of harassment typically involves a supervisor who takes adverse action against an employee who refuses to submit to sexual advances. Although there are no defenses to this type of harassment for employers, the rules create certain incentives for them nonetheless.

Employers who face automatic liability for this kind of supervisory conduct have the incentive to be more discriminate in hiring supervisors, to train them more effectively, and to monitor their behavior more closely during employment. The fact that the employer has the power to take these prophylactic steps contributed to the Court's decision to impose liability upon them for failing to do so.²⁸

²⁵ Although these incentives are targeted indirectly at harassers—to prevent or deter them from harassing—the absence of individual liability under Title VII means that harassers have little reason to react to the legal regime itself. Every federal court of appeals to consider the issue has concluded that Title VII does not permit individual liability against harassing supervisors. *See, e.g., Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313–17 (2d Cir. 1995); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995). Some states, however, do permit individual liability under their own anti-discrimination laws. *See, e.g., Genaro v. Cent. Transp., Inc.*, 703 N.E.2d 782, 787–88 (Ohio 1999). A partial remedy for the problems identified in this Article is to change this approach and establish individual liability for supervisory harassers. *See infra* text accompanying notes 438–439.

²⁶ *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

²⁷ The Supreme Court insisted in *Faragher* and *Ellerth* that *quid pro quo* did not create a legally significant category, but then recreated an essentially identical category under a new name—harassment resulting in a tangible employment action. *Ellerth*, 524 U.S. at 753.

²⁸ *See Faragher*, 524 U.S. at 803:

Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

Second, employers have an incentive to take preventative measures because of the affirmative defense available in hostile environment cases,²⁹ the first prong of which requires employers to take "reasonable care" to "prevent . . . any sexually harassing behavior."³⁰ This incentive was reinforced by a ruling from the Supreme Court the year following *Faragher* and *Ellerth* in *Kolstad v. American Dental Ass'n*,³¹ which held that an employer may not be forced to pay punitive damages for supervisory harassment when the conduct is contrary to the employer's good-faith efforts to comply with Title VII. Employers who insure against sexual harassment claims have an additional incentive,³² since many insurers require policyholders to take certain prophylactic measures as a condition of coverage.³³

The duty to prevent harassment has been interpreted by lower courts to include three possible elements: formal policies, anti-harassment training, and miscellaneous preventative measures.

Of course, employers have the incentive to take these measures to avoid all forms of harassment, not just *quid pro quo*. The affirmative defense may further contribute to the incentive to screen and monitor supervisors. *See, e.g., O'Rourke v. City of Providence*, 235 F.3d 713, 736 (1st Cir. 2001) (holding that the defendant could not make out the affirmative defense, in part, because it "made no attempt to keep track of the conduct of supervisors") (citing *Faragher*, 524 U.S. at 808).

²⁹ "Hostile environment" describes harassment consisting of verbal, physical, or environmental behavior that is sexual in nature and has the effect of creating a hostile, offensive, or abusive working environment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

³⁰ *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

³¹ 527 U.S. 526, 545 (1999). Justice O'Connor specifically acknowledged anti-harassment policies and programs as the type of good-faith efforts courts should consider in deciding whether to spare an employer from punitive damages. *See id.*

³² *See Tony Attrino, CFOs Urged to Learn Costs of Bias Cases*, NAT'L UNDERWRITER PROP. & CASUALTY, Oct. 26, 1998 (discussing growth in demand for Employment Practices Liability Insurance (EPLI)); Kearney W. Kilens, *Assessing EPLI Coverage: Helpful Questions for Potential Insureds*, 24 EMP. REL. L.J. 101, 102 (1998) (finding that EPLI is readily available, even for intentional violations). Just a few years ago, the only specific insurance an employer could buy in this area was a sexual harassment defense policy, which covered the costs of defending against a harassment lawsuit but not damages that might be awarded to the victim. *See Martha Sweeney Kulak, Sexual Harassment in the Workplace: A Claim Perspective and Interpretation*, C.P.C.U. J. 227, 232 (Dec. 1992). Sexual harassment claims are probably excluded from most employers' general liability policies, either because they do not meet the definition of bodily injury or because an exclusion for intentional acts may apply. *See id.* Victim compensation may be available, however, under the employer's liability section of a worker's compensation policy. *See id.*; *see also Schmidt v. Smith*, 713 A.2d 1014, 1017-18 (N.J. 1998) (allowing claim under workers' compensation). *But see Ottumwa Hous. Auth. v. State Farm and Casualty Co.*, 495 N.W.2d 723, 730 (Iowa 1993) (rejecting claim filed under workers' compensation).

³³ *See, e.g., John D. Canoni, Sexual Harassment: The New Liability*, 46 RISK MGMT. 12 (1999) ("EPLI will become more popular—even applying for such insurance is helpful because carriers will not cover a company unless its employment policies and procedures are in order.").

i. Formal Policies

Although the Supreme Court stopped short in *Faragher* and *Ellerth* of absolutely requiring employers to enact formal, written anti-harassment policies, it came very close.

While proof that an employer had promulgated an anti-harassment 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.³⁴

Courts have been strict with employers who do not meet this basic requirement of having a policy specifically dealing with sexual harassment,³⁵ but have been flexible in approving different types of policies.³⁶

Courts differ on the necessary elements of a legally sufficient policy, but most require the following: (i) a description of prohibited conduct;³⁷ (ii) a list of individuals to whom complaints should be made,³⁸ with a bypass procedure to ensure that no victim will have to complain to her harasser;³⁹ and (iii) a grievance procedure calculated to bring out complaints. Additional elements may weigh in an employer's favor.⁴⁰ Separate clauses prom-

³⁴ *Faragher*, 524 U.S. at 807. The EEOC has taken the position that small businesses may be able to satisfy this prong of the affirmative defense without a formal, written policy as long as they have informal mechanisms in place for preventing harassment. See EEOC, QUESTIONS & ANSWERS FOR SMALL EMPLOYERS ON EMPLOYER LIABILITY FOR HARASSMENT BY SUPERVISORS, at <http://www.eeoc.gov/docs/harassment-facts.html> (last modified June 21, 1999), at Question 7 ("Small businesses may be able to discharge their ability to prevent and correct harassment through less formal means.").

³⁵ See, e.g., *Molnar v. Booth*, 229 F.3d 593, 601 (7th Cir. 2000) (holding that the employer could not prevail on the affirmative defense as a matter of law because it maintained only a general anti-discrimination policy, which made no specific mention of sexual harassment).

³⁶ See, e.g., *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1297-99 (11th Cir. 2000) (approving store's policy even though only one in-store person was designated to receive complaints, because employees had knowledge of and access to other designees in the district).

³⁷ See, e.g., *Thomas v. BET Soundstage Rest.*, 104 F. Supp. 2d 558, 565 (D. Md. 2000) (holding employers' policy inadequate because it did not define harassment or give any examples).

³⁸ See, e.g., *Gentry v. Exp. Packaging Co.*, 238 F.3d 842, 847-48 (7th Cir. 2001) (finding employer's policy inadequate because it designated the "Human Resources Representative" to receive complaints, but did not specify who filled the position).

³⁹ See, e.g., *O'Rourke v. City of Providence*, 235 F.3d 713, 736 (1st Cir. 2001) (denying employer's claim to the affirmative defense in part because the policy did not include any assurance that the harasser could be bypassed in registering or processing complaints). The failure to include a bypass procedure was one factor in the Supreme Court's decision that the defendant in *Faragher* could not prevail on the affirmative defense. See *Faragher*, 524 U.S. at 808.

⁴⁰ See, e.g., *Kohler v. Inter-Tel Tech.*, 244 F.3d 1167, 1180 (9th Cir. 2001) (praising employer's policy because it defined sexual harassment, designated a list of employees to receive complaints and included a bypass procedure, described the potential disciplinary measures, and stated that retaliation would not be tolerated).

ising confidentiality and prohibiting retaliation are examples of clauses that support an employer's claim of reasonable preventative efforts.⁴¹

Whether an employer's anti-harassment policy has been sufficiently disseminated to the workforce has turned out to be an important factor in cases considering the affirmative defense. *Faragher* set the stage for this development when it deprived the employer of the opportunity to prove the affirmative defense, in part because it "had entirely failed to disseminate its [sexual harassment] policy among [its] . . . employees."⁴² While courts have continued to punish employers who fail to disseminate or make available their anti-harassment policies,⁴³ they have also meted out significant rewards to employers who keep their employees on notice of their policies and procedures.⁴⁴ At least one circuit has held that distribution of an adequate policy provides "compelling proof" of adequate prevention, which can only be rebutted with evidence that the "employer adopted or administered [it] in bad faith or that the policy was otherwise defective or dysfunctional."⁴⁵ Other courts have imposed a slightly more rigorous standard, requiring that employers maintain policies that are "reasonably designed and reasonably effectual."⁴⁶

⁴¹ See, e.g., *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001) (finding of adequate prevention based in part on the policy's promises that complaints would "be kept as confidential as possible" and that no employee would "be penalized in any way for reporting a harassment problem"); *Thomas*, 104 F. Supp. 2d at 565 (noting that otherwise inadequate policy also lacked provisions on retaliation and confidentiality). *But cf.* *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245 (2d Cir. 2001) (holding policy that does not promise confidentiality was nonetheless sufficient to satisfy the first prong of the affirmative defense).

⁴² *Faragher*, 524 U.S. at 808.

⁴³ See *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1027 (10th Cir. 2001) (denying employer's motion for judgment as matter of law because "the evidence indicates that non-supervisory personnel were not provided with copies of the policy, nor were copies of the policy posted on all the bulletin boards in the mine"); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1314 (11th Cir. 2001) (holding that employer is "required to show that its sexual harassment policy was effectively published"); *Wilburn v. Fleet Fin. Group, Inc.*, 170 F. Supp. 2d 219, 229-30 (D. Conn. 2001) (finding prevention inadequate when employer neither distributed policy nor provided training that the policy mandated).

⁴⁴ See, e.g., *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 644 (7th Cir. 2000) (upholding grant of summary judgment to the employer, in part because the employer made the policy available in "public access" places where the employees could read it, even though the employer never distributed it to each employee).

⁴⁵ *Barrett*, 240 F.3d at 266; see also *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811 (7th Cir. 1999) (holding that a company's distribution of an appropriate policy often satisfies the first prong of the affirmative defense).

⁴⁶ *Reese v. Meritor Auto., Inc.*, 113 F. Supp. 2d 822, 827 (W.D.N.C. 2000); see also *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1268 (M.D. Ala. 2001) (denying employer the first prong of the affirmative defense because policy was not comprehensive, well-known, or vigorously enforced); *Reed v. Cracker Barrel Old Country Store, Inc.*, 133 F. Supp. 2d 1055, 1068 (M.D. Tenn. 2000) (inquiring not only about the existence of an anti-harassment policy, but also whether it is being implemented and is reasonably effective).

ii. Training and Other Prevention Efforts

Although distribution of an appropriate anti-harassment policy may be sufficient to satisfy the first prong of the affirmative defense, employers have nonetheless been advised to undertake additional prevention efforts to better insulate themselves from liability. Training is one example. *Faragher* and *Ellerth* were widely interpreted by employment advisors and commentators to make employee and supervisor training important, if not required.⁴⁷ Courts weigh anti-harassment training as a factor in evaluating an employer's preventative efforts,⁴⁸ but none has made it an absolute requirement for establishing the affirmative defense.⁴⁹ Employers may have other incentives to offer training, including but not limited to state law that sometimes requires it.⁵⁰

Employers have also undertaken more creative prevention efforts, such as monitoring employee e-mail for certain types of language or images,⁵¹ or providing individualized training programs.⁵² These efforts, while

⁴⁷ See, e.g., Peter Aronson, *Justices' Sex Harassment Decisions Spark Fears: Companies Review Policies to Avoid 'Ellerth' Liability*, 21 NAT'L L.J. (Nov. 9, 1998), at A1 (reporting that companies offering sexual harassment training cannot keep up with the demand after the *Faragher* and *Ellerth* decisions); Harriet Johnson Brackey, *Everyone Knows What Harassment Is—Don't They?*, MIAMI HERALD, Oct. 19, 1998, at 9 (“[T]raining on this subject [is] a proactive investment that companies are now almost required to make.”); David Rubenstein, *Harassment Prevention Is Now a Must for U.S. Companies*, 93 CORP. LEGAL TIMES 31 (Aug. 1999) (reporting that recent “Supreme Court decisions were widely interpreted to mean that having [training] programs in place could be a defense in a sexual harassment suit, and many companies have since moved to establish them”).

⁴⁸ See, e.g., *Shaw*, 180 F.3d at 812–13 (counting training of managers as one factor supporting summary judgment for employer based on affirmative defense); *Harrison*, 248 F.3d at 1028 (considering lack of training as one factor illustrating the inadequacy of the employer's prevention efforts). Applying Lauren Edelman's theory of legal endogeneity, Susan Bisom-Rapp argues convincingly that the legal and human resource professionals actually created this legal standard through their own prior emphasis on training. See Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 156–61 (2001) [hereinafter Bisom-Rapp, *Fixing Watches with Sledgehammers*].

⁴⁹ Cf. *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 268 (4th Cir. 2001) (refusing to find employer's prevention efforts inadequate just because employees could not recall the details of their training about the anti-harassment policy); *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 510 (6th Cir. 2001) (denying judgment as matter of law, in part because no anti-harassment training was given even though corporate policy mandated it).

⁵⁰ See CONN. GEN. STAT. § 46a-54 (2001) (requiring employers with more than fifty employees to provide sexual harassment training to supervisory personnel); 775 ILL. COMP. STAT. 5/2-105(B)(5)(c) (2001) (requiring, among other things, that state agencies provide sexual harassment training to all employees); VT. STAT. ANN. tit. 21, § 495h (2001) (requiring all employers to adopt a policy against sexual harassment and encouraging them to offer sexual harassment training to all employees). The incentive to offer training is further reinforced by the EEOC's policy guidance, issued in the wake of *Faragher* and *Ellerth*. The EEOC implores employers to offer general anti-harassment training to all employees, as well as targeted training to supervisory employees. EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, EEOC COMP. MAN. (BNA), June 18, 1999, N:4075, at 17, [hereinafter *EEOC Enforcement Guidance*] available at <http://www.eeoc.gov/docs/harassment.html>.

⁵¹ See Emily Madoff, *E-Mail's Role in Hostile Work Environment*, N.Y.L.J., Aug. 23,

certainly not necessary to the affirmative defense, are also weighed in the employer's favor.⁵³

There is, however, a certain disincentive for taking any preventative measure beyond those expressly required by the affirmative defense. When a victim complains, the employer, at least theoretically,⁵⁴ cannot prevail on the affirmative defense because the second prong requires the plaintiff employee to have unreasonably failed to take advantage of corrective opportunities provided by the employer to avoid harm.⁵⁵ Thus, employers may have a disincentive to undertake any employer measures that go beyond the minimum requirements if those additional measures actually *induce* victims to complain. There is thus an "incentive to exercise a minimal amount of care that satisfies the judicial standard but nonetheless results in an atmosphere that ultimately discourages complaints."⁵⁶

b. Correction

Two rules provide employers with an incentive to respond to complaints of harassment. First, employers are liable for any harassment—wrought by supervisors, co-workers, or third parties—about which they knew or should have known and failed to stop.⁵⁷ This negligence principle sets a minimum threshold for liability, thereby providing an incentive for employers to intervene in all cases where they have actual or constructive notice of harassment.

1999, at S6 (urging employers to read all employee e-mail to protect against sexual harassment liability in the wake of *Faragher* and *Ellerth*).

⁵² See Richard D. Wellbrock, *Sexual Harassment Policies and Computer-Based Training*, 26 CMTY. C. REV. 51, 65 (1999) (advocating a computer-based training model for sexual harassment education, in part because it can tailor the training to user responses and knowledge).

⁵³ See Sindy J. Policy, *Employer Monitoring of Employee Internet and Email Use: An Effective Litigation Avoidance Tool*, 17 COMPUTER & INTERNET L. 21 (2000).

⁵⁴ See *supra* note 23.

⁵⁵ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

⁵⁶ David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1301 (2001) (noting the disincentive to going beyond compliance with basic standards of prevention). These authors suggest that, under the current standard, employers:

aiming to avoid liability would be best served by not offering a [1-800] hotline or other similar methods of reporting harassment that are easy and anonymous. . . . [Employers] would be well-advised not only to scrap the anonymous reporting mechanisms, but also to eliminate or discontinue so-called "sexual harassment training" programs for employees (but obviously not for managers) that go above and beyond the reasonableness necessary to win on an *Ellerth*- or *Faragher*-based motion.

Id. at 1300–01 (internal citations omitted).

⁵⁷ See *Faragher*, 524 U.S. at 799.

Beyond mere negligence, employers are also liable for all supervisory hostile environment harassment unless they can satisfy the affirmative defense requirements. The first prong of the affirmative defense, discussed above in the context of prevention, also requires employers to prove that they have taken reasonable care “to . . . correct any sexually harassing behavior.”⁵⁸ Adequate correction entails two things: maintaining an appropriate grievance procedure and responding appropriately to actual complaints.

i. Grievance Procedures

In order to satisfy the second prong of the affirmative defense, employers must maintain a grievance procedure designed specifically to handle sexual harassment complaints.⁵⁹ For liability purposes, the general requirement is that a grievance procedure must be constructed to encourage complaints from victims.⁶⁰ The only specific rules to come from this general standard are that an adequate procedure must include a bypass process to permit a victim to avoid filing a complaint with the harasser, and the policy must clearly identify those individuals designated to receive complaints.⁶¹ Beyond these minimal requirements, courts have tolerated varied complaint procedures and have given employers some discretion in mandating the type or form of complaint necessary to trigger a formal investigation.⁶²

ii. Response to Complaints

Beyond simply maintaining a complaint procedure, employers must also adequately respond to known incidents of harassment. Employers can acquire notice through formal complaints⁶³ or readily observable har-

⁵⁸ *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

⁵⁹ *See* *Molnar v. Booth*, 229 F.3d 593, 601 (7th Cir. 2000) (finding employer’s corrective measures inadequate because the general anti-discrimination policy “did not provide any guidance as to what employees should do in the face of sexual harassment”).

⁶⁰ *Cf.* *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1269 n.22 (M.D. Ala. 2001) (refusing to grant employer summary judgment on the affirmative defense where there was evidence to suggest that mid-level supervisors blocked plaintiff’s attempts to report harassment to higher-ranking supervisors); *Thomas v. BET Soundstage Rest.*, 104 F. Supp. 2d 558, 565 (D. Md. 2000) (noting “evidence that the policy was implemented with the use of intimidating interrogation tactics which could effectively discourage individuals from utilizing the complaint process” as an additional flaw in employer’s efforts to correct harassment).

⁶¹ *See supra* text accompanying note 38.

⁶² *See, e.g., Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1297–99 (11th Cir. 2000) (approving policy with only one person designated to receive complaints).

⁶³ A corollary to this principle is that employers cannot honor a victim’s request for inaction without jeopardizing their subsequent ability to prove the affirmative defense. *See, e.g., O’Dell v. Trans World Entm’t Corp.*, 153 F. Supp. 2d 378, 390 n.5 (S.D.N.Y. 2001) (“[A]n employer has an obligation to investigate a claim of sexual harassment even when

assment in the workplace; both trigger the duty to respond.⁶⁴ Courts have given employers leeway to set their own complaint procedures,⁶⁵ but have said that these procedures should not be so narrow as to evade responsibility for obvious problems of harassment. One employer was deprived of the affirmative defense, for example, by failing to respond to a complaint that did not use the precise words "sexual harassment," even though the complainant described behavior that clearly violated the employer's internal policy.⁶⁶ In contrast, another employer was exonerated from liability despite the employee's claim that the employer had a duty, upon noticing that she and her supervisor spent a great deal of time together, to make sure her relationship with her supervisor was consensual.⁶⁷

Based on these rules about notice, it appears that employers must investigate all harassment complaints they receive,⁶⁸ and they must take responsive measures reasonably calculated to stop the harassment.⁶⁹

the employee decides not to proceed with her complaint.").

⁶⁴ See, e.g., *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 510 (6th Cir. 2001) (denying employer summary judgment on the affirmative defense based in part on evidence that "goosing was a frequent occurrence at the facility, but that no one was ever disciplined, even when supervisors witnessed the practice"); *Thomas*, 104 F. Supp. 2d at 568 (stating that employer may be "charged with constructive knowledge of sexual harassment, even if unreported, if the harassment was so broad in scope, and so permeated the workplace, that it must have come to the attention of someone authorized to do something about it").

⁶⁵ Some courts have found that the duty to respond is only triggered by a complaint that correctly utilizes an employer's internal grievance procedure, even though the employer may have received actual notice of harassment through some other means. See, e.g., *Madray*, 208 F.3d at 1300 (complaint to non-designated managers does not put the employer on notice of harassment); *EEOC v. Dinuba Med. Clinic*, 222 F.3d 580, 587 (9th Cir. 2000) (suggesting that employer could have required complaints to be in writing, although it did not). This approach, while perhaps consistent with the affirmative defense, ignores the baseline negligence standard, which holds employers responsible for any harassment that they knew about and failed to address. Cf. *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (complaining to co-workers does not trigger duty to respond absent evidence that complaints "filtered up to management"). Some courts have gone to the other extreme, charging an employer with constructive notice when employees, on whom the employer has imposed an internal duty to report, learn of harassment, whether or not they report it to the employer. See, e.g., *Dinkins*, 133 F. Supp. 2d at 1269.

⁶⁶ See *Gentry v. Exp. Packaging Co.*, 238 F.3d 842, 848 (7th Cir. 2001).

⁶⁷ See *Reese v. Meritor Auto., Inc.*, No. 00-1604, 2001 U.S. App. LEXIS 3517, at *11-*12 (4th Cir. Mar. 8, 2001).

⁶⁸ See, e.g., *Beard v. Flying J., Inc.*, 266 F.3d 792, 799 (8th Cir. 2001) (criticizing employer for failing to interview other female employees who had similar stories of harassment and failing to react to allegations of recurring harassment by a supervisor who had been warned); *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1209 (10th Cir. 2000) (criticizing the employer's investigation as "inadequate, if not a complete sham" where the employer did not even know which party was the harasser and which the victim); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (rejecting affirmative defense where employer "neither conducted the 'thorough investigation' nor took the 'appropriate action' promised by its . . . policy").

⁶⁹ See *Kohler v. Inter-Tel Tech.*, 244 F.3d 1167, 1181 (9th Cir. 2001) (holding that employer undertook "a paradigm of the reasonable efforts" by reviewing policy with offender, reprimanding him, threatening to deny him a promotion, and conducting anti-harassment training seminars for the entire work force); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 876 (9th Cir. 2001) (citing the lack of progressive discipline for repeat offenses as part of

Thus, when a corporate officer responded to one victim's formal complaint by telling her "that things had been that way for a long time at [this company], that the business world was full of pricks like Charlie . . . and . . . to get used to it because that is the way the business world was," the employer failed to satisfy the second prong of the affirmative defense.⁷⁰

The exact responsive measures that need to be taken are clearly reserved to the employer's discretion.⁷¹ Successfully stopping harassment is generally treated as a sufficient,⁷² but not necessary, condition for the employer to prevail on the first prong of the affirmative defense.⁷³

2. Communication to Employers

News of the *Faragher* and *Ellerth* decisions spread quickly through the world of human resources. Employers may first have learned of the decisions and their impact through newspaper reports,⁷⁴ EEOC guidelines published the following year,⁷⁵ or perhaps through the academic com-

employer's inadequate corrective measures). *But cf.* *Reese v. Meritor Auto., Inc.*, 113 F. Supp. 2d 822, 828 (W.D.N.C. 2000) (finding that corrective action may be sufficient even when it is not designed to make the harasser suffer).

⁷⁰ *Cadena*, 224 F.3d at 1209; *see also* *EEOC v. R & R Ventures*, 244 F.3d 334, 341 (4th Cir. 2001) (finding corrective measures inadequate where employer accused complainant of overreacting and failed to investigate her complaints); *Beard v. Flying J, Inc.*, 116 F. Supp. 2d 1077, 1092 (S.D. Iowa 2000) (stating that jury could find employer's corrective measures inadequate where the harasser was kept on as a manager despite numerous complaints of harassment that the employer found to be credible).

⁷¹ *See, e.g.*, *Swingle v. Henderson*, 142 F. Supp. 2d 625, 637 (D.N.J. 2001) ("If an employer chooses an adequate remedy to prevent sexual harassment, the aggrieved employee cannot object to such a remedy and dictate instead that her employer take such remedial action as the employee deems appropriate.").

⁷² *See id.* (holding that employer cannot be liable when its response stops harassment); *Anderson v. Dillard's, Inc.*, 109 F. Supp. 2d 1116, 1125 (E.D. Mo. 2000) (describing how employer's corrective measures may be insufficient when, even though harassment stopped, plaintiff continued to encounter other difficulties while working for the harasser).

⁷³ *See, e.g.*, *Savino v. C.P. Hall Co.*, 199 F.3d 925, 932-34 (7th Cir. 1999) (granting affirmative defense despite employer's failure to end harassment); *Watkins v. Prof'l Sec. Bureau, Ltd.*, 1999 WL 1032614, at *4 (4th Cir. Nov. 15, 1999) (per curiam) (concluding that an employer can satisfy the first prong of the affirmative defense even without stopping harassment following a complaint); *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999) ("An 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."); *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) ("Sometimes . . . 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."). *But see* *Harbison v. Pilot Air Freight*, No. IP 99-0882-C, 2001 U.S. Dist. LEXIS 5024, at *76-*78 (S.D. Ind. Mar. 16, 2001) (finding that recurring harassment undermines employer's claim that it took reasonable measures to correct the problem).

⁷⁴ *See, e.g.*, *Aronson*, *supra* note 47, at 1 ("[E]mployment law specialists are reporting a dramatic increase in inquiries and requests for training from large corporations that may just need to 'tweak' their sexual harassment policy to small companies that need to start from scratch."); *Rubenstein*, *supra* note 47, at 31 (describing the detailed prevention program of one large company as a model for others).

⁷⁵ *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 50.

mentary that eventually emerged.⁷⁶ But many employers were made aware of the rules of liability and their obligations thereunder by lawyers and consultants. Law firms issued warnings to their clients about the new rules.⁷⁷ Employment law letters were published in droves.⁷⁸ Employee- and management-side reporters tracked and interpreted the opinions for their constituencies.⁷⁹ Bar associations and law firms offered continuing legal education programs on current developments in harassment law.⁸⁰ Consequently, human resource consultants found themselves in high demand.⁸¹

Most of this advice was formulated as a "recipe[] for legal compliance," urging employers to take specific steps to avoid harassment and litigation.⁸² Evidence suggests that employers are quick to incorporate this type of advice into their policies and procedures, given their desire to avoid interference from courts and regulators, the pressure to appear concerned about and compliant with anti-discrimination rules,⁸³ and the desire to control the risk of litigation and its consequences.⁸⁴

⁷⁶ See, e.g., Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959 (1999) [hereinafter Bisom-Rapp, *Bulletproofing the Workplace*].

⁷⁷ See, e.g., Samuel D. Walker & David S. Fortney, *Sexual Harassment: The New Rules of the Road*, 6 METRO. CORP. COUNSEL, Dec. 1998, at 12 (identifying six practical steps for employers to take to avoid liability under *Faragher* and *Ellerth*); see also Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 76, at 976–80 (discussing the various mechanisms by which lawyers transmit advice about new developments in anti-discrimination law to employers).

⁷⁸ See, e.g., Dinse, Knapp & McAndrew, P.C., *Would Your Policies Withstand a 'Closer Look'?*, VT. EMP. L. LETTER (Nov. 1998) (describing the Court's new opinions and providing sample policies that would pass muster under them).

⁷⁹ See, e.g., Michelle E. Phillips, *EEOC Guidance on Sexual Harassment for Supervisors*, 5 ANDREWS SEXUAL HARASSMENT LITIG. REP., Aug. 1999, at 3 (providing recommendations to employers on how to "revise and distribute harassment policies in order to comply with federal law").

⁸⁰ See, e.g., SUFFOLK COUNTY BAR ASS'N, SEXUAL HARASSMENT IN THE WORKPLACE (May 17, 2000) (on file with author).

⁸¹ See, e.g., Rebecca Ganzel, *What Sexual Harassment Really Prevents*, 10 TRAINING 86 (Oct. 1998) (reporting that "trainers saw their workload spike up sharply" after the Supreme Court decided *Faragher* and *Ellerth*).

⁸² Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 76, at 980 (drawing conclusion based on content analysis of advice and training materials produced by management-side employment lawyers). Some advice is explicitly designed to reduce liability. For example, employers are warned about how to document investigations so that they will have evidence to use at trial. Aronson, *supra* note 47, at 1 (reporting that many employers now require all employees to sign a document confirming they have read the company's sexual harassment policy); Canoni, *supra* note 33, at 12 ("Employers must conduct both regular and follow-up training sessions to ensure that new hires and transfers are informed. Attendance should be mandatory, with sign-in sheets and follow-up sessions for absent employees."); see also James J. Oh, *Internal Sexual Harassment Complaints: Investigating to Win*, 18 EMPL. REL. L.J. 227, 227 (1992) (outlining components of investigation necessary to "avoid or limit liability").

⁸³ Employers arguably create goodwill by adapting their workplace environments to common cultural norms, one of which is "adherence to antidiscrimination principles." Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 76, at 987.

⁸⁴ See *id.* at 984–88. Bisom-Rapp also makes out a compelling case that lawyers who

3. *Employer Responses*

Employers, by and large, have incorporated the incentives described above into their workplace structures.⁸⁵ Even before the Supreme Court clarified the standards for liability, most employers had an array of measures in place designed to prevent harassment and limit their exposure to liability.⁸⁶ Studies indicate that the widespread enactment of employment policies and procedures began in the late 1960s, spurred by the enactment of Title VII and the surrounding uncertainty about employers' responsibilities and their potential for liability.⁸⁷

Policies and procedures dealing specifically with sexual harassment came later, many after the Supreme Court's 1986 decision in *Meritor Savings Bank*, which made clear that liability turned, at least in part, on employer behavior.⁸⁸ Anecdotal evidence suggests that employers have continued to enact and update policies in response to incentives created by the Supreme Court's recent clarification of the liability regime.⁸⁹

A 1999 study conducted by the Society for Human Resources Management (SHRM Survey) reported that ninety-seven percent of responding employers have written policies against sexual harassment.⁹⁰ Most of these policies include the legally required elements such as a definition of prohibited conduct (ninety-three percent) and identification of a chain of communication for making complaints (ninety-three percent), as well as additional "best practices" elements like a stated intention or mission to eradicate workplace harassment (eighty-one percent) or a promise of confidentiality (seventy-eight percent).⁹¹ Approaches to disseminating information to employees vary among employers. Eighty-five percent in-

give prevention advice overstate the risks, thereby creating a stronger need for their services. *See id.* at 983; *see also* Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC'Y REV. 47, 74-75 (1992); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 379 (1997) (predicting that the "systematic overstatement of risk is a robust, if not universal, phenomenon in the legal profession").

⁸⁵ Other institutions have implemented sexual harassment prevention measures as well. *See, e.g.*, Troy M. Johnson, *Sexual Harassment Prevention: A Survey of Current Practices*, CUPA J. 21, 22 (Fall 1999/Winter 2000) (surveying universities about the types of preventative and corrective measures they have undertaken).

⁸⁶ Although this chronology might suggest that employers are motivated by something other than litigation prevention, most employers were simply (correctly) anticipating that these measures would help them avoid future liability. Employer behavior, in turn, helped create the legal standard itself. *See* Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 76, at 969 (describing role of employer norms in creating standards of liability).

⁸⁷ *See id.* at 968 (describing sociological studies by Frank Dobbin and Lauren Edelman).

⁸⁸ 477 U.S. 57, 71-73 (1986).

⁸⁹ *See* Phillips, *supra* note 79, at 3.

⁹⁰ *See* SHRM SURVEY, *supra* note 9, at 6. Another survey, conducted by Human Resources Executive, reported that sexual harassment policies are the most common of all employer policies, enacted by at least ninety-five percent of their respondents. *See* HUMAN RESOURCES EXECUTIVE 39 (Dec. 1993).

⁹¹ *See* SHRM SURVEY, *supra* note 9, at 7.

clude the harassment policy in the employee handbook, but only sixty-one percent review the policy in a training session.⁹² Forty-two percent post their policies in common areas.⁹³

Many employers now undertake preventative measures beyond simply adopting and distributing an anti-harassment policy.⁹⁴ More than half of employers (sixty-two percent) provide sexual harassment prevention training, with larger organizations more likely to offer it than smaller ones.⁹⁵ Most employers that offer training make it mandatory for their employees, especially supervisory personnel, and forty percent rely on legal counsel or outside consultants to conduct it.⁹⁶ Every federal agency provides training, although only one-third make it mandatory for all employees.⁹⁷

Larger employers, particularly those with documented problems of harassment, have taken other measures to prevent future harassment and avoid future litigation. Mitsubishi Motor Manufacturing of America, for example, after settling private and EEOC lawsuits at a cost of more than \$40 million,⁹⁸ hired a former Secretary of Labor to conduct an audit of the company's employment practices and workplace environment.⁹⁹ Pursuant to the auditor's findings, the company adopted a zero-tolerance policy for harassment and created an entire administrative department devoted to training employees about the policy and investigating harassment complaints.¹⁰⁰ In addition to requiring mandatory re-training every two years for employees, Mitsubishi increased investigations of complaints and the imposition of discipline on offenders.¹⁰¹

Employers have formalized their corrective measures as well as their preventative ones. Eighty-six percent of respondents to the SHRM Survey reported that they have formal investigatory processes for sexual harassment. Most involve members of the human resource department in the investigation (ninety-three percent); in-house legal staff members are involved by significantly fewer employers (twenty-two percent).¹⁰² Investigations are relatively short, lasting on average between two and seven

⁹² See *id.*

⁹³ See *id.*

⁹⁴ This survey suggests that employers either have not been counseled as to the "efficient" level of prevention or are trying to do more than limit liability. See *supra* text accompanying notes 54–56.

⁹⁵ See SHRM SURVEY, *supra* note 9, at 8.

⁹⁶ See *id.* at 9.

⁹⁷ See USMSPB 1995, *supra* note 7, at 42.

⁹⁸ See *Mitsubishi Harassment Settlement Approved*, N.Y. TIMES, June 26, 1998, at D20.

⁹⁹ See Barnaby J. Feder, *\$34 Million Settles Suit for Women at Auto Plant*, N.Y. TIMES, June 12, 1998, at A12.

¹⁰⁰ See Peter Aronson, *Mitsubishi Comes Back From Disaster of 1998*, NAT'L L.J. (Apr. 29, 2002), at A23.

¹⁰¹ See *id.*

¹⁰² See *id.*

business days.¹⁰³ Many employers have also instituted mediation or arbitration to resolve harassment complaints without resort to litigation.¹⁰⁴

D. Victims: Incentives, Communication, and Responses

1. Victim Incentives

The new regime targets victim behavior, as well as that of the employer and the harasser. The primary incentive comes from the second prong of the affirmative defense, which requires the employer to prove that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁰⁵ If the employer can prove that it behaved well *and* that the victim failed to properly report the harassment, it can prevail on the affirmative defense.

As a general matter, courts have strictly enforced the victim’s duty to complain. Cases analyzing this prong of the affirmative defense have focused on whether the victim made correct use of the grievance procedures, how long the victim waited to complain, and whether a victim who failed to complain had any justification for her silence.

Courts have also mandated that victims strictly comply with the procedures outlined in the employer’s anti-harassment policy, as long as the policy was made available to employees.¹⁰⁶ For example, an employee who complains about harassment to her direct supervisor rather than to someone designated in the policy is generally held not to have taken advantage of corrective opportunities provided by the employer.¹⁰⁷ Courts also do not generally permit victims to rely on outside complaints to the EEOC or a union as a substitute for utilizing the employer’s internal complaint procedures, even though the complaints are eventually reported back to

¹⁰³ *See id.*

¹⁰⁴ *See infra* text accompanying notes 401–402.

¹⁰⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

¹⁰⁶ *See, e.g., Mernik v. Classic Cars, Inc.*, NO 3:99-CV-1327-P, 2000 U.S. Dist. LEXIS 9373, at *34–*35 (N.D. Tex. June 28, 2000) (finding plaintiff’s mention to employer of “crude and vulgar” behavior was insufficient to constitute availment of the employer’s sexual harassment procedures).

¹⁰⁷ *See Dowdy v. North Carolina*, No. 01-1706, 2001 U.S. App. LEXIS 24382, at *3 (4th Cir. Nov. 13, 2001) (holding that employer satisfied second prong of the affirmative defense through evidence that employee, despite attending a sexual harassment training course and having a copy of the sexual harassment policy available to her, complained to wrong supervisor); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1300-02 (11th Cir. 2000) (finding that complaining to managers not designated by the policy is unreasonable for purposes of the affirmative defense); *Green v. Wills Group, Inc.*, 161 F. Supp. 2d 618, 626 (D. Md. 2001) (holding that complaining to wrong person rendered victim’s behavior unreasonable); *cf. Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1177–78 (N.D. Iowa 2000) (holding that speaking with manager not specified in policy may be reasonable since designated person called her “paranoid” and was generally unresponsive to her complaints).

the employer.¹⁰⁸ Additionally, victims must cooperate with the employer's investigation.¹⁰⁹

Courts have found delays as short as seven days to be unreasonable,¹¹⁰ though the acceptable lag time varies with the severity of the harassment.¹¹¹ Courts have not been sympathetic to claims that the victim was waiting to see if the behavior continued or to gather more evidence of harassment.¹¹²

Courts have been generally reluctant to accept excuses for failing to complain.¹¹³ In many jurisdictions, a "generalized fear of retaliation" constitutes an *insufficient* justification for ignoring an employer's internal grievance procedure.¹¹⁴ There has, however, been some recognition at the summary judgment stage that victims should have the opportunity to prove that the fears they harbor have an objective or reasonable basis.¹¹⁵ For

¹⁰⁸ See, e.g., *Jackson v. Ark. Dep't of Educ.*, 272 F.3d 1020, 1025 (8th Cir. 2001) (finding that electing to file a grievance with the EEOC rather than the employer constitutes an unreasonable failure to take advantage of corrective opportunities); cf. *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 699–700 (7th Cir. 2001) (finding victim's external complaint to be an adequate substitute because district's policy made internal grievance procedure optional).

¹⁰⁹ See, e.g., *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 643 (7th Cir. 2000) (holding that failing to give honest answers to employer during investigation is unreasonable); *McCluney v. Cuomo*, 83 Fair Empl. Prac. Cas. (BNA) 893, 899 (N.D. Tex. 2000) (finding that denying to investigator that harassment occurred is unreasonable). *But see Harbison v. Pilot Air Freight*, No. IP 99-0882-C, 2001 U.S. Dist. LEXIS 5024, at *81 (S.D. Ind. Mar. 16, 2001) (holding that failing to turn over plaintiff's notes to the employer for purposes of the investigation was not necessarily unreasonable).

¹¹⁰ See *Marsicano v. Am. Soc'y of Safety Eng'rs*, No. 97-C7819, 1998 WL 603128, at *7 (N.D. Ill. Sept. 4, 1998) (finding seven-day delay unreasonable); see also *Jackson*, 272 F.3d at 1026 (holding victim's more than nine-month delay before complaining to be too long under the second prong); *Newsome v. Admin. Office of Courts*, 103 F. Supp. 2d 807, 820 (D.N.J. 2000) (describing victim's two-year delay before complaining as "eminently unreasonable"). *But see, e.g., EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 511 (6th Cir. 2001) (excusing victim for failure to complain after first incident because "he was new to the company, had no witnesses, and the harasser was his supervisor").

¹¹¹ See *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269–70 (4th Cir. 2001) (finding that the "gravity and numerosity of the incidents" made it unreasonable for victim to have waited to complain).

¹¹² See *id.* at 269. *But see Harbison*, 2001 U.S. Dist. LEXIS 5024, at *80 (holding that jury may find it reasonable for plaintiff to delay complaining until conduct reached a "certain level of persistence and offensiveness").

¹¹³ *But see Reed v. Cracker Barrel Old Country Store, Inc.*, 133 F. Supp. 2d 1055, 1069 (M.D. Tenn. 2000) (identifying factors that may excuse a victim's failure to complain).

¹¹⁴ *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1026 (10th Cir. 2001) (holding that "a generalized fear of retaliation does not excuse a failure to report sexual harassment") (quoting *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001)); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (holding that being "too scared" is not a justification for failing to complain without evidence to substantiate such fears); *Hill*, 218 F.3d at 644 (holding that "apprehension does not eliminate the requirement that the employee report harassment"); *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 493 (S.D.N.Y. 1998) (holding that conclusory allegations of feared repercussions do not excuse failure to complain).

¹¹⁵ See, e.g., *Anderson v. Deluxe Homes*, 131 F. Supp. 2d 637, 651 (M.D. Pa. 2001) (holding that warnings from other employees that complaint would result in retaliatory firing might make plaintiff's failure to complain reasonable).

example, prior unresponsiveness of the employer may excuse a victim's failure to complain.¹¹⁶

2. *Communication to Victims*

The legal incentive for victims to respond to harassment in certain, narrowly defined ways is clear, but it is unlikely that victims will both be aware of the incentive and conform their behavior accordingly. Mechanisms for relaying advice to potential or actual victims are obviously limited. Lawyers and consultants who conduct training seminars and workshops represent the employer and may therefore predictably hesitate to give advice to employees that will have the effect of preserving a cause of action against the employer. Unlike defense lawyers, plaintiffs' lawyers rarely have the opportunity to counsel their clients *before* the offending action occurs.¹¹⁷

3. *Victim Responses*

Sexual harassment victims have traditionally tended not to utilize internal complaint procedures or otherwise formally report problems of harassment. Filing a complaint with an employer is in fact the least likely response for a victim of harassment.¹¹⁸ According to a recent study of federal employees, forty-four percent of those who had experienced sexual harassment took no action, while only twelve percent reported the conduct to a supervisor or other official.¹¹⁹ The low rate of reporting is somewhat startling given that the workplace surveyed is one in which every department has an established sexual harassment policy,¹²⁰ and seventy-eight percent of survey respondents reported knowing about the formal complaint channels available to them.¹²¹ Other surveys have affirmed comparably low rates of reporting.¹²²

¹¹⁶ See, e.g., *Young v. R.R. Morrison & Son*, 159 F. Supp. 2d 921, 927 (N.D. Miss. 2000) (noting that "a plaintiff may bring forward evidence of prior unresponsive action by the company or management to actual complaints" as a reason for not complaining). *But see* *Burrell v. Crown Cent. Petroleum, Inc.*, 121 F. Supp. 2d 1076, 1083-84 (E.D. Tex. 2000) (finding victim's failure to complain due to supervisors' participation in the harassment and their lack of appropriate response to harassment committed by others was unreasonable when complaint procedures provided for alternative means of reporting harassment).

¹¹⁷ See Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 76, at 981.

¹¹⁸ See, e.g., USMSPB 1995, *supra* note 7, at 33 (reporting that only six percent of victims filed a formal complaint).

¹¹⁹ See *id.* at 30.

¹²⁰ See *id.* at 40.

¹²¹ See *id.* at 33.

¹²² See Jean W. Adams et al., *Sexual Harassment of University Students*, 24 J.C. STUDENT PERSONNEL 484, 488-89 (1983) (finding that no student experiencing sexual advances, propositions, or extortion reported the incident to university officials); CULBERTSON ET AL., *supra* note 7, at 17 (showing victim reporting rates of twenty-four percent for enlisted women and twelve percent for female officers); Louise F. Fitzgerald et al., *The*

These surveys also reveal that little has changed over a period of time in which employers have made significant improvements in their equal employment practices and procedures generally, as well as to their harassment policies specifically. A 1981 survey of federal employees revealed that only three percent of female respondents who had experienced harassment filed a formal complaint with their employer, while sixty-one percent did nothing at all.¹²³ A 1988 survey of the same workforce showed a similarly low rate of reporting, with only five percent of victims filing an internal complaint.¹²⁴ A 1995 survey shows victims of harassment to be almost as unlikely to file formal complaints of harassment with their employers as they were fifteen years prior.¹²⁵

Despite employee surveys that suggest the rate of reporting has stagnated at a relatively low level, surveys of employers suggest some increase in reporting.¹²⁶ Employers have reported an increase in the filing of internal grievances and complaints,¹²⁷ with larger organizations more likely to have complaints of harassment filed against them than smaller ones.¹²⁸

Even with an increase in the absolute number of internal complaints, these surveys support the conclusion that victims remain, overall, unlikely to report harassment to their employers. Large employers, for example, receive an average of six complaints per year, about two-tenths of one percent per 100 employees.¹²⁹ Yet, surveys done in the same time period, albeit based on different workforces, show that four in ten women report having experienced harassing behaviors in the previous two years.¹³⁰ Taken together, these numbers suggest a significant gap between the

Incidence and Dimensions of Sexual Harassment in Academia and the Workplace, 32 J. VOCATIONAL BEHAV. 152, 162 (1988) (finding that only three percent of their sample had attempted to report a sexual harassment experience); BARBARA A. GUTEK, *SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIORS AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS* 71 (1985) [hereinafter GUTEK, *SEX AND THE WORKPLACE*] (describing a survey of workers in Los Angeles in which eighteen percent of women harassed reported it to someone in authority); James F. Gruber & Lars Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 WORK & OCCUPATIONS 271, 286-87 (1982) (showing a victim reporting rate of only seven percent for harassed female automobile workers); see also *The Civil Rights Act of 1991: Hearing on H.R. 1 Before the House Comm. on Educ. and Labor*, 102d Cong., 1st Sess., 172 (1991) (statement of Dr. Freada Klein) (estimating that at least ninety percent of sexual harassment victims are unwilling to report the conduct).

¹²³ USMSPB 1981, *supra* note 6, at 67, 71.

¹²⁴ USMSPB 1988, *supra* note 7, at 27.

¹²⁵ See, e.g., USMSPB 1995, *supra* note 7, at 29 ("The single most common response of employees who are targets of sexual harassing behaviors hasn't changed . . . since 1980. That response has been, and continues to be, to ignore the behavior or do nothing.")

¹²⁶ See SHRM SURVEY, *supra* note 9, at 5.

¹²⁷ See *id.* (reporting that thirty percent of complaints in a recent four-year period were received in the last year, compared with only fifteen percent in the first).

¹²⁸ See *id.* (reporting that seventy-five percent of employers with 250 employees or more had at least one sexual harassment complaint during the survey period, compared with only thirty-five percent of smaller employers).

¹²⁹ See *id.*

¹³⁰ USMSPB 1995, *supra* note 7, at 13.

number of women harassed and the number of women who report the harassment. Surveys of victims and employers both indicate that although victims respond in myriad ways to harassing behavior, most are informal and nonconfrontational.¹³¹

There are a number of studies designed to examine the ways in which victims respond to harassing behavior.¹³² Many of them rely on participants' responses to questions about how they would respond to various hypothetical scenarios to assess the likely victim response to harassment. These laboratory studies tend to show that many participants believe they would be able to handle the situation themselves. Fifty-three percent of respondents in one study indicated they would "have a talk" with the harasser.¹³³ Seventy-nine percent of respondents in another study who had "received at least one sexual overture from a man at work reported that they were confident they could handle future overtures."¹³⁴ One problem with these studies, however, is that these optimistic conclusions by research participants about their ability to handle hypothetical situations of harassment are rarely replicated by real victims.¹³⁵

Real victims tend at first to ignore incidents of harassment and subsequently respond with mild retributions like, "I'm not your type."¹³⁶ They also tend to find ways to rationalize the harassment by attributing it to non-recurring circumstances, like the wearing of a particular outfit, or treating it as a joke.¹³⁷ Women also take sometimes costly steps to avoid the harasser, the job, or the situation, rather than deal with the harassment directly.¹³⁸ Early studies rated these responses according to their

¹³¹ See generally Grossman, *supra* note 5, at 723–28 (reviewing literature on victim response); see also Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 136–41 (2001) (reviewing literature on victim response); Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 175–84 (2001) (reviewing literature on victim response).

¹³² See, e.g., David E. Terpstra & Douglas D. Baker, *The Identification and Classification of Reactions to Sexual Harassment*, 10 J. ORG. BEHAV. 1, 12 (1989) [hereinafter Terpstra & Baker, *The Identification and Classification of Reactions*]; see also Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 37 (1993) (reviewing studies).

¹³³ Gutek & Koss, *supra* note 132, at 37 (reviewing surveys and studies).

¹³⁴ *Id.*

¹³⁵ See *id.*; see also Adams et al., *supra* note 122, at 489 (noting the "marked contrast between what students think they would do and what students actually do when confronted with [sexually harassing] behaviors"); Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 119 (1995) (noting that "actual victims have been shown to behave quite differently than research participants or the general public say they would behave").

¹³⁶ See Gutek & Koss, *supra* note 132, at 37.

¹³⁷ See *id.* at 38.

¹³⁸ See *id.*

degree of assertiveness, finding that real victims of harassment tend to respond in relatively non-assertive ways.¹³⁹

A later study, by Louise Fitzgerald, Suzanne Swan, and Karla Fischer, created an alternative framework, one that would both avoid the central critique of laboratory studies—that they do not predict the responses of real victims—and give a more complete depiction of victim response.¹⁴⁰ These researchers thus developed a system of coding actual victim responses to a variety of sexual harassment prevalence surveys. Fitzgerald and her colleagues also shifted the focus from measuring the degree of assertiveness to classifying responses as either internally or externally focused.¹⁴¹ This approach captures the cognitive strategies used by victims and gives a more complete picture of the ways victims respond to harassment.¹⁴²

The Fitzgerald study identifies common internally focused responses such as endurance (ignoring the harassment), denial (pretending it is not happening), reattribution (reinterpreting the situation so it is not defined as harassment), illusory control (blaming oneself), and detachment (separation from harasser or situation).¹⁴³ Common externally focused responses include avoidance of the harasser or situation, appeasement (putting off the harasser without direct confrontation), and social support (talking to friends or co-workers about the harassment), as well as more assertive responses like confronting the harasser or filing a complaint. The most infrequent response, the authors concluded, “is to seek institutional/ organizational relief. Victims apparently turn to such strategies as a last resort when all other efforts have failed.”¹⁴⁴

Given the vast literature documenting the unwillingness of victims to file formal complaints and the reasons behind it, the question becomes whether the new legal rules of liability will induce changes in the workplace that might in turn increase reporting rates. That question is addressed in Part II below, which evaluates the likelihood that the legal regime will improve corrective remedies for harassment victims.

¹³⁹ See, e.g., James E. Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 SOC. SCI. RES. 3 (1989); James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOC. SCI. Q. 814 (1986) [hereinafter Gruber & Bjorn, *Women's Responses*]; Gutek & Koss, *supra* note 132, at 37–38; Terpstra & Baker, *The Identification and Classification of Reactions*, *supra* note 132, at 2.

¹⁴⁰ Fitzgerald et al., *supra* note 135, at 119.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See *id.* at 119–20.

¹⁴⁴ *Id.* at 120.

II. EVALUATING THE NEW REGIME: PREVENTION OF HARASSMENT

As described in the previous Part, the affirmative defense and related rules of liability are calculated to influence three groups of individuals: employers, harassers, and victims. These rules should, as a matter of statutory interpretation, contribute to the goals of Title VII: (1) to prevent discriminatory conduct (here, harassment),¹⁴⁵ and (2) to compensate victims.¹⁴⁶ This Part examines whether the incentives created by the affirmative defense and adopted by employers are likely to serve the goal of prevention by reducing the incidence of sexual harassment.¹⁴⁷

For this legal regime to prevent harassment, the legal incentives must not only influence employers to take some preventative steps, but also ensure that the particular steps taken have a substantial likelihood of success. Understanding whether the law sets up a framework calculated to ensure success, rather than just compliance, requires a review of the literature concerning both the general causes of harassment and how discrete, testable preventative measures have been shown in empirical studies to influence harasser behavior.

A. *The Causes of Harassment*

Both individual and organizational factors are implicated in the problem of sexual harassment. Research shows proclivities to harass based on individual personality and group status, as well as organizational structures that permit those proclivities to be indulged.

¹⁴⁵ See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (crafting holding to conform to “Title VII’s deterrent purposes”); *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999) (describing Title VII’s “primary objective” as a “prophylactic one”) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

¹⁴⁶ See, e.g., *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 358 (1995) (“Compensation for injuries caused by the prohibited discrimination is [one goal of Title VII.]”); *Landgraf v. USI Film Prod.*, 511 U.S. 244, 282 (1994) (stating that the Civil Rights Act of 1991 “reflects Congress’ desire to afford victims of discrimination more complete redress for violations of [Title VII]”); see also *Kolstad*, 527 U.S. at 545 (acknowledging Title VII’s goal of remedying harm).

¹⁴⁷ Some important contributions to this inquiry have been made recently. See Beiner, *Sex, Science and Social Knowledge*, *supra* note 1, at 324, 334; Susan Bisom-Rapp, *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 BERKELEY J. EMP. & LAB. L. 1 (2001); Bisom-Rapp, *Fixing Watches with Sledgehammers*, *supra* note 48.

1. *Individual Factors*

Research about sexual harassment has revealed several different explanatory models that focus on the conduct and characteristics of the individuals who engage in harassing behavior. These models explore who (individually or because of particular group membership) is likely to harass and, to a lesser extent, what motivates their conduct. This Section discusses the natural/biological model and the boundary differentiation model, both of which bear on the issue of employer liability.

a. *The Natural/Biological Model*

The literature on sexual harassment often cites a natural/biological model of harassment, which hypothesizes that sexual harassment is a function of sexual desire generally and a function of men's tendency toward sexual aggression specifically.¹⁴⁸ Pursuant to this model, men are said to harass more than women—and to choose women as victims—because they have stronger sex drives, and their sexually aggressive behavior is perpetually reinforced by society. The model assumes not only that men are motivated by strong sex drives to commit harassment, but also that men and women are sexually attracted to one another and tend to act on those impulses.¹⁴⁹ Intent to dominate or discriminate is not part of this theory.¹⁵⁰

Although this model has been dismissed by most academics,¹⁵¹ survey data and empirical studies do reveal that men are significantly more likely to engage in harassing behavior than women. At least ninety percent of all harassment is committed by men,¹⁵² and men show a greater propensity toward harassment in laboratory studies.¹⁵³

¹⁴⁸ See Sandra S. Tangri et al., *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES 33 (1982); David E. Terpstra & Douglas D. Baker, *Sexual Harassment at Work: The Psychological Issues*, in VULNERABLE WORKERS: PSYCHOSOCIAL AND LEGAL ISSUES (M. J. Davidson & J. Earnshaw eds., 1991).

¹⁴⁹ See Tangri et al., *supra* note 148, at 35.

¹⁵⁰ See *id.*

¹⁵¹ Margaret S. Stockdale, *The Role of Sexual Misperceptions of Women's Friendliness in an Emerging Theory of Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 84, 94-95 (1993) (describing the natural/biological model and basis for rejecting it).

¹⁵² See USMSPB 1995, *supra* note 7, at 18 (ninety-three percent); SHRM SURVEY, *supra* note 9, at 5 (ninety-two percent); see also EEOC CHARGE STATISTICS, *supra* note 9 (in 2001, only fourteen percent of charges were filed by men). These surveys do not, however, give merit to other assumptions from this model, like the claim that harassers would "more likely be unmarried, and recipient/victims would be similar in age, race, and occupational status." Stockdale, *supra* note 151, at 94.

¹⁵³ Elissa L. Perry et al., *Propensity to Sexually Harass: An Exploration of Gender Differences*, 38 SEX ROLES 443, 454 (1998) (finding men to have higher Likelihood to Sexually Harass (LSH) scores than women). The system for evaluating an individual's propensity to harass, developed by John Pryor, is discussed *infra* notes 160-162 and ac-

Courts themselves have, perhaps unwittingly, drawn on aspects of this model in analyzing cases of opposite-sex harassment. The model's assumption about male sex drives was at play in early sexual harassment cases, one of which characterized a supervisor's harassing behavior as simply "satisfying a sexual urge" rather than committing an act of discrimination.¹⁵⁴ The same court drew on the model's assumption about mutual sexual attraction, suggesting that sexual harassment was a natural outgrowth of having men and women work together that could be prevented only by having "employees who were asexual."¹⁵⁵

The natural/biological model is also reflected in contemporary cases, which tend to assume that sexual behavior directed at a member of the opposite sex is motivated by sexual desire.¹⁵⁶ Rather than make an inquiry into whether a particular incident occurred "because of sex"—a statutory requirement that distinguishes behavior that is illegally discriminatory from behavior that is simply abusive—courts have instead tended to presume that any sexual behavior directed at a member of the opposite sex is motivated by sexual attraction to the victim and, absent evidence of the harasser's homosexuality or bisexuality, necessarily occurs because of the victim's sex.¹⁵⁷

Despite the prevalent assumption that men are more likely to harass than women, little has been done to explore *why* men are more likely to harass, even though there has been a recent resurgence of an analogous sociobiological claim about why men commit rape.¹⁵⁸ The focus, instead, has been on developing harasser profiles or models for predicting likely harassers.

Surveys, which have been responsible for publicizing a wealth of information about the prevalence of harassment and the demographic characteristics of victims, have unfortunately been of little use in detailing

companying text.

¹⁵⁴ *Corne v. Bausch & Lomb*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (dismissing sexual harassment complaint for failure to state a claim under Title VII).

¹⁵⁵ *Id.*

¹⁵⁶ *See, e.g., Davis v. Coastal Int'l Sec., Inc.*, No. 00-7293, 2002 U.S. App. LEXIS 417, at *7–*8 (D.C. Jan. 11, 2002).

¹⁵⁷ *See Vicki Schultz, Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1716 (1998) (noting and criticizing this tendency). *See also* GUTK, SEX AND THE WORKPLACE, *supra* note 122, at 1, 15–18, 129–52.

¹⁵⁸ *See* RANDY THORNHILL & CRAIG PALMER, A NATURAL HISTORY OF RAPE: BIOLOGICAL BASIS OF SEXUAL COERCION (2000); *see also* Owen Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827 (1999). There has also been some effort to use evolutionary psychology to explain sexual harassment. *See, e.g.,* Michael V. Studd & Urs E. Gattiker, *The Evolutionary Psychology of Sexual Harassment in Organizations*, 12 ETHOLOGY & SOC. BIOLOGY 249, 281 (1991) (finding support for hypothesis that "the psychological mechanisms underlying male sexual behavior have been designed by selection to motivate males to seek out and take advantage of as many sexual opportunities as feasible given the nature of the current social environment").

harasser characteristics. Harassers are, of course, unlikely to self-report, though some information about them is provided by victims.¹⁵⁹

While surveys have not been particularly useful in examining harasser characteristics, studies utilizing a laboratory setting to examine characteristics common to harassers have been instructive. The most significant innovation was contributed by John Pryor, who developed a predictive scale to rate potential harassers according to their Likelihood to Sexually Harass (LSH).¹⁶⁰ The rating system focuses only on quid pro quo harassment, a relatively severe form in which a supervisor threatens to withhold a reward or exact a punishment if a subordinate refuses to submit to sexual advances.

The propensity scale rates participants on a range from a High LSH to a Low LSH. The rating is formed by evaluating a participant's responses to a series of questions after reading different sexual harassment scenarios in which a male has the power to control a subordinate female's working conditions. The participant is asked, among other things, whether he would be likely to behave in the same way as the harasser in a particular scenario if he was assured that he would not be caught.¹⁶¹ High ratings on this scale tend to be positively correlated with sexist beliefs and similarly high ratings on a Likelihood to Rape scale, and negatively correlated with support for feminist attitudes and "empathic perspective-taking."¹⁶²

The research about individual proclivities finds, as surveys have, that men are more likely to harass than women, and that beliefs about gender and sex roles may further emphasize those tendencies. It may also support the theory that harassment is caused by male sexual aggression. But, because the participants in studies employing Pryor's methodology are asked to assess their likelihood to harass only when there is no possibility of punishment, the resulting LSH rating may be more reflective of their willingness to abuse power than their sexual desire or aggression per se.¹⁶³

b. The Boundary Differentiation Model

Another promising line of inquiry may be into perceptions of harassment and difficulties with boundary differentiation, which some researchers have suggested can explain a great deal of the sexual harass-

¹⁵⁹ See John B. Pryor, *Sexual Harassment Proclivities in Men*, 17 *SEX ROLES* 269, 270 (1987).

¹⁶⁰ *Id.* at 269.

¹⁶¹ See Stockdale, *supra* note 151, at 84, 86 (describing the LSH rating system).

¹⁶² *Id.*

¹⁶³ See Perry et al., *supra* note 153, at 445 (discussing Pryor's studies).

ment that occurs in the workplace.¹⁶⁴ Central to this approach is the near-universal empirical finding that men and women perceive sexual harassment differently,¹⁶⁵ although studies disagree as to the magnitude of such differences.¹⁶⁶

Gender differences in perception operate in two ways. First, studies show that where conduct is clearly sexual, men are more likely to see the situation positively, where women are more likely to perceive it negatively or as harassing.¹⁶⁷ Second, men may be more likely to perceive

¹⁶⁴ See, e.g., Antonia Abbey, *Misperception of Friendly Behavior as Sexual Interest: A Survey of Naturally Occurring Incidents*, 11 *PSYCHOL. WOMEN Q.* 173 (1987); Antonia Abbey, *Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?*, 42 *J. PERSONALITY & SOC. PSYCHOL.* 830 (1982) [hereinafter Abbey, *Sex Differences*]; Catherine B. Johnson et al., *Persistence of Men's Misperceptions of Friendly Cues Across a Variety of Interpersonal Encounters*, 15 *PSYCHOL. WOMEN Q.* 463 (1991); Frank E. Saal et al., *Friendly or Sexy? It May Depend on Whom You Ask*, 13 *PSYCHOL. WOMEN Q.* 263 (1989); Stockdale, *supra* note 151, at 84.

¹⁶⁵ See, e.g., Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 *LAW & HUM. BEHAV.* 33, 35 (1998) (“[M]en and women often, but not invariably, perceive social-sexual behavior, especially in the workplace, in different ways.”) (citations omitted); see also Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 *AM. PSYCHOL.* 1070, 1070–76 (1993); Mary A. Gowan & Raymond A. Zimmerman, *Impact of Ethnicity, Gender, and Previous Experience on Juror Judgments in Sexual Harassment Cases*, 26 *J. APPLIED PSYCHOL.* 596, 596–617 (1996); Gutek, *SEX AND THE WORKPLACE*, *supra* note 122, at 71 (1985); Barbara A. Gutek et al., *Interpreting Social-Sexual Behavior in a Work Setting*, 22 *J. VOCATIONAL BEHAV.* 30 (1983) [hereinafter Gutek, *Social-Sexual Behavior*]; William H. Hendrix et al., *Sexual Harassment and Gender Differences*, 13 *J. SOC. BEHAV. & PERSONALITY* 235, 247 (1998) (finding evidence to support hypothesis that “females saw potentially harassing events as more sexually harassing than their male counterparts”); Gary N. Powell, *Effects of Sex Role Identity and Sex on Definitions of Sexual Harassment*, 14 *SEX ROLES* 9, 16–17 (1986); ROSEMARIE SKAINE, *POWER AND GENDER: ISSUES IN SEXUAL DOMINANCE AND HARASSMENT* 178 (1996) (citing studies showing difference between male and female perceptions of harassment); see also Adams et al., *supra* note 122, at 487 (finding that female students are more likely to define behavior as sexual harassment in every category, particularly with respect to undue attention, sexist comments, and verbal advances). *But see* Danielle Foulis & Marita P. McCabe, *Sexual Harassment: Factors Affecting Attitudes and Perceptions*, 37 *SEX ROLES* 773, 788 (1997) (finding no support for hypothesis that perceptions of sexual harassment vary by gender); John J. Hartnett et al., *Perceptions of Males and Females Toward Sexual Harassment and Acquiescence*, 4 *J. SOC. BEHAV. & PERSONALITY* 291, 296–97 (1989) (finding no gender difference in recommended discipline for harassing supervisor or in negatively rating the harasser).

¹⁶⁶ Blumenthal, *supra* note 165, at 46; see also Douglas D. Baker et al., *Perceptions of Sexual Harassment: A Re-Examination of Gender Differences*, 124 *J. PSYCHOL.* 409, 410, 412 (1990) [hereinafter Baker et al., *Perceptions of Sexual Harassment*] (suggesting that “gender differences in perceptions of sexual harassment may be overstated”).

¹⁶⁷ See, e.g., S. Gayle Baugh & Diana Page, *A Field Investigation of Gender-Based Differences in Perceptions of Sexual Harassment*, 13 *J. SOC. BEHAV. & PERSONALITY* 451, 458–59 (1998) (finding a marginally significant effect that women perceive sociosexual behaviors at work as more harassing than men); Gutek et al., *Social-Sexual Behavior*, *supra* note 165, at 30, 44 (finding that women are likely to view ambiguous sexual behaviors less positively than men); Barbara A. Gutek et al., *Sexuality and the Workplace*, 1 *BASIC & APPLIED SOC. PSYCHOL.* 255, 259–60, 264 (1980); Alison M. Konrad & Barbara A. Gutek, *Impact of Work Experiences on Attitudes Toward Sexual Harassment*, 31 *ADMIN. SCI. Q.* 422, 435 (1986); Paula M. Popovich et al., *Perceptions of Sexual Harassment as a Func-*

ambiguous social interaction as having a sexual undertone than women; when men respond in kind, women may find "the response to be uninvited and unwelcome."¹⁶⁸ Conversely, when sexual behavior is initiated by women, men tend to find it flattering rather than harassing.¹⁶⁹

To the extent that men and women attach different interpretations to sociosexual behaviors in the workplace¹⁷⁰ and have differing thresholds for unwanted sexual attention,¹⁷¹ boundary differentiation problems may result. These problems are most applicable to hostile environment harassment. Differences in perception based on gender are more exaggerated with respect to less severe conduct, such as sexual jokes or comments. The differences tend to abate when perceptions relate to conduct that is either physical, assaultive, or explicitly based on a threat, because most individuals can easily identify these behaviors as harassing regardless of gender.¹⁷²

Other studies have tried to distinguish between differences in perception based on gender per se and differences based on gender roles and gender stereotypes.¹⁷³ For example, one study of the influence of gender roles on perceptions of harassment purported to show that women rated

tion of Sex of Rater and Incident Form and Consequence, 27 SEX ROLES 609, 622 (1992).

¹⁶⁸ Baugh & Page, *supra* note 167, at 452; *see, e.g.*, Abbey, *Sex Differences*, *supra* note 164, at 831-38; Robin M. Kowalski, *Inferring Sexual Interest from Behavioral Cues: Effects of Gender and Sexually Relevant Attitudes*, 29 SEX ROLES 13, 32 (1993); Saal et al., *supra* note 164, at 263-76.

¹⁶⁹ Gutek, *Social-Sexual Behavior*, *supra* note 165, at 44 (finding that sexual behavior initiated by a woman was viewed more positively both by male targets and observants than similar behavior initiated by a man); *see* Hendrix et al., *supra* note 165, at 248; Konrad & Gutek, *supra* note 167, at 430 (finding in study that men were four times more likely than women to be flattered by sexual overtures at work).

¹⁷⁰ *See* Baugh & Page, *supra* note 167, at 458-59. Studies in this vein were the basis for the movement to adopt a "reasonable woman" standard in evaluating hostile environment claims. *See* Blumenthal, *supra* note 165, at 33 (describing use of studies in debate over "reasonable woman" standard). The "reasonable woman" standard, adopted by the Ninth Circuit in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), has neither been explicitly adopted nor rejected by the Supreme Court. The Court has, however, on two occasions stated that harassment must be viewed from the perspective of the victim, leaving courts free to consider the individual victim's identity and perceptions. *See* *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (holding that the objective severity of harassment must be considered in light of "the social context in which particular behavior occurs and is experienced by its target"); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (holding that harassment must be evaluated based on the totality of the circumstances, which includes consideration of victim's identity and context).

¹⁷¹ Baugh & Page, *supra* note 167, at 452 ("[W]omen in general have a lower threshold for perceiving sexual harassment than do men.')

¹⁷² *See* Foulis & McCabe, *supra* note 165, at 775; Tricia S. Jones & Martin S. Remland, *Sources of Variability in Perceptions of and Responses to Sexual Harassment*, 27 SEX ROLES 121, 123 (1992) (noting studies that have found that the more severe the behavior, the more likely raters are to perceive the situation as harassing).

¹⁷³ *See* Barbara A. Gutek, *How Subjective is Sexual Harassment? An Examination of Rater Effects*, 17 BASIC & APPLIED SOC. PSYCHOL. 447, 461 (1995) [hereinafter Gutek, *Rater Effects*] (claiming that factors "associated with gender," such as stereotypes, propensity to harass, gender roles, and tolerance for harassment, can likely explain much of the gender difference in perceptions of harassment).

high on a “femininity” scale also showed greater tendencies to label behavior as sexual harassment, while men rating high on a “masculinity” scale tended to label relatively few behaviors as harassing.¹⁷⁴ Likewise, studies have shown perceptions of harassment to correlate inversely with sexist attitudes. For example, those holding sexist beliefs are less likely to define incidents as harassing than those not holding such beliefs.¹⁷⁵

One consequence of these different perceptions is that men, particularly those rating high in terms of masculinity, have broader definitions of acceptable social-sexual conduct and concomitantly narrower definitions of sexual harassment.¹⁷⁶ It has thus been suggested that men who harass “are carrying out behavior that they consider to be appropriate for their gender role.”¹⁷⁷ These gender-related gaps in perception are aggravated in the sexual harassment context because the definition of prohibited conduct is vague,¹⁷⁸ and the subjective perception of the recipient trumps the intent of the harasser.¹⁷⁹

Gender does not explain all differences in perception, however. Studies also suggest that differences exist based on past exposure to information about or complaints of sexual harassment, which can be a function of organizational background or time with a particular company.¹⁸⁰ These factors may look like gender differences, however, since women are more likely to have had past negative experiences at work and therefore are more likely to rate sexual behavior as harassing.¹⁸¹ Studies have

¹⁷⁴ See Foulis & McCabe, *supra* note 165, at 776 (reporting on prior studies reaching this conclusion); *id.* at 787 (reporting on authors’ own study reaching same conclusion); Powell, *supra* note 165, at 16 (finding a relationship between masculinity and an individual’s definition of sexual harassment).

¹⁷⁵ See Foulis & McCabe, *supra* note 165, at 777 (reporting on prior studies); *id.* at 787 (concluding based on authors’ own study that gender role stereotypes were the “strongest predictor of attitudes to sexual harassment”).

¹⁷⁶ Konrad & Gutek, *supra* note 167, at 436.

¹⁷⁷ Foulis & McCabe, *supra* note 165, at 775; see also David E. Terpstra & Douglas D. Baker, *A Framework for the Study of Sexual Harassment*, 7 BASIC & APPLIED PSYCHOL. 17, 19 (1986).

¹⁷⁸ See James E. Gruber, *A Typology of Personal and Environmental Sexual Harassment: Research and Policy Implications for the 1990s*, 26 SEX ROLES 447 (1992) (noting that the definition of sexual harassment is vague enough to permit different perceptions of what is prohibited; such differences may then result in different interpretations of what constitutes acceptable interpersonal behavior).

¹⁷⁹ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (mandating that claims be evaluated from the perspective of the victim); see also *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 566 (6th Cir. 1998) (noting that the intent of the harasser is irrelevant).

¹⁸⁰ See Konrad & Gutek, *supra* note 167, at 424–25; Aron Saperstein et al., *Ideology or Experience: A Study of Sexual Harassment*, 32 SEX ROLES 835, 835–42 (1995).

¹⁸¹ See, e.g., Gerald L. Blakely et al., *The Relationship Between Gender, Personal Experience, and Perceptions of Sexual Harassment in the Workplace*, 8 EMPLOYEE RESP. & RTS. J. 263 (1995) (being a target of sexual harassment may affect perceptions of harassing conduct); Konrad & Gutek, *supra* note 167, at 424 (noting a difference between men and women when labeling behavior as sexual harassment, partially due to women’s more frequent negative sexual harassment experiences). *But see* Foulis & McCabe, *supra* note 165, at 776 (finding, surprisingly, that experience with harassment varied inversely with perceptions of harassment).

also shown some variation in perceptions of harassment based on age,¹⁸² job category,¹⁸³ and job context.¹⁸⁴

Researchers examined the interrelationship between perceptions, job context, and gender in further depth. Their research tested the sex-role spillover model developed by Barbara Gutek and Bruce Morasch.¹⁸⁵ This model is predicated on the idea that "gender roles spill over into the workplace and replace or compete with the expectations associated with work-related roles."¹⁸⁶ Female workers take on typically female personas, and male workers, male personas. This role incorporation, in turn, might affect perceptions of harassment. For example, the model hypothesizes that "sex-role behaviors may be seen by employees as being more appropriate in traditional jobs as compared with integrated and nontraditional jobs."¹⁸⁷ Thus, a woman in a traditionally female job may be more likely to tolerate or expect sexual behavior from male workers, whereas a woman in a nontraditional occupation might be inclined to define the same behavior as harassing.

Several studies tested the sex-role spillover theory, and most found at least some connection between perceptions of harassing behavior and job context. Susan Sheffey and R. Scott Tindale, for example, found that their participants "rated ambiguous behaviors as being more sexually harassing, less appropriate, and less frequent in integrated and nontradi-

¹⁸² Studies suggest that younger individuals are more likely to tolerate harassing behavior than older ones. Bernice Lott et al., *Sexual Assault and Harassment: A Campus Community Case Study*, 8 SIGNS 296, 313 (1982); see also Gutek, *Rater Effects*, *supra* note 173, at 461 (noting that age and gender are the two characteristics that "seem to predict definition of sexual harassment"). It is not obvious why younger individuals would be more tolerant of harassment, nor clear whether the noted effect is truly a function of age or, instead, a result of the fact that younger study participants tend to be students while older ones tend to be workers. See Gutek, *Rater Effects*, *supra* note 173, at 461; cf. Hendrix et al., *supra* note 165, at 247 (finding that full-time employees were more likely to define various situations as sexual harassment than full-time students). But see Terpstra & Baker, *The Identification and Classification of Reactions*, *supra* note 132, at 7 (finding that working women and female students gave similar responses to hypothetical scenarios of harassment).

¹⁸³ One study, for example, hypothesized that perceptions of sexual harassment would also differ based on job category; managers, for instance, having been the contact person for complaints or the object of training, may be more likely to "perceive sociosexual behaviors at work as a more serious problem than would nonmanagement personnel." Baugh & Page, *supra* note 167, at 454 (reviewing literature that supports this theory). They reported that others have found perception differences based on job type, even though their own study showed no significant effect. *Id.* at 459. But there are also studies that suggest the opposite—that higher-ranking employees are "less likely than others to label behavior as sexual harassment." See Gutek, *Rater Effects*, *supra* note 173, at 461.

¹⁸⁴ See *infra* text accompanying notes 187–189.

¹⁸⁵ See Barbara A. Gutek & Bruce Morasch, *Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, 38 J. SOC. ISSUES 55, 56 (1982) (proposing sex-role spillover model, which claims that harassment is the product of carrying over "gender-based expectations for behavior that are irrelevant or inappropriate to work").

¹⁸⁶ Susan Sheffey & R. Scott Tindale, *Perceptions of Sexual Harassment in the Workplace*, 22 J. APPLIED PSYCHOL. 1502, 1504 (1992) (describing Gutek & Morasch model).

¹⁸⁷ *Id.* at 1506.

tional settings as compared with traditional settings.”¹⁸⁸ The authors found these results predictable, pursuant to the sex-role spillover model, in workplaces with less differentiation between sex roles and work roles.¹⁸⁹

There are thus a variety of individual factors that alone, or in conjunction with the organizational factors discussed below, might contribute to the problem of sexual harassment.

2. Organizational Factors

Organizational factors also play a role in facilitating sexual harassment, but the precise mechanisms that either allow harassment to flourish or stifle it are difficult to identify. Most of the theories that tie organizational structure to the prevalence of harassment focus to some extent on power differentials between perpetrator and victim, which, in turn, are often issues of gender.

a. The Role of Power

Two basic theories identify power differentials between men and women at work as the primary catalyst of sexual harassment.¹⁹⁰ First, organizational theorists propose that sexual harassment is “the result of certain opportunity structures created by organizational climate, hierarchy, and specific authority relations.”¹⁹¹ This, in turn, becomes a gendered explanation, given the “prevailing organizational structure in our society, in which most positions of authority are held by men, who often practice their power and exploit their organizational positions for sexual profit.”¹⁹²

Although this theory is supported by studies documenting the high rate of harassment of women working in traditionally male occupa-

¹⁸⁸ *Id.* at 1514.

¹⁸⁹ *See id.*

¹⁹⁰ *See* Jeannette N. Cleveland & Melinda E. Kerst, *Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship*, 42 J. VOCATIONAL BEHAV. 42 (1993) (cataloguing role of organizational, societal, and personal power in producing or enhancing sexual harassment in the workplace).

¹⁹¹ Tangri et al., *supra* note 148, at 34.

¹⁹² Azy Barak et al., *An Empirical Test of the Role of Power Differential in Originating Sexual Harassment*, 17 BASIC & APPLIED PSYCHOL. 497, 498 (1995) (citing Tangri et al., *supra* note 148); *see also* Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 40 n.10 (1993) (describing Catharine MacKinnon's theory of sexual harassment as structuralist, stressing that “women are susceptible to harassment because of occupational segregation, a situation in which most women occupy low status, low paying jobs and tend to be supervised by men”); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (employing similar structuralist approach to analyzing sex inequality in the workplace).

tions,¹⁹³ it is undermined by studies finding that the rate of supervisor harassment is far outpaced by co-worker harassment.¹⁹⁴ It is also questioned by at least one empirical study that attempted to test the link between power and harassment.

A study of Israeli workers compared the overall rate of harassment reported by working women in a traditional workplace environment to that reported by women living on a kibbutz, arguably a more egalitarian environment. The two groups reported almost identical rates of harassment, leading the authors of the study to question the significance of the role played by power differentials in producing harassment.¹⁹⁵

A second power-based approach to explaining harassment is couched as a sociocultural theory. Proponents suggest that gendered power differentials—at the societal rather than the workplace level—produce harassment in the workplace. Sexual harassment, according to this theory, is:

an abuse of the powerful over the powerless. Because of the patriarchal structure of our society and culture, men (who are more likely to be powerholders) are more likely than women to sexually harass. And women, who are more likely to be powerless, are more likely than men to be sexually harassed.¹⁹⁶

Feminist theorists, drawing on the sociocultural approach, describe sexual harassment as only “one manifestation of a pervasive cultural enforcement of gender inequality.”¹⁹⁷

¹⁹³ See James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 314 (1998) [hereinafter Gruber, *Women's Experiences*] (finding that “[g]ender predominance is an important predictor of both physical threat and sexual materials”); James E. Gruber, *The Sexual Harassment Experiences of Women in Nontraditional Jobs: Results from Cross-National Research*, PROCEEDINGS OF THE FIRST NATIONAL CONFERENCE ON SEX AND POWER IN THE WORKPLACE: A CONFERENCE TO PROMOTE WOMEN AND MEN WORKING PRODUCTIVELY TOGETHER 128 (1992); Edward LaFontaine & Leslie Tredeau, *The Frequency, Sources, and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 31 SEX ROLES 422, 441 (1986); Robert E. Niebuhr & Wiley R. Boyles, *Sexual Harassment of Military Personnel: An Examination of Power Differentials*, 15 INT'L J. INTERCULTURAL REL. 445 (1991).

¹⁹⁴ Terri C. Fain & Douglas L. Anderton, *Sexual Harassment: Organizational Context and Diffuse Status*, 22 SEX ROLES 291, 300 (1987) (concluding from empirical study that sexual harassment is more likely to occur when the victim is not a supervisor); GUTER, SEX AND THE WORKPLACE, *supra* note 122, at 65; *see also supra* note 12.

¹⁹⁵ See Barak et al., *supra* note 192, at 510-11. Their findings lend more support to the biological model, discussed above, and the sociocultural model, discussed below, since those models emphasize characteristics shared by both groups of study participants. *See id.*

¹⁹⁶ Stockdale, *supra* note 151, at 96; *see also* Barak et al., *supra* note 192, at 498 (describing harassment as “basically a product of norms, values, stereotypes, myths, and general relevant expectations and beliefs that prevail in Western society, which generally delineate male dominance over women”).

¹⁹⁷ Tangri et al., *supra* note 148, at 35; Barak et al., *supra* note 192, at 499 (describing the “sexual harassment phenomenon chiefly as an exhibition of attempts of male dominance to overpower females and emphasiz[ing] female subordination and even owner-

The sociocultural approach focuses on the ways in which men are socialized to exhibit “domineering sexual behaviors” and women are socialized into complementary passive and acquiescent roles.¹⁹⁸ A variety of data points reinforce this explanation for sexual harassment. The high proportion of male harassers and female victims supports this model,¹⁹⁹ as does the prevalence of harassment in workplaces with a skewed sex-ratio.²⁰⁰ The typical non-assertive reaction of victims in response to harassment is also consistent with the sociocultural approach.²⁰¹ Likewise, the reported economic consequences for female victims is consistent with the model’s theory that the “function of sexual harassment is to keep women economically dependent and generally subordinate.”²⁰²

b. Work Environment Correlations

Power undoubtedly plays a significant role in workplace harassment, but that knowledge offers little aid in predicting harassment—beyond the prediction that most harassers will be men and most victims will be women—and thus gives few clues about appropriate techniques for preventing it. In terms of predictive value, studies showing correlations between harassment and certain types of organizational environments may be more promising than theories about the causes of harassment. Studies have noted the correlation between sexual harassment and several factors, including the “visibility and contact in sex-integrated jobs; the sex ratio; occupational norms; one’s job function; and availability of grievance procedures and job alternatives.”²⁰³

Workplace norms is a promising area of inquiry. Harassment tends to occur more often in highly sexualized work environments, male-dominated work environments, and work environments in which the employers exercise little or no control over behavior.²⁰⁴ Workplaces filled with pornography, for example, tend to be hotbeds of harassment.²⁰⁵ Studies have also found an inverse correlation between perceived equal

ship”); see also Nicholas Davidson, *Feminism and Sexual Harassment*, 28 Soc’y 39, 41 (1991) (describing feminist definition of sexual harassment by reference to the presumption “that the man holds power with which he is able to coerce the woman [to submit to sexual advances]”).

¹⁹⁸ See Tangri et al., *supra* note 148, at 40.

¹⁹⁹ See *supra* note 9.

²⁰⁰ See, e.g., USMSPB 1995, *supra* note 7.

²⁰¹ See *supra* text accompanying notes 136–144.

²⁰² Tangri et al., *supra* note 148, at 41; see also *infra* text accompanying note 300.

²⁰³ Tangri et al., *supra* note 148, at 38–40 (predicting identity of victims and harassers, and level of harassment, based on varying organizational factors).

²⁰⁴ See *id.* (explaining the role of local norms and employer control in fostering sexual harassment).

²⁰⁵ See Beiner, *Sex, Science and Social Knowledge*, *supra* note 1, at 295–96 (describing studies documenting this correlation).

employment opportunity for women and the level of harassment.²⁰⁶ The presence of harassing role models may also trigger others, particularly those who have a high LSH rating, to engage in sexually harassing behavior.²⁰⁷

More common today than work sites plastered with pin-ups or harassing higher-ups are workplaces in which there is simply a norm of employer tolerance or even subtle encouragement of harassing behavior.²⁰⁸ Studies show a strong correlation between ratings of management effectiveness in reacting to sexual harassment and the occurrence of harassing behavior, suggesting that "norms set by local management importantly contribute to the occurrence of sexual harassment."²⁰⁹ If "top management condones sexual harassment by ignoring it, discouraging complaints, or participating in it, then those disposed to sexually harass will be likely to do so."²¹⁰

An article by Elizabeth O'Hare and William O'Donohue suggests a new, four-factor model for predicting and explaining sexual harassment.²¹¹ This model hypothesizes that there are four requirements that must be met in order for sexual harassment to occur: motivation (power, control, or sexual attraction); overcoming internal inhibitions (fear of reprisal or rejection); overcoming external inhibitions (organizational variables like sex-ratio and sexist attitudes); and overcoming victim resistance (job-status and sex role).²¹² The authors tested this model empirically, finding it to be a better predictor of sexual harassment than each of the models discussed previously.²¹³ They found the strongest risk factors for harassment were "a lack of knowledge about grievance procedures for sexual harassment, an unprofessional atmosphere, and the existence of sexist attitudes in the workplace."²¹⁴

²⁰⁶ See LaFontaine & Tredeau, *supra* note 193, at 441.

²⁰⁷ See John B. Pryor et al., *A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction*, 42 J. VOCATIONAL BEHAV. 68, 78 (1993) (applying the concept of "behavioral contagion" to sexual harassment).

²⁰⁸ See *id.* at 70 (concluding, based on survey data, that "sexual harassment seems to be more likely to occur when local norms permit such behavior"); see also Juliano & Schwab, *supra* note 9, at 567 (finding, based on study of published sexual harassment cases, that only seven percent of them involved allegations of posters or pin-ups).

²⁰⁹ Pryor et al., *supra* note 207, at 73.

²¹⁰ *Id.* at 80; see also Theresa M. Glomb et al., *Structural Equation Models of Sexual Harassment: Longitudinal Explorations and Cross-Sectional Generalizations*, 84 J. APPLIED PSYCHOL. 14, 26 (1999) (finding a relationship between organizational tolerance and sexual harassment).

²¹¹ Elizabeth A. O'Hare & William O'Donohue, *Sexual Harassment: Identifying Risk Factors*, 27 ARCHIVES SEXUAL BEHAV. 561 (1998).

²¹² *Id.* at 565.

²¹³ *Id.* at 574.

²¹⁴ *Id.* at 576.

B. The Effectiveness of Preventative Measures

The incentives described in Part I are calculated to prevent harassment by indirectly targeting potential harassers. However, the question remains whether these incentives actually work. As the above discussion illustrates, an analysis of the causes of harassment does not reveal a panacea for the problem. Instead, it suggests some theoretical connections between the causes of harassment. This Section explores those connections and then examines empirical studies testing their strength.

1. Theoretical Connections

Research on individual proclivities, which finds that men are more likely to harass than women and that masculine men are more likely to harass than effeminate men,²¹⁵ suggests that preventative efforts need to target subgroups of workers.

Exploring misperceptions about what constitutes harassment is important to the extent that if they are a cause of harassment, correcting them may become a cure.²¹⁶ For example, the boundary differentiation findings²¹⁷ suggest that the key to reducing harassment may indeed be education and training. If those findings are correct, then the focus should be on teaching those who are misperceiving situations to perceive them differently or, at the very least, teaching them to recognize that their perceptions are not universally held. The research on the interplay between perceptions and gender roles also suggests the need to focus on sex stereotyping in general, since the spillover of these roles contributes to the problem of harassment.

An analysis of organizational factors likewise points to possible avenues for prevention. To the extent harassment is a function of the opportunity to abuse power, the best preventative measures may focus on reducing opportunities for such abuse through greater screening and monitoring of those holding positions of authority. This “organizational” cause, however, is intertwined with the individual ones. For example, men who score high on the LSH scale tend to engage in harassing behavior in situations where their motives might not be obvious.²¹⁸ Workplace structure, duties, and supervision thus affect individuals’ likelihood to harass, as do their individual proclivities.

²¹⁵ Effeminacy in this context refers to behavior and characteristics that are not stereotypically masculine, including dress, appearance, physical attributes and actions, and verbal patterns.

²¹⁶ See Stockdale, *supra* note 151, at 94.

²¹⁷ See *supra* notes 164–189 and accompanying text.

²¹⁸ See Pryor, *supra* note 159, at 288.

If harassment is a function of larger problems of gender dominance in society, the proper preventative measures for individual employers are less obvious. Significant changes to workplace structure, rather than the simple addition of specific anti-harassment measures, are necessary. Occupational segregation, which is still a significant problem in the American workplace, may breed this form of gender dominance. Again, this cause is also interrelated with individual ones because female perceptions and tolerance of harassment vary with the extent to which the work environment is male-dominated.²¹⁹ Thus, the same behavior may be regarded as harassment in one environment, but not in another.

Some of these theoretical cures for harassment might be promising, but empirical data is needed to see if they can be supported. For example, while problems with boundary differentiation suggest education as a cure, it is unclear whether individuals' perceptions can in fact be changed. And if they can be changed, what is the best method to do so? Likewise, information about individual proclivities suggests that training should target likely harassers. What it does not tell us is whether likely harassers can change, and what motivation might be necessary to induce such a change. These are some of the questions addressed in the remainder of this Part.

2. *The Effect of Policies and Procedures on Levels of Harassment*

Human resource professionals have long reported that "their biggest problem with the issue of sexual harassment is that the majority of employees are uncertain as to what constitutes sexual harassment."²²⁰ The logical implication is that differences in perception—whether based on gender or other factors—may be neutralized or mitigated by training about sexual harassment.²²¹ The enactment and dissemination of anti-harassment policies is at least theoretically calculated to produce this effect.

²¹⁹ See *supra* notes 185–189 and accompanying text.

²²⁰ Blakely et al., *supra* note 8, at 71 (citing J.J. Laabs, *HR Puts its Sexual Harassment Questions on the Line*, 74 PERSONNEL J. 36 (1995)).

²²¹ Baker et al., *Perceptions of Sexual Harassment*, *supra* note 166, at 410 ("Organizations may want to focus a portion of their training programs for new employees on sexual harassment issues to help clarify differences in perceptions and forestall problems of sexual harassment."); Douglas D. Baker et al., *The Influence of Individual Characteristics and Severity of Harassing Behavior on Reactions to Sexual Harassment*, 22 SEX ROLES 305, 320 (1990) [hereinafter, Baker et al., *Influence of Individual Characteristics*] ("[O]rganizations may want to offer training programs illustrating a range of sexually harassing behaviors and the likely reactions to them . . . Individuals' ability to more accurately predict the negative reactions and consequences of sexually harassing behaviors may in turn reduce the likelihood of their occurrence."); Hendrix et al., *supra* note 165, at 248 ("By making people more aware of what is sexual harassment, organizations may be better able to eliminate or minimize any perceptual differences.").

The law, as explained above, now essentially requires employers to maintain anti-harassment policies and grievance procedures.²²² There is some survey data to support the effectiveness of establishing harassment policies. For instance, the most recent study by the USMSPB found that eighty percent of respondents “counted establishing and publicizing sexual harassment policies among the most effective actions an organization can take to reduce or prevent sexual harassment.”²²³ (Although only sixty-eight percent of the respondents in that same survey thought that anti-harassment policies changed the way employees behaved toward one another.²²⁴) However, survey data on the background level of harassment undermines claims about the effectiveness of policies and procedures. Since surveys began to track levels of harassment more than twenty years ago, the number of employers enacting and disseminating anti-harassment policies has grown exponentially while the underlying level of harassment has gone unchanged.²²⁵ This alone suggests the preventative power of such devices is limited.

There is likewise some empirical data to support at least a limited role for policies in preventing harassment. One study of female workers in Canada found a statistically significant inverse correlation between sexual harassment policies and procedures and the incidence of harassment. Specifically, researchers found that informational measures such as policies and posters were helpful in reducing less severe forms of environmental harassment like sexual comments and pornographic posters.²²⁶ However, these methods were not as effective in targeting more severe forms of harassment, particularly incidents directed at specific individuals. For those, more proactive methods, signaling a true commitment by the employer to actively influence the work environment, were necessary.²²⁷ Previous researchers reached similar conclusions, finding that “sexual harassment is curtailed only when an organization makes a concerted . . . and highly visible effort to deal with the problem.”²²⁸

²²² See *supra* text accompanying notes 34–40.

²²³ USMSPB 1995, *supra* note 7, at 41 (respondents noted the following measures, in rank order, as among the “most effective an organization could take”: establish and publicize policies, provide training for employees, publicize potential penalties, publicize complaint channels, protect victims from reprisal, provide training for supervisors, and enforce strong penalties).

²²⁴ See *id.*

²²⁵ Since these surveys ask about actual experiences of employees rather than reported incidents, the constant number cannot be explained as less harassment with more reporting.

²²⁶ Gruber, *Women’s Experiences*, *supra* note 193, at 316.

²²⁷ See *id.* (finding that while informational methods are effective at preventing environmental harassment, proactive methods like training are necessary to prevent harassment targeted at individuals).

²²⁸ See *id.*; Pryor et al., *supra* note 207, at 68 (arguing that proactive measures have the effect of changing perceptions and creating “local norms” that make harassment less acceptable).

These studies give some support for mandating the adoption of anti-harassment policies, but suggest that greater proactive measures are more likely to be effective. One proposition that could be tested is why these measures affect the rate of harassment, addressing, in particular, whether potential harassers are deterred by learning of the possible sanctions for violating an employer's anti-harassment policy.

3. *The Effect of Training on Levels of Harassment*

Anti-harassment training, which is encouraged but not required²²⁹ by *Faragher* and *Ellerth*, is a more promising tool of prevention than policies and procedures. The objectives of most training programs include increasing knowledge and awareness about sexual harassment and, in turn, changing attitudes and behavior about it. Theoretically, greater awareness about sexual harassment should result in fewer harassing actions, particularly given the strength of the findings about the role of misperceptions in causing harassing behavior. It was the perceived effectiveness of training that led former EEOC chair Eleanor Holmes Norton to claim that "[s]exual harassment has developed as one of the great lessons in how education can have an effect on an offensive practice."²³⁰

Survey respondents share this optimism about the effectiveness of training. According to one survey, sixty-three percent of respondents thought training helps prevent sexual harassment to a "moderate or great extent." Yet, at least one in five employees who had attended formal training thought it had no effect on their attitudes or beliefs.²³¹

Researchers have only begun to focus on the efficacy of training in the last decade or so. This focus flows from the observations of many academics that training programs, though widely used, suffer from a lack of validation of their effectiveness. This deficiency has been described variously as an "unpleasant empirical truth," a "glaring omission []," "both unfortunate and somewhat unsettling," and "perhaps the most alarming gap."²³²

Today there is a small but growing body of studies that attempts to evaluate the effect of anti-harassment training on perceptions, attitudes, and beliefs about harassment, as well as its effect on behavior. Because perceptions about harassment involving open threats or obvious links

²²⁹ See *supra* notes 48–50 and accompanying text. Training is, as discussed above, mandated by some state laws. See *supra* note 50 and accompanying text. Federal agencies are also required to offer anti-harassment training to their employees. See USMSPB 1995, *supra* note 7, at 42.

²³⁰ Ronni Sandroff, *Sexual Harassment in the Fortune 500*, 13 WORKING WOMAN 69, 73 (1988).

²³¹ USMSPB 1995, *supra* note 7, at 43.

²³² Robert Moyer & Anjan Nath, *Sexual Harassment Training Interventions*, 28 J. APPLIED SOC. PSYCHOL. 333, 334–35 (1998) (summarizing observations of other researchers on the poor state of knowledge about the efficacy of anti-harassment training).

between sexual submission and work-related benefits do not tend to vary much,²³³ these studies often focus on the effect of training in more ambiguous situations involving sexual comments, gestures, and overtures.

Early studies looked at the effects of training interventions on particular working populations. One of the first studies examined the change in attitudes of university residential advisors after exposure to training materials. This population was targeted because the advisors were likely to receive harassment complaints from residents and would be expected to provide counseling or direction in response.²³⁴ The participants completed an initial survey designed to measure their skill at identifying sexual harassment before undergoing a two-hour training session. Two weeks later, participants took a post-training test.²³⁵ The study found that male participants significantly increased their awareness about sexual harassment, but that the effect on women was not statistically significant.²³⁶

A second study followed the implementation of a comprehensive anti-harassment program, including a training component designed to change attitudes and norms about harassment on a university campus.²³⁷ This study, which attempted to gauge the effectiveness of the training program through a pre- and post-survey of participants' attitudes and knowledge about sexual harassment, found evidence of a training effect. Participants overwhelmingly responded that they had developed a "greater understanding of the problem of sexual harassment, increased their understanding of the nature of proscribed socio-sexual behaviors, increased their awareness of [the university's] sexual harassment policy and laws regarding sexual harassment, and made them better able to assist victims of sexual harassment."²³⁸ The attitude and belief surveys also reflected other positive changes in most training participants, including a lesser tendency to blame harassment victims, an increase in knowledge of victim's rights, and a belief that the institution was "genuinely interested in providing an environment free from sexual harassment."²³⁹

A third early study examined the effect of a more than two-hour harassment training program on the attitudes of a large group of community care workers in Illinois.²⁴⁰ Based on this study, which was precipitated by a concern about the number of reported incidents of harassment in this

²³³ See *id.* at 336 n.3.

²³⁴ See Kathleen Beauvais, *Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes*, 12 SIGNS 130, 131 (1986).

²³⁵ *Id.* at 137.

²³⁶ See *id.* at 139–40.

²³⁷ Daniel A. Thomann et al., *An Organizational Development Approach to Preventing Sexual Harassment*, 40 CUPA J. 34, 39 (1989).

²³⁸ *Id.*

²³⁹ *Id.* at 40.

²⁴⁰ See Sandra J. Maurizio & Janet L. Rogers, *Sexual Harassment and Attitudes in Rural Community Care Workers*, 16 HEALTH VALUES 40, 41 (1992).

population of workers,²⁴¹ the authors concluded that the training was "an effective intervention," leading to greater understanding of the problem of sexual harassment and strategies for preventing it.²⁴²

Finally, a fourth study attempted to measure the effect of an intervention to reduce gender insensitivity and sexual harassment at Stanford Medical School.²⁴³ The authors utilized an annual survey about the incidence of sexual harassment and other aspects of the work environment following the introduction of mandatory sexual harassment and diversity training along with other measures designed to change the culture.²⁴⁴ In that study, the authors found a reduction in the number of sexual harassment incidents, though the overall number remained, in their assessment, unacceptably high. They also found some improvements in the overall climate.²⁴⁵ Although this study has methodological limitations (such as the lack of a control group) that make it difficult to conclude that the changes resulted from the training, it provides some evidence of the effect of preventative measures in an actual workplace setting.

Newer studies have retreated to the laboratory, using college students in heavily controlled experiments designed to test the effects of training programs on potential harassers. Although methodologies vary, the general thrust of training studies is an evaluation of attitudes toward and perceptions of harassment before and after being exposed to some kind of training materials. Recent studies have tried to cure some of the limitations of earlier studies by introducing control groups against which to measure reported improvements.

In a study by Gerard Blakely, Eleanor Blakely, and Robert Moorman, for example, researchers examined the effect of training on perceptions of harassment.²⁴⁶ They hypothesized that individuals "exposed to the topic of sexual harassment during training would perceive sexually oriented work behavior as more sexually harassing than would individuals who had not received training about sexual harassment."²⁴⁷ Participants in this study were asked to view a training video on sexual harassment and participate in a classroom discussion about the film.²⁴⁸ Six

²⁴¹ *Id.*

²⁴² *Id.* at 44. Specifically, participants were considerably more likely to agree after the training intervention that wearing a professional uniform and behaving professionally were likely to reduce the incidence of harassment. *Id.* at 42, 44.

²⁴³ See Charlotte D. Jacobs et al., *Impact of a Program to Diminish Gender Insensitivity and Sexual Harassment at a Medical School*, 75 ACAD. MED. 464 (May 2000).

²⁴⁴ *Id.* at 465.

²⁴⁵ *Id.* at 467.

²⁴⁶ See Blakely et al., *supra* note 8, at 74.

²⁴⁷ *Id.*

²⁴⁸ Surveys suggest that videotapes are "the most commonly used instructional method for organizational training, used by over ninety percent of surveyed organizations." Elissa Perry et al., *Individual Differences in the Effectiveness of Sexual Harassment Awareness Training*, 28 J. APP. SOC. PSYCH. 698, 699 (1998). Training videos typically define harassment, give examples, and discuss some of the related legal issues. *Id.* at 700.

weeks later, participants completed a questionnaire measuring perceptions of sexual harassment. A control group that had not viewed the video or participated in the discussion then completed the same questionnaire.²⁴⁹ The two groups were similar in terms of gender, age, work experience, and familiarity with the Clarence Thomas/Anita Hill sexual harassment controversy.²⁵⁰ The questionnaire described thirteen scenarios, all involving sexual behavior, ranging from innocuous to ambiguous to severe, initiated by a male supervisor toward a female subordinate.²⁵¹

The data, culled from the responses of the two groups of participants, gave at least partial support for the authors' hypothesis that training affects perceptions of sexual harassment.²⁵² The data showed that participants who underwent training rated severe behavior as significantly more harassing than the participants in the control group, but that training had a less significant effect on perceptions of ambiguous behavior, and no effect on ratings of innocuous behavior.²⁵³

An additional finding of the study is that gender differences in perception were reduced by training. In particular, faced with ambiguous behavior, males were more likely to share the perception of females as to whether the conduct was harassing after they had participated in the training program.²⁵⁴ Drawing on other studies suggesting that individuals who "perceive a behavior as harassing are less likely to engage in such a behavior," the authors concluded that their findings provided support for urging employers to adopt training programs in addition to policies.²⁵⁵

A study by Robert Moyer and Anjan Nath focused more explicitly on gender differences and the effects of training. One problem with earlier studies, they noted, was that previous studies showing gender difference in perceptions were not measured against any baseline. Thus, they argued, it is not clear whether "women see more sexual harassment because they are *better* at detecting it . . . when it occurs," or whether "women are sometimes 'seeing' sexual harassment when it isn't there[.]"²⁵⁶

The authors' solution to this problem was to compare the perceptions of male and female participants, both trained and untrained, to an expert standard.²⁵⁷ The trained group watched an instructional video about sexual harassment; the control group did not. Both groups were then given a

²⁴⁹ See Blakely et al., *supra* note 8, at 75.

²⁵⁰ See *id.* at 76.

²⁵¹ See *id.* at 75.

²⁵² See *id.* at 78–79.

²⁵³ See *id.* at 77.

²⁵⁴ See *id.* at 79.

²⁵⁵ *Id.*

²⁵⁶ Moyer & Nath, *supra* note 232, at 336.

²⁵⁷ *Id.* at 335. Moyer and Nath also criticize prior studies for failing to use control groups, a problem they cure by looking at both trained and untrained lay persons to evaluate perceptions of harassment.

series of written scenarios and asked to determine whether sexual harassment had occurred. A panel of seven experts was also asked to evaluate each written scenario under one state's law.²⁵⁸

The authors drew two conclusions from the preliminary study. First, they concluded that women's perceptions of harassment are more in line with the experts.²⁵⁹ Second, they found that although "trained participants were significantly better than untrained participants at detecting sexual harassment when our experts said it occurred, they were also significantly more likely than untrained participants to perceive sexual harassment when our experts said it had *not* occurred."²⁶⁰ Thus, training did *enhance* perceptions of harassment, though it did not necessarily improve them.

The authors' main study involved separating participants into three groups: no exposure, one-exposure, and three-exposures. The first group received no materials; the second group received a poster about sexual harassment that state law requires employers to post, as well as a written anti-harassment policy; and the third group received the poster, the policy, and two written tests with immediate feedback. After exposure to the designated materials, these groups were then asked to evaluate the same written scenarios used in the preliminary study.²⁶¹

This study showed evidence of a training effect as well. The three-exposures group identified harassment more expertly than the one-exposure group, and both were more expert than the control group.²⁶² Unlike the preliminary study, the change in perceptions resulting from training was in fact an improvement: there was an increase in "hits" with scenarios identified by experts as harassing without an offsetting increase in false-positives.²⁶³ The multiple exposures may have produced the improved outcome over the preliminary study.

The study also concluded, however, that the training effect depended on gender.²⁶⁴ The authors found that although untrained women perceive harassment "more expertly" than untrained men,²⁶⁵ men were more likely to "improve" based on training than women.²⁶⁶ But the difference, the authors claim, is not because women already knew everything the men learned in training. To the contrary, they claim that men and women acquire similar amounts of knowledge through training, but that despite

²⁵⁸ The study relied on the law of Maine, which is virtually indistinguishable from federal law and the law of most states on what conduct constitutes actionable sexual harassment. *Id.* at 338.

²⁵⁹ *Id.* at 340.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 341.

²⁶² *Id.* at 342.

²⁶³ *Id.* at 344.

²⁶⁴ *See id.* at 342.

²⁶⁵ *Id.* at 344.

²⁶⁶ *Id.* at 343.

equal acquisition of knowledge, men's perceptions change more.²⁶⁷ Their explanation for the perceptual improvement is that training causes men to focus on the problem of sexual harassment more closely, which enables them to assess the scenarios more accurately after they are trained.²⁶⁸

Another study, conducted by Elissa Perry, Carol Kulik, and James Schmidtke, attempted to measure the training effect on different types of men. Using the rating system designed by Pryor,²⁶⁹ the authors coded participants on the LSH scale.²⁷⁰ They then conducted a study to measure the effect of watching a commercially available sexual harassment training video on each of these groups, as compared to control groups.²⁷¹ This study, unlike others previously discussed, attempted to measure not only knowledge acquisition about harassment, but also whether viewing the harassment training video had any effect on behavior. It looked for a behavioral effect by testing the participant's willingness to engage in inappropriate touching of a female associate.²⁷² The study participants first watched a sexual harassment training video, then watched a golf video, and finally attempted to teach a female associate how to putt. Observations of the golf lesson gave the researchers information on touching behavior and enabled them to compare the level of inappropriate touching between trained and untrained men in an activity that requires, or at least provides an opportunity for, some amount of touching.²⁷³

The results of this study were mixed. The authors found that exposure to the training video did improve knowledge and reduce inappropriate touching for some participants, yet did not affect long-term attitudes related to the propensity to harass.²⁷⁴ A key finding of this study is that training affects people differently. Individuals with a high LSH knew less about harassment and engaged in more inappropriate touching without training than those with a low LSH. The training reduced inappropriate touching for the high LSH group but not the low LSH group. It had this effect, apparently, without any change in attitude, as no participant scored lower on the LSH scale after training than before.²⁷⁵ This finding suggests that training might be effective at changing behavior even if it cannot change attitudes. It also suggests that training tailored to employ-

²⁶⁷ *Id.* at 344.

²⁶⁸ *Id.* The three limitations conceded by the authors are, first, that a different panel of experts might have made different judgments; second, that their study does not test for longevity of the effects reported; and, third, that their findings may not apply to perceptions of real-life harassment as opposed to written scenarios. *See id.* at 346–47.

²⁶⁹ *See supra* text accompanying notes 160–162.

²⁷⁰ The coding was done using Pryor's "LSH instrument" as well as a survey including questions about sexual attitudes. *See* Perry et al., *supra* note 153, at 706.

²⁷¹ *See id.* at 705–11 (describing study design).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 716.

²⁷⁵ *Id.*

ees' particular characteristics, something not done by most employers, could be useful.²⁷⁶

Taken together, these later studies provide some empirical evidence of a training effect; that is, exposure to sexual harassment training has been found to make lay-persons perceptions of harassment more expert. They also show that training can, under some circumstances, directly affect behavior such as inappropriate touching. Men are more susceptible to the training effect than women; high LSH individuals, more so than low LSH individuals.

While this data is hopeful, there remains a significant gap between these general findings and the conclusion that training will actually reduce harassment. Improved perceptions about written scenarios may or may not translate into better perceptions about real-person interactions in the workplace.²⁷⁷ A better ability to perceive conduct as harassing may or may not translate into a lesser likelihood of engaging in it.²⁷⁸ There are only a few studies making these connections, and fewer still replicating these findings outside of a laboratory setting equipped with adequate statistical controls.²⁷⁹ It is also unclear from these studies whether the training effect is a lasting one, or whether improvements in perceptions dissipate over time.²⁸⁰ Researchers are also hesitant to generalize from the findings based on studies involving college students to working adults.²⁸¹

Training may also produce unwanted effects. Increased awareness of what constitutes harassment and the potential consequences for engaging in it may deter men from working with women, particularly in a supervisory or mentoring relationship, for fear of being implicated in sexual har-

²⁷⁶ Specifically, the author suggests that trainers should measure the LSH of participants before a training program and then determine appropriate training methods based on that information. *See id.* at 717–18; *see also* USMSPB 1995, *supra* note 7, at 45 (concluding, based on survey data, that “agencies need to consider several more tailored responses” in addition to “policy, training, and complaint programs”).

²⁷⁷ *See* Moyer & Nath, *supra* note 232, at 347 (questioning whether individuals who learn to perceive harassment more expertly due to training may nonetheless have difficulty perceiving it in real-life situations).

²⁷⁸ *Id.* There is perhaps a further weak link in the chain, suggested by Joann Keyton and Steven Rhodes. Based on a study measuring participants ability to identify sexual harassment, the authors conclude that there is little relation between empathy and the ability to properly label incidents as harassing. The cautionary tale, according to the authors, is that training programs often rely on the “assumption that employees will be able to extrapolate what they viewed or heard in training to their organizational interaction.” Joann Keyton & Steven C. Rhodes, *Organizational Sexual Harassment: Translating Research into Application*, 27 J. APPLIED COMM. RES. 158, 170 (1999). This assumption, they believe, is not warranted given the failure of their empathy-identification hypothesis. *See id.*

²⁷⁹ *See infra* text accompanying notes 284–285.

²⁸⁰ *See* Moyer & Nath, *supra* note 232, at 347 (noting that “delayed retention” tests would be necessary to determine whether the effect of training is long-lived).

²⁸¹ *See* Blakely et al., *supra* note 8, at 80 (noting the continued controversy resulting from generalizing responses of college students to those of working men and women); Perry et al., *supra* note 153, at 457 (noting similar concern about generalizing survey results to the workplace setting, particularly given research suggesting that younger workers may be more receptive to awareness training than older workers).

assment charges.²⁸² In addition, mandatory training, particularly the more intense approach often termed “diversity training,” may create resentment among participating employees.²⁸³

These studies make training a worthwhile subject of study and probably a worthwhile pursuit for employers. In the end, however, if training becomes universal and the level of harassment stays the same, the potential suggested by these studies will have gone unfulfilled. As the authors of one study cautioned, “[U]ntil education and training interventions can be shown to actually reduce the incidence of sexual harassment, it would be unwise to attach much practical significance to the present line of inquiry.”²⁸⁴ A significant gap in the literature is “methodologically strong, empirical evaluations of existing policies, programs, and training that purport to have an impact on sexual harassment.”²⁸⁵ Longitudinal studies of existing programs, while difficult to effectuate, would bridge some of this gap.

Social science tells us that current preventative efforts employers take may help, but are not sufficient to effect a meaningful reduction in the level of harassment. It should thus be incumbent on employers, argued in Part III, to find more successful approaches to prevention.

III. EVALUATING THE NEW REGIME: REDRESSING HARASSMENT

When preventative efforts fail, victims should be ensured adequate compensation for harm, as remedying harm resulting from discrimination is as important a goal under Title VII as preventing it.²⁸⁶ The affirmative defense also produces incentives for employers and victims that are related to this goal—namely, the adoption of internal grievance procedures and penalties for victims who do not utilize them. This Part examines whether the affirmative defense is likely to increase or decrease victims’

²⁸² See Nina Burleigh & Stephanie B. Goldberg, *Breaking the Silence: Sexual Harassment in Law Firms*, A.B.A. J. 46, 48 (Aug. 1989); Cynthia Fuchs-Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 376–77 (1995). The obvious disadvantage to women of this type of behavior is reinforced by a strange line of decisions from both state and federal courts concluding that when a man fires a woman to avoid making his wife jealous, for example, he has not committed sex discrimination. See, e.g., *Kahn v. Objective Solutions, Int’l*, 86 F. Supp. 2d 377 (S.D.N.Y. 2000); *Mittl v. N.Y. State Div. of Human Rights*, 741 N.Y.S.2d 19 (N.Y. App. Div. 2002).

²⁸³ See Barbara A. Gutek, *Sexual Harassment Policy Initiatives*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* (William O’Donohue ed., 1997), at 195.

²⁸⁴ Moyer & Nath, *supra* note 232, at 347.

²⁸⁵ John B. Pryor & Kathleen McKinney, *Research on Sexual Harassment: Lingering Issues and Future Directions*, 17 *BASIC & APPLIED PSYCHOL.* 605, 609 (1995) (summarizing the current state of research on sexual harassment).

²⁸⁶ See *supra* notes 145–146 and accompanying text; see also Grossman, *supra* note 5, at 720–21 (criticizing the Supreme Court for minimizing Title VII’s compensatory purpose in recent cases).

likelihood of obtaining compensation for harassment, or otherwise affect the validity or justness of the available remedial measures.

A. *Identifying Competing Interests*

The previous Part examined whether the proliferation of sexual harassment policies and training is likely to have any effect on the frequency of sexual harassment by preventing such harassment before it occurs. This involved a fairly straightforward empirical examination, because the goal—reducing the incidence of harassment—neatly serves the interests of all relevant parties. Once harassment occurs, however, the interests of the parties diverge: employees become either victims or harassers, and employers seek to avoid liability or other negative consequences flowing from the harassment.²⁸⁷

In the face of harassment, the victim typically wants the harassment to cease, the harm to be redressed, and normal working conditions to resume. The accused harasser typically wants notice of the complaint, a speedy and fair resolution of the complaint, the implementation of adequate procedural safeguards to ensure vindication in the event of an unjust accusation, and the restoration of normal working conditions. The employer typically wants to minimize exposure to liability, reduce negative publicity or other adverse consequences of complaints, and restore normal working conditions.

This Section will examine the competing interests of relevant parties in resolving harassment disputes and will discuss which interests are served by the remedial procedures established by *Faragher* and *Ellerth*.

B. *The Employer's Duty To Respond*

The current legal regime is predicated on the assumption that employers learn of harassment because the victim complains. This assumption has been made into law by the second prong of the affirmative defense, which penalizes a victim who fails to take advantage of available corrective opportunities. If victims do not complain, they not only are deprived of any immediate corrective measures in most cases (because the employer may not learn of the problem), but also of compensation in any resulting lawsuit. Typical sexual harassment victims, however, do not file complaints with their employers, at least not immediately. This legal regime is thus likely to minimize victim access to compensation, a prob-

²⁸⁷ This characterization of the relative interests involved is based in part on the framework set out in Edward J. Costello, *The Mediation Alternative in Sex Harassment Cases*, ARB. J. 16, 16–17 (Mar. 1992).

lem compounded by the unforgiving approach courts have taken since *Faragher* and *Ellerth* in defining “reasonable” victim behavior.²⁸⁸

One problem with this approach is that it assumes victims, like employers, will respond to harassment by registering prompt internal complaints about the harassing conduct, even though empirical research suggests that response is unlikely. Research suggests that not only are victims unlikely to learn about the rules that place such a premium on filing an internal complaint,²⁸⁹ but also that even if they know of the rules, victims will be unlikely to conform their behavior.²⁹⁰

In evaluating the liability regime, it is thus important to examine why victims do not complain and whether the post-*Faragher/Ellerth* legal structure includes any measures likely to trigger an increase in victim reporting.

1. Why Victims Tend Not To Report Harassment

Victims forego internal grievance mechanisms for a variety of reasons,²⁹¹ including a desire to avoid the likely consequences of filing a complaint.²⁹² Victims fear retaliatory firing or other adverse actions that will jeopardize their economic security.²⁹³ They also fear other forms of retaliation²⁹⁴ and ostracization by co-workers,²⁹⁵ which may create an even

²⁸⁸ See *supra* text accompanying notes 105–116.

²⁸⁹ See *supra* text accompanying note 117.

²⁹⁰ See *supra* text accompanying notes 123–125.

²⁹¹ Fitzgerald et al., *supra* note 122, at 152–53 (cataloguing empirical studies of under-reporting).

²⁹² Denise H. Lach & Patricia A. Gwartney-Gibbs, *Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution*, 42 J. VOCATIONAL BEHAV. 102, 111 (1993) (describing survey data about job consequences for filing sexual harassment complaints); Jan Salisbury et al., *Counseling Victims of Sexual Harassment*, 23 PSYCHOTHERAPY 316, 319 (1986) (noting that the “occurrence of physical and mental symptoms is dramatically higher [for those who file formal complaints] than [sic] for those who do not”).

²⁹³ See, e.g., Ben Bursten, *Psychiatric Injury in Women’s Workplaces*, 14 BULL. AM. ACAD. PSYCHIATRY L. 245, 248 (1986) (“[The] social fact that women need employment that may not be abundantly available tends to create a willingness to tolerate persistently abusive conditions of work.”).

²⁹⁴ See, e.g., Teresa L. Butler & A. Michael Weber, *Retaliation Lawsuits are Increasing Rapidly*, NAT’L L.J., Jan. 11, 1999, at B5 (citing statistic that 22.5% of all EEOC charge-processing is comprised of claims of retaliation); Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOT. J. 161, 164 (1990) (estimating, based on personal experience as ombudsperson in sexual harassment cases, that seventy-five percent of victims express serious concern about retaliatory or adverse consequences for complaining).

²⁹⁵ See Burleigh & Goldberg, *supra* note 282, at 51 (noting the difficulties of being a “whistle-blower” and trying to remain collegial); Mary P. Koss, *Changed Lives: The Psychological Impact of Sexual Harassment*, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 73, 81 (Michele A. Paludi ed., 1990); Rowe, *supra* note 294, at 164 (noting that sexual harassment victims worry about disapproval from co-workers and supervisors if they complain); CULBERTSON ET AL., *supra* note 7, at 17 (finding that at least one-third of sexual harassment victims reported undesirable changes to the work environment). *But cf.*

more hostile working environment than they currently suffer, or more subtle harms such as losing a mentor.²⁹⁶ Victims may also remain silent because they blame themselves for the situation,²⁹⁷ or because “[c]alling attention to offensive behavior reinforces stereotypes of women as victims.”²⁹⁸

Despite the case law, which often derides these fears as “generalized” or “baseless,”²⁹⁹ studies in fact demonstrate that women who report sexual harassment often face adverse consequences.³⁰⁰ The question, then, is whether any of the other measures taken by employers are likely to minimize these consequences or otherwise contribute to an increase in reporting. There is some incentive for employers to prevent retaliation, since their attempt to do so may contribute to the affirmative defense.³⁰¹ However, ultimately failing in such an attempt does not preclude successful proof of the defense.

2. Improving Victim Reporting Rates

Researchers have made some effort to develop predictive models of reactions to harassment,³⁰² although none of the models focus on the ef-

Natalie Dandekar, *Contrasting Consequences: Bringing Charges of Sexual Harassment Compared with Other Cases of Whistleblowing*, 9 J. BUS. ETHICS 151, 153 (1990) (suggesting that sexual harassment complainants are often perceived favorably by co-workers and suffer far less than other whistleblowers).

²⁹⁶ See Burleigh & Goldberg, *supra* note 282, at 51 (“A lot of women won’t object to harassment because they’re afraid of alienating their mentors.”).

²⁹⁷ See *id.* at 48 (“In fact, one of the reasons women lawyers don’t report harassment is that they feel inadequate for not being able to cope with it on their own. They see it as a character defect rather than a management problem.”); cf. Bursten, *supra* note 293, at 248 (“[Women] may not report the harassment because they feel powerless, demeaned, and intimidated.”).

²⁹⁸ See Burleigh & Goldberg, *supra* note 282, at 48.

²⁹⁹ See *supra* note 114.

³⁰⁰ See, e.g., Salisbury et al., *supra* note 292, at 316 (noting, based on clinical observations of victims over a three-year period, that sexual harassment complainants face psychological abuse, lower performance evaluations, shunning of co-workers, and withdrawal of social support); David E. Terpstra & Susan E. Cook, *Complaint Characteristics and Reported Behaviors and Consequences Associated with Formal Sexual Harassment Charges*, 38 PERSONNEL PSYCHOL. 559 (1985) (reporting that a majority of women who filed sexual harassment complaints were ultimately dismissed from their jobs); see also Fitzgerald et al., *supra* note 135, at 122–23 (summarizing studies showing that victims who report harassment often suffer adverse consequences); cf. Juliano & Schwab, *supra* note 9, at 560 (finding that only eleven percent of plaintiffs in sexual harassment lawsuits resulting in published opinions were still working for their employer at the time they filed the suit).

³⁰¹ See *supra* notes 40–41 and accompanying text.

³⁰² There is a parallel line of research relating to rape victims. See generally Shirley Feldman-Summers & Jeanette Norris, *Differences Between Rape Victims Who Report and Those Who Do Not Report to a Public Agency*, 14 J. APPLIED SOC. PSYCHOL. 562 (1984); Mary P. Koss, *The Hidden Rape Victim: Personality, Attitudinal, and Situational Characteristics*, 9 PSYCHOL. WOMEN Q. 193 (1985); Linda S. Williams, *The Classic Rape: When Do Victims Report?*, 31 SOC. PROBS. 459 (1984).

fect of employer grievance procedures or corrective measures. Studies suggest that the nature of a victim's reaction may depend on individual factors such as gender,³⁰³ race,³⁰⁴ religiosity,³⁰⁵ class,³⁰⁶ and personal assertiveness.³⁰⁷ The nature of the harassment also predicts reporting.³⁰⁸

In addition, the likelihood of reporting may be influenced by the organizational structure of the workplace. Past treatment of complaining victims may be one factor,³⁰⁹ as may the gender balance in the workplace.³¹⁰ A study by Jane Adams-Roy and Julian Barling found that victims who had filed a formal harassment complaint in the past were less likely to perceive the organization's policies as fair, and thus might be

³⁰³ See Baker et al., *Influence of Individual Characteristics*, *supra* note 221, at 318. The authors of this study also found that women are disproportionately more likely to resist and report unwelcome physical contact or other physically threatening conduct than other forms of harassment. *Id.*

³⁰⁴ See Linda Kalof et al., *The Influence of Race and Gender on Student Self-Reports of Sexual Harassment by College Professors*, 15 GENDER & SOC'Y 282, 296-97 (2001) (finding that although female college students are harassed at similar levels regardless of race, non-white women are less likely to label the experience as harassment and more "reluctant to report sexual harassment because of the potential loss of educational rewards or norms").

³⁰⁵ Baker et al., *Influence of Individual Characteristics*, *supra* note 221, at 319 (finding that victims with "high religiosity levels" are more likely to respond assertively, if indirectly, to harassing behavior than others).

³⁰⁶ See Eileen Breshnahan, *Putting Your Body on the Line: A Meditation on "Hostile Environment" Sexual Harassment in Working-Class Perspective*, 9 NAT'L WOMEN'S STUD. ASS'N J. 64 (1997) (exploring, based on her subjection to harassment while working as a letter-sorter for the United States Postal Service, the many reasons working class women may not report harassment to management).

³⁰⁷ See Jane Adams-Roy & Julian Barling, *Predicting the Decision to Confront or Report Sexual Harassment*, 19 J. VOCATIONAL BEHAV. 329, 334 (1998). The authors found that women with a high level of personal assertiveness were more likely to report harassment. They found this result hopeful, on the theory that assertiveness is a behavior that can be taught.

³⁰⁸ See, e.g., Baker et al., *Influence of Individual Characteristics*, *supra* note 221, at 319 (finding that women "may employ passive reactions to non-threatening socio-sexual behaviors," but "may invoke more assertive reactions" to threatening behavior); Fitzgerald et al., *supra* note 135, at 121 (reviewing studies showing that "explicit, repeated, and obviously harassing situations are more likely to elicit some form of assertion or a more formal complaint"); Mary Sullivan & Deborah I. Bybee, *Female Students and Sexual Harassment: What Factors Predict Reporting Behavior?*, 50(2) J. NAT'L ASS'N WOMEN DEANS & COUNS. 11, 14 (1987) (finding severity of conduct to be a significant predictor of reporting); Terpstra & Baker, *The Identification and Classification of Reactions*, *supra* note 132, at 7 (finding that sexual harassment victims, predicting their own responses to harassment based on hypothetical scenarios, were most likely to report physical harassment like rape and assault).

³⁰⁹ See Patricia A. Gwartney-Gibbs & Denise H. Lach, *Sociological Explanations for Failure to Seek Sexual Harassment Remedies*, 9 MEDIATION Q. 365, 371-72 (1992); see also Sullivan & Bybee, *supra* note 308, at 14 (finding that subjects believe victims will be more likely to report harassment if the victims perceived the reporting procedures to be effective and felt they would be believed).

³¹⁰ See Gwartney-Gibbs & Lach, *supra* note 309, at 370 (noting that the prevalence of traditional authority relationships, in which men tend to be supervisors and women tend to be subordinates, may affect women's likelihood of pursuing sexual harassment claims).

less likely to report a future incident.³¹¹ That same study found no relationship between job tenure and likelihood of filing a formal complaint.³¹²

The most interesting work in this area has been done by James Gruber and Lars Bjorn, who have combined individual and organizational variables affecting response rates to develop a predictive model. The authors drew on models used to predict *targets* of harassment to predict *responses* to harassment.³¹³ The authors analyzed the influence of sociocultural power, organizational structure, and personal resources like self-esteem on responses to harassment, which they in turn categorized as either passive, deflective, or assertive.³¹⁴

Based on interviews of 150 women working in unskilled jobs at an auto plant, Gruber and Bjorn found that women holding "low sociocultural power" (i.e., young, single, black, or uneducated women) were no less likely to respond assertively to harassment than other women,³¹⁵ but that women with less "organizational power" (i.e., those who work in male-dominated areas or those with low-skill or low-status jobs) tended to respond more passively than other women.³¹⁶ Finally, the authors found that women characterized as having low self-esteem or "low life satisfaction" responded less assertively than others.³¹⁷

Putting all their data together, the authors found job skills and work-area sex composition to be the two strongest determinants of victim response, with personal resources ranking third. They thus concluded that "the manner in which women handle sexual harassment is determined primarily by their location in the organizational environment,"³¹⁸ and that "more integrated, less sexualized work environments would not only result in less harassment but would most likely encourage more assertive responses to any sexual harassment which might occur."³¹⁹ However, personal resources played some role. Gruber and Bjorn also concluded that support groups for women in the workplace may indirectly contribute to better reporting rates.³²⁰

These predictive models help explain patterns and variations in response rates, but do not necessarily provide guidance for improving them (beyond overcoming entrenched societal problems such as occupational

³¹¹ See Adams-Roy & Barling, *supra* note 307, at 334; see also Laurie A. Rudman et al., *Suffering in Silence: Procedural Justice Versus Gender Socialization Issues in University Sexual Harassment Grievance Procedures*, 17 BASIC & APPLIED PSYCHOL. 519, 534 (1995) (finding that victims who failed to report harassment are more likely to score high on a "futility index" assessing the likely response to complaints).

³¹² See Adams-Roy & Barling, *supra* note 307, at 333.

³¹³ See Gruber & Bjorn, *Women's Responses*, *supra* note 139, at 814.

³¹⁴ See *id.* at 815-19 (describing study design).

³¹⁵ See *id.* at 819.

³¹⁶ See *id.* at 821.

³¹⁷ See *id.* at 822.

³¹⁸ *Id.*

³¹⁹ *Id.* at 824.

³²⁰ See *id.*

segregation and power disparities between men and women). To that end, research examining what kind of training is effective for victims is necessary.³²¹

One study conducted by Gruber and Michael Smith found that “women responded more assertively to unwanted sexual attention when the workplace implemented several means (e.g., policy, complaint procedure, training) for dealing with harassment problems.”³²² The policies and procedures may signify the employer’s control over “sexualized interaction in the workplace,” and lead victims to rely on the employer to enforce appropriate professional roles.³²³ But as researchers in this area recognize, a more thorough analysis of employer intervention, beyond simply asking whether a particular workplace has a policy against sexual harassment, is necessary.

One avenue to explore is whether women’s failure to report harassment is related to misperceptions about the definition of harassment and its prohibition. One problem that has surfaced in the empirical studies is that women, although generally more adept at identifying harassing behavior than men, have more difficulty with labeling conduct they themselves are experiencing as harassment.³²⁴ This inability to label their own experiences as harassment reduces the likelihood of reporting a problem.

One study suggests some ways to circumvent, if not overcome, labeling difficulties. Linda Brooks and Annette Perot conducted a study with the starting hypothesis that victims will not report a problem unless they perceive the behavior as serious or offensive.³²⁵ In that study, based on responses from female graduate students and faculty members at a large university, the authors attempted to measure the variables that

³²¹ Most empirical work evaluating the effects of training has focused on the effect on potential harassers rather than victims. See *supra* text accompanying notes 229–276.

³²² Gruber, *Women’s Experiences*, *supra* note 193, at 316 (describing results of 1995 study). The 1995 study tested factors affecting the willingness of sexual harassment victims to complain. See James F. Gruber & Michael D. Smith, *Women’s Responses to Sexual Harassment: A Multivariate Analysis*, 17 *BASIC & APPLIED PSYCHOL.* 543 (1995).

³²³ See Gruber & Smith, *supra* note 322, at 559.

³²⁴ See, e.g., Fitzgerald et al., *supra* note 122, at 171; see also Beiner, *Sex, Science and Social Knowledge*, *supra* note 1, at 309 (discussing studies documenting self-labeling difficulties). *But cf.* Mollie L. Jaschik & Bruce R. Fretz, *Women’s Perceptions and Labeling of Sexual Harassment*, 25 *SEX ROLES* 19, 22 (1991) (finding that women are unlikely to label behavior as “sexual harassment” without first being cued to the term).

³²⁵ Linda Brooks & Annette R. Perot, *Reporting Sexual Harassment: Exploring a Predictive Model*, 15 *PSYCHOL. WOMEN Q.* 31, 33 (1991). The authors preliminarily assumed that the victim’s labeling behavior as harassment was a necessary precursor to her reporting it, but they abandoned that hypothesis based on a review of the literature showing that assumption to be unwarranted. *Id.* Labeling has also been shown to be unrelated to the negative outcomes associated with sexual harassment; that is, victims of harassing behavior suffer negative consequences whether or not they identify their experience as “sexual harassment.” See Vicki J. Magley et al., *Outcomes of Self-Labeling Sexual Harassment*, 84 *J. APPLIED PSYCHOL.* 390, 399 (1999) (concluding that because negative outcomes “occurred even in the absence of cognitive labeling,” it must be “the fact of harassment and not its label or appraisal as stressful that leads to outcomes” (emphasis in original)).

might contribute to "perceived offensiveness" and to determine whether offensiveness, in turn, predicted reporting.³²⁶ They found that perceived offensiveness was indeed a significant predictor of reporting,³²⁷ and was influenced by both feminist ideology and frequency of the harassing behavior.³²⁸ Based on these findings, the authors concluded that employers could "facilitate more reporting if public policy statements and educational efforts encouraged potential victims to identify and affirm feelings of offensiveness in response to inappropriate sexual behaviors"³²⁹

It may therefore be that improvements to existing policies and procedures create a more hospitable environment for reporting complaints. According to research in this area, strong statements against harassment found in many policies should affirm the offensiveness of such behavior to victims. Formalized grievance procedures should make victims think their complaints will not be futile. Strong proactive measures to prevent harassment should generate more assertive responses from victims. Policies that include strong statements prohibiting retaliation and promising confidentiality should influence reporting rates, since fear of adverse consequences is a major cause of victims' failure to report.³³⁰

Survey results from the USMSPB, however, undercut these predictions. The latest survey shows a reporting rate of only twelve percent, despite the substantial efforts the federal government has made to disseminate information about anti-harassment policies and grievance procedures, as well as its efforts to offer training for all employees.³³¹ It thus appears that the vast proliferation of policies and procedures has not drastically altered the complex set of economic, psychological, and behavioral forces that keep most victims from reporting harassment.

The legal structure also gives insufficient incentives for employers to make broader efforts, such as eliminating gender imbalance in the workplace and maintaining tighter control over the work environment, both measures that could potentially make victims more likely to report. Currently, the affirmative defense, coupled with the reality of victim reporting, translates into a strong likelihood that victims will continue to be deprived of compensation for harassment.³³²

³²⁶ Brooks & Perot, *supra* note 325, at 35.

³²⁷ *See id.* at 43.

³²⁸ *Id.* at 45. Other studies have shown similar results with respect to the frequency and severity of conduct. *See supra* note 308 and accompanying text.

³²⁹ Brooks & Perot, *supra* note 325, at 45.

³³⁰ As discussed below, problems endemic to internal investigations, such as breaches of confidentiality and the presence of in-house bias, might undermine these potential improvements in reporting.

³³¹ *See* USMSPB 1995, *supra* note 7, at 30.

³³² Linda Hamilton Krieger has argued that this disconnect does not necessarily militate in favor of a different legal regime. Rather, she suggests, there is a normative question whether victims ought to be able to recover damages in lawsuits when they have, for whatever reason, deprived the employer of the opportunity to remedy the situation internally. *See* Krieger, *supra* note 131, at 194–95. The duty to complain is not, however, imposed on

C. Outcomes for Reported Complaints

A second basis for evaluating the legal framework established by *Faragher* and *Ellerth* is whether it enables complaints that are filed to be resolved fairly, resulting in adequate redress of victims' harm. Internal investigations are the centerpiece of the remedial approach endorsed by the Supreme Court. In essence, the affirmative defense requires that sexual harassment disputes be investigated and resolved internally before proceeding to court. A victim who refuses to assist an internal investigation loses her Title VII claim,³³³ and an employer who fails to conduct such an investigation loses all defenses to the claim of harassment.³³⁴ Employers have equipped themselves to fulfill the requirement of internal investigations, often relying on third-party investigators and alternative dispute resolution to resolve claims. But internal investigations are far from perfect. This Section evaluates these methods of resolving sexual harassment disputes.

1. Internal Dispute Resolution

There are some common pitfalls in internal investigations that undermine both their actual and perceived fairness and effectiveness.³³⁵ Investigations may be evaluated by three different measures: procedural justice (how the decision is made), interactional justice (how people are treated by the employer during the course of the investigation), and distributive justice (whether the ultimate outcome is fair).³³⁶

The measure of both procedural and interactional justice in the sexual harassment context can be considered a function of whether the investigative process encourages or discourages future complaints.³³⁷ Sev-

any other victims of discrimination. See Grossman, *supra* note 5, at 729–32 (pointing out doctrinal inconsistencies in Supreme Court's rule that victims who fail to complain could lose their cause of action entirely).

³³³ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (holding second prong of affirmative defense turns on employee's availment of employer's internal grievance procedures); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (same); see also *Scrivener v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 971 (5th Cir. 1999) (establishing that defendant met second prong of affirmative defense where plaintiff misled investigation by denying that harassment occurred); *Speight v. Albano Cleaners, Inc.*, 21 F. Supp. 2d 560, 564 (E.D. Va. 1998) (finding defendant established affirmative defense where plaintiff refused to identify harasser); see also *supra* note 109.

³³⁴ *Faragher*, 524 U.S. at 807 (first prong of affirmative defense turns on employer's reasonable efforts to investigate and correct harassment); *Ellerth*, 524 U.S. at 765 (same).

³³⁵ See Peter W. Dorfman et al., *Investigations of Sexual Harassment Allegations: Legal Means Fair—or Does It?*, 39 HUM. RESOURCE MGMT. 33 (2000) (outlining best practices for harassment investigations).

³³⁶ See *id.* at 34 (describing three basic measures of justice used in fields of management and organizational theory).

³³⁷ See Rudman et al., *supra* note 311, at 534 (finding the perceived absence of procedural justice to be a significant predictor of the failure to report harassment).

eral problems that plague internal investigations tend to have a negative effect on future complaints. First, the difficulty in maintaining confidentiality is significant. Victims frequently identify the lack of confidentiality as a justification for foregoing an internal grievance procedure.³³⁸ Their fears are likely justified given that even where the employer promises confidentiality, some employees will learn about the allegations legitimately as the investigation proceeds, either because they are charged with completing the investigation or because they have information relevant to the charges;³³⁹ others, perhaps many others, will learn about the allegations through the rumor mill.³⁴⁰ Moreover, the employer's desire to complete a thorough investigation—necessary to ensure fairness to the accused and to minimize liability for the employer—directly conflicts with the victim's desire for confidentiality.³⁴¹

A second limitation on the effectiveness of an employer's internal investigation is the perception of credibility. It is only natural for all parties—the complainant, other employees, the accused, and outside agencies—to view the internal fact-finding process with some measure of suspicion since the employer may have self-interested motives in its handling and resolution of a particular case.³⁴²

While *perceived* bias affects interactional justice, *actual* bias also affects both procedural and distributive justice. Internal investigations are unavoidably biased. At a minimum, the individual who handles the investigation for the employer will shift from a purportedly neutral fact-finder during the internal proceeding to a key witness for the employer should the complaint reach a court.³⁴³ Moreover, the fact that employers' concerns about legal liability and the future harmony and productivity of its workers are but two of the many factors that may actually or seemingly influence an employer's investigation.

³³⁸ See *supra* notes 294–295.

³³⁹ See Costello, *supra* note 287, at 17 (“[N]o matter how stringent the ‘confidentiality’ requirements are, some co-workers will learn about the complaint as part of their jobs.”).

³⁴⁰ See *id.* (describing the typical “culture” that results in breaches of confidentiality); Jonathan Day, *The Problem of Perceptions: Reasons For Outsourcing the Sexual Harassment Investigation*, EMP. REL. TODAY, Spring 2000, at 101, 103 (“Watercooler gossip, off-hours phone calls, and E-mail chat are all fairly active around even a modestly secret allegation.”).

³⁴¹ See Costello, *supra* note 287, at 18 (“There is also little question that, with each passing day, the number of fellow employees who know about the complaint, and the level of detail of their knowledge, will increase. Nothing so titillates the American imagination as a controversy whose subject matter is sex.”).

³⁴² See *id.* (“Where the accused is a member of management, complainants are understandably suspicious about the *bona fides* of an investigation conducted by management or under its direction. Both complainant and accused may fear a whitewash by the employer to avoid unwelcome publicity.”); Day, *supra* note 340, at 105 (describing a survey in which ninety-two percent of the survey respondents said “employees perceive a management-conducted investigation—any management-conducted investigation—as biased”).

³⁴³ See Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC'Y REV. 497, 506 (1993).

In-house fact-finders may also be biased in defense of the institution, as well as harbor their own prejudices and predispositions about the harasser and the victim.³⁴⁴ Various studies have explored other sources of bias beyond simple prejudice in favor of the employer's interests—fact-finders may also have predispositions about sexual harassment generally.³⁴⁵ Men, for example, tend to downplay sexual harassment as a problem and therefore take it less seriously. A study by Eliza Collins and Timothy Blodgett found that male managers are less likely to label scenarios as sexual harassment and are surprised by laws and norms that take it seriously.³⁴⁶ Another study examined whether the sex of the decision maker makes a statistically significant difference on his or her judgment of responsibility and appropriate discipline in a sexual harassment case. Although the study found that women were slightly more likely to “view the incident as sexual harassment, attribute greater degrees of responsibility to the alleged harasser and lesser degrees of responsibility to the victim, and consistently recommend more severe disciplinary action,” the results were not statistically significant.³⁴⁷

Another study looked at whether the physical attractiveness or “pristine”³⁴⁸ appearance of the complainant would affect whether she was perceived as truthful or untruthful in her description of the sexually harassing incident.³⁴⁹ In that study, the authors found that an unattractive woman was “perceived as significantly less truthful” than an attractive woman, but that a woman’s “pristine” appearance had no effect on the perceptions of her veracity.³⁵⁰

³⁴⁴ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1587 (1991) (“Partiality comes in many forms. In its most virulent form it results from prejudice in favor of or against a person because of his race, gender, sexual orientation, disability, religion, or class.”); *see also id.* at 1588–89 (“Even among well-intentioned judges who try to be impartial, the twin dangers of unacknowledged perspective and unrecognized partiality are always present.”).

³⁴⁵ Cf. Liza H. Gold, *Addressing Bias in the Forensic Assessment of Sexual Harassment Claims*, 26 J. AM. ACAD. PSYCHIATRY L. 563, 563 (1998) (noting the problem of bias in the forensic assessment by psychiatrists of sexual harassment claims, given the fact that most people carry strong opinions about sexual harassment).

³⁴⁶ See C. Collins & T. Blodgett, *Sexual Harassment: Some See It . . . Some Won't*, 1981 HARV. BUS. REV., Mar.-Apr. 1981, at 80, 81–82, 92; Gutek et al., *Social-Sexual Behavior*, *supra* note 165, at 44 (finding that men may look at “stringent sexual harassment guidelines” and “wonder what all the fuss is about”).

³⁴⁷ Daniel A. Thomann & Richard L. Wiener, *Physical and Psychological Causality as Determinants of Culpability in Sexual Harassment Cases*, 17 SEX ROLES 573, 589 (1987); cf. Hartnett et al., *supra* note 165, at 296–97 (finding that men and women agreed about appropriate punishment for the harasser, but that both, surprisingly, rated the harasser more favorably than the victim).

³⁴⁸ The “pristine” model is attired with conservative dress, minimal make-up, and clean, straight hair.

³⁴⁹ See John S. Seiter & Deborah Dunn, *Beauty and Believability in Sexual Harassment Cases: Does Physical Attractiveness Affect Perceptions of Veracity and the Likelihood of Being Harassed?*, 17 COMM. RES. REP. 203 (2000).

³⁵⁰ See *id.* at 206–07; *see also* Wilbur A. Castellow et al., *Effects of Physical Attractiveness of the Plaintiff and Defendant in Sexual Harassment Judgments*, 5 J. SOC. BEHAV.

Perceptions about the fairness of in-house investigations may actually increase employer liability, because victims are more likely to resist the findings and seek redress in court.³⁵¹

Even neutral procedures may operate in a biased manner. For example, if women are relatively powerless within a particular institution or workplace, they may be more likely to suffer retaliation for filing a complaint and thus more likely to prefer informal grievance procedures.³⁵²

The in-house investigation may also alter the workplace dynamic in a way that is particularly detrimental to women. Individuals who have been sexually harassed may not feel comfortable with an in-house complaint process.³⁵³ A victim-employee may feel further victimized by the allegiance of the fact-finding employee with the harassing employee. Employers have an incentive to design internal procedures that minimize "cost, time, and harm to public image"—all goals that may cut against the victim's interests.³⁵⁴

Even in the absence of bias, internal investigations suffer from flaws that make the attainment of distributive justice—a fair outcome—unlikely. The latest USMSPB survey finds that some of the same problems that dampen victim reporting also plague supervisors charged with investigating harassment complaints. They feel uncomfortable confronting harassers and discussing sexual issues, and may avoid formal investigations and adverse findings because they do not want to cause long-term career damage to the accused.³⁵⁵

Human resource professionals recommend that personnel charged with investigating harassment claims be specifically trained to identify harassing behavior and to evaluate conflicting evidence,³⁵⁶ but such training is seldom given.³⁵⁷ At least one study has shown a training effect for individuals responsible for receiving harassment complaints; after complet-

& PERSONALITY 547, 556 (1990) (finding that subjects were most likely to reach a "guilty" judgment with an attractive plaintiff-unattractive defendant combination).

³⁵¹ See Day, *supra* note 340, at 102 ("Employees are, a priori, suspicious of management's conclusions and fairness. This being the case, they tend to fight or disbelieve the findings, resist internal resolution attempts, and file countercharges—regardless of the investigation's actual integrity.").

³⁵² See Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 J. AM. PSYCHOL. ASS'N. 497, 500 (1991).

³⁵³ Cf. Grillo, *supra* note 344, at 1585 ("[A] person might not want to participate in mediation because the timing is wrong. She might be willing to mediate in the future, but might feel for the present too vulnerable, angry, hurt or fragile to use anything but a formal process with built-in distancing mechanisms.").

³⁵⁴ Edelman et al., *supra* note 343, at 499.

³⁵⁵ See USMSPB 1995, *supra* note 7, at 36–39. The studies showing that high-ranking managers are less likely to define behavior as harassing may contribute to the inadequacy of or delay in an employer's response. See Gutek, *Rater Effects*, *supra* note 173, at 460.

³⁵⁶ See, e.g., Mark L. Lengnick-Hall, *Checking Out Sexual Harassment Claims*, HR MAG., Mar. 1992, at 77, 81. Employers are also counseled to monitor and review investigations to ensure "consistency and fairness." *Id.*

³⁵⁷ See Dorfman et al., *supra* note 335, at 33.

ing a training program, contact persons knew more about sexual harassment and were better able to provide effective service to victims.³⁵⁸ Many sources also recommend that two investigators be used in order to avoid a biased or careless result.³⁵⁹

The desire to avoid disrupting the work environment may further undercut the employer's ability to handle internal investigations. An internal investigation demands involvement by several members of the workplace: the individuals charged with investigating and imposing disciplinary action on the offender, the complainant, the accused, and any witnesses or employees with relevant information.³⁶⁰ The employer thus has an incentive to minimize the length and invasiveness of the investigation to avoid disruption.

Many of the problems faced by employers in investigating their own employees may be solved by deferring to neutral third parties.³⁶¹ Outside attorneys, consultants, and investigators may better protect confidentiality and minimize disruption to the workplace. Although the cost may be greater, many employers will be willing to absorb it in order to avoid lawsuits. There is anecdotal evidence supporting a trend toward using outside investigators.³⁶²

One potential obstacle to outsourcing investigations is the position taken by the Federal Trade Commission that third parties who conduct sexual harassment investigations constitute "consumer reporting agencies" under the Fair Credit Reporting Act (FCRA).³⁶³ According to this interpretation, an investigator must obtain prior consent from the harasser as well as comply with various disclosure requirements.³⁶⁴ Such consent

³⁵⁸ See Michelle C.D. Blaxall, *The Development and Evaluation of a Sexual Harassment Contact Person Training Package*, 17 BEHAV. MODIFICATION 148, 158–59 (1993); see also Beauvais, *supra* note 234, at 131 (studying the training effect on residential advisors designated to receive complaints from students).

³⁵⁹ See, e.g., Oh, *supra* note 82, at 228–29; see also Andrea Williams, *AAA's Sexual Harassment Claims Resolution Process*, 20 COLO. LAW. 1217, 1218 (1993) (describing the American Arbitration Association's Model Sexual Harassment Claims Resolution Process, which recommends that each fact-finding team consist of one male and one female to bring a "balanced perspective to the investigation"). At least one study has also found that female victims are more likely to report an incident of harassment to a woman than to a man. See Sullivan & Bybee, *supra* note 308, at 14.

³⁶⁰ See Costello, *supra* note 287, at 17–18.

³⁶¹ See Day, *supra* note 340, at 106 ("[I]f management considered all of the potentially destructive effects of even a single sexual harassment case, the decision would almost certainly be to outsource its investigation to an impartial, disinterested, and professional third party."); Susan Gardner & Kathryn Lewis, *Sexual Harassment Investigations: A Portrait of Contradictions*, SOC'Y FOR ADVANCED MGMT. J., Autumn 2000, at 29, 33–34 (noting problems with in-house investigations, including bias and the difficulty of maintaining confidentiality, that make the use of outside investigators appealing).

³⁶² See, e.g., Beverly Garofalo & Ana Marie Castle Bray, *Applying the FCRA to Third-Party Sexual Harassment Investigations*, EMP. L. STRATEGIST, July 1999, at 1 (reporting that "increasingly, companies have been turning to outside investigators and attorneys" after receiving complaints of sexual harassment).

³⁶³ See *id.* (describing FTC opinion letter and industry reaction).

³⁶⁴ See *id.*; see also Fair Credit Reporting Act, 15 U.S.C. § 1681 (2000); Gardner &

is rarely forthcoming, further frustrating employer investigations. Even where the harasser consents, the disclosure requirements force the employer to compromise confidentiality, which has the potential to undermine victim reporting.³⁶⁵ The FCRA also requires that the investigator disclose the name and unedited testimony of the complainant and witnesses to the accused, which may contribute to greater incidence of retaliation. To avoid these traps,³⁶⁶ employers may hesitate to make use of outside investigators, despite the problems endemic to internal investigations.

Some of the problems cited above can be resolved by adopting a legal standard that measures employer liability according to their actual success in stopping harassment. Courts do look at the promptness and effectiveness of an employer's response to complaints, although stopping the harassment and preventing recurrence is not always the benchmark used.³⁶⁷ A stricter standard for employers might spur better policies, which, in turn, might reflect a manifest commitment to correcting harassment while minimizing disruption to the workplace.

Even if employers manage to satisfy all three measures of justice by conducting internal investigations that are fair in process and outcome, they may still be inconsistent with Title VII's overriding goal of preventing discrimination. Lauren Edelman, Howard Erlanger, and John Lande studied internal dispute resolution (IDR) techniques for handling complaints of discrimination to determine the extent to which they mimic legal resolutions, avoid legal interference, or achieve legal ideals. One concern, developed in organizational literature, is that employers have a rational interest in resolving grievances without necessarily identifying the problem as discrimination or reducing its occurrence.³⁶⁸ The authors interviewed complaint handlers in ten organizations of different sizes and purposes. Through those interviews, the authors developed a series of conclusions about the nature of IDR in the context of discrimination.

First, the authors found that law plays a very small role in handling complaints. "Although complaint handlers are concerned with avoiding external complaints and litigation and are therefore attentive to what courts would do in a given case, they tend to subsume legal goals under

Lewis, *supra* note 361, at 29 (discussing conflict between hiring neutral third parties to conduct harassment investigations and the FCRA).

³⁶⁵ Gardner & Lewis, *supra* note 361, at 34.

³⁶⁶ Recent cases have rejected the FTC's interpretation of the FCRA, holding that "certain reports investigating alleged workplace misconduct did not trigger the FCRA's notice and consent requirements." Mark J. Biros & Christine D. Bachman, *The Fair Credit Reporting Act: Courts Seek to Remedy the "Catch 22,"* METRO. CORP. COUNS., Feb. 2002, at 4.

³⁶⁷ See *supra* notes 72-73 and accompanying text. The uncertainty about what the law requires may actually, in this context, be more likely to produce hyper- rather than sub-optimal responses from employers. Afraid of allowing a potential harasser to linger and cause liability problems in the future, many employers have become quick to terminate accused employees rather than impose a lesser measure of discipline.

³⁶⁸ See Edelman et al., *supra* note 343, at 499-500.

managerial goals.”³⁶⁹ Smooth functioning of the organization, rather than individual rights, takes center stage. Thus, as predicted, employers focus on resolving the conflict, which often means treating it as an interpersonal dispute rather than discrimination.³⁷⁰ This approach can serve the goal of procedural justice by making the victim feel that her complaint has been handled fairly and effectively, but may not actually contribute to a reduction in workplace discrimination.³⁷¹

Second, the authors found that complaint handlers make little or no attempt to adopt substantive legal standards in analyzing complaints, but instead apply a general concept of fair treatment to all claims brought to their attention.³⁷² Fair treatment was not construed by most complaint handlers in this study as requiring consistency with the law.³⁷³ Thus, goals like gender equality become less important than they otherwise might be in an administrative or judicial proceeding.³⁷⁴

Third, the authors found that complaint handlers tend to redefine complaints of discrimination as managerial problems. Recasting complaints in this way enables handlers to fix a problem without “labeling and condemning discrimination where it does in fact exist.”³⁷⁵ Although this approach sometimes grants remedies to complainants where the formal legal system would not (because a court would simply dismiss a claim that did not qualify as discrimination), it also “undermine[s] the legal right to nondiscrimination.”³⁷⁶ Internal processes that recast problems as managerial difficulties fail to contribute to the development of a standard for judging later cases.³⁷⁷ Moreover, the “therapeutic remedies” used to resolve conflict may have the effect of convincing the complainant that she in fact suffered no legal harm, when the judicial system would find to the contrary. This is a classic example of an approach that creates procedural justice without achieving Title VII’s goal of preventing discrimination.

The flaws in internal claims processes identified by Edelman and her colleagues are sufficiently serious to question the appropriateness of the law’s heavy reliance on them in the sexual harassment context. Even if conducted fairly, which is hard to guarantee, these IDRs may have no effect on the level of harassment, while systematically denying victims both public vindication and compensation for harm.

³⁶⁹ *Id.* at 511.

³⁷⁰ *Id.*

³⁷¹ *Id.* at 512.

³⁷² *Id.* at 513.

³⁷³ *Id.* at 514.

³⁷⁴ *Id.* at 515.

³⁷⁵ *Id.* at 516. One caveat to this finding is that the authors found complaint handlers “most likely to recognize discrimination in sexual harassment cases.” *Id.* at 523.

³⁷⁶ *Id.* at 518.

³⁷⁷ *Id.* at 524.

Has the new legal regime done anything to improve this bleak state of internal affairs? Not much, although by making liability turn, at least in part, on the adequacy of an employer's corrective measures, the Court has increased the chances that claims will be resolved more efficiently and effectively. But, as with the conclusions about the prevention of harassment, the effectiveness of these measures would be better reinforced by a legal standard focusing on success rather than compliance.

2. *Alternative Dispute Resolution*

Given the problems associated with internal investigations and the potential damages at stake, many employers have begun to offer or require alternative dispute resolution (ADR) in place of both internal investigations and subsequent administrative and judicial proceedings. A rise in both voluntary³⁷⁸ and mandatory use of ADR to resolve sexual harassment complaints is inevitable.³⁷⁹

Title VII, as amended by the Civil Rights Act of 1991, explicitly encourages parties to resolve employment disputes using alternative means of dispute resolution (both arbitration, an adversarial process resulting in a binding decision of an arbitrator, and mediation, a non-binding, conflict-resolving process aided by a neutral third party).³⁸⁰ One potential advantage of ADR for victims is that the EEOC, due to tremendous volume, is not capable of processing all the charges filed, and therefore might not litigate on the victim's behalf.³⁸¹ Mediation and arbitration thus provide an opportunity to resolve claims without the expense of a full lawsuit. The following Section discusses additional advantages and disadvantages of ADR for victims in sexual harassment cases.

³⁷⁸ See, e.g., Rubenstein, *supra* note 47, at 31 (reporting on the adoption by PaineWebber of the Forum for Alternate Issue Resolution, a program offering several ADR options to sexual harassment complainants); Miles L. Davies, *Dispute-Resolution Program Could Pay for Itself*, DENVER POST, Sept. 13, 1998, at J23 (recommending, based on Faragher and Ellerth, that employers institute ADR programs for employment related disputes).

³⁷⁹ Several articles comprehensively consider the use of ADR techniques in sexual harassment cases. See Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489 (1997) (advocating for greater use of mediation in the context of sexual harassment); Costello, *supra* note 287, at 16; Howard Gadlin, *Careful Maneuvers: Mediating Sexual Harassment*, 7 NEGOTIATION J. 139 (1991); Williams, *supra* note 359, at 1217.

³⁸⁰ Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991). Before this Amendment, Title VII encouraged "conference, conciliation, and persuasion" to accomplish the same task. 42 U.S.C. § 2000e-5(b) (1994).

³⁸¹ See Susan A. FitzGibbon, *Arbitration, Mediation, and Sexual Harassment*, 5 PSYCHOL. PUB. POL'Y & L. 693, 714-15 (1999).

a. Mediation

Mediation has become popular in the sexual harassment context in both public and private sector institutions. The EEOC has begun experimenting with mediation, offering complainants the option of mediating their disputes.³⁸²

Advocates urge that the primary problems raised by in-house investigations may be avoided through mediation.³⁸³ For example, mediation is better able to accommodate participants' desire for confidentiality and flexibility.³⁸⁴ In addition, concerns about in-house bias and confidentiality are not as strong when an employer devolves control to an outside mediator.³⁸⁵ Likewise, mediation may handle grievances in a manner consonant with the complainant's preferences to stop the harassment without fear of retaliation, achieve a successful resolution of an ambiguous situation,³⁸⁶ and educate the harasser.³⁸⁷

To the extent mediation can preempt litigation by satisfying the claimant's desires, it may also serve the interests of all parties by avoiding the cost, delay, and exposure associated with lawsuits.³⁸⁸ A study of the EEOC's mediation pilot program showed a fifty-two percent settlement rate and benefits to complainants comparable to those obtained through litigation.³⁸⁹ It is difficult to evaluate mediation from a distributive justice perspective because it is almost always conducted with complete privacy, generates no published decision or outcome, and rarely garners any media interest.

³⁸² See Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 155 (1999) (describing the EEOC's experiment with mediation). The American Arbitration Association designed a Model Sexual Harassment Claims Resolution Process to be used by employers in conjunction with their own anti-harassment policies and grievance procedures. Williams, *supra* note 359, at 1217 (describing model process).

³⁸³ See Costello, *supra* note 287, at 19–20 (assessing the relative costs and benefits of sexual harassment investigations conducted by employers, administrative agencies, courts, and outside mediators, and concluding that resolution in the context of mediation is clearly superior for many people given the interests of all parties involved); see also FitzGibbon, *supra* note 381, at 715–19 (describing the benefits of mediating sexual harassment claims).

³⁸⁴ See, e.g., Linda Stamato, *Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum?*, 10 MEDIATION Q. 167, 168 (1992); Harkavy, *supra* note 382, at 158.

³⁸⁵ See FitzGibbon, *supra* note 381, at 718 (praising the "privacy and confidentiality of the mediation process" for sexual harassment disputes).

³⁸⁶ Mediation also allows the parties to reach a resolution without making "a credibility determination, which could be damaging to one or both parties." *Id.*

³⁸⁷ See, e.g., Gadlin, *supra* note 379, at 139; Harkavy, *supra* note 382, at 158; Barbara J. Gazeley, *Venus, Mars, and the Law: On Mediation of Sexual Harassment Cases*, 33 WILLAMETTE L. REV. 605, 633 (1997); FitzGibbon, *supra* note 381, at 718 (noting that mediation may be "particularly suitable to resolve disputes in which the parties have an ongoing relationship").

³⁸⁸ See, e.g., FitzGibbon, *supra* note 381, at 717; Harkavy, *supra* note 382, at 159; Stamato, *supra* note 384, at 168.

³⁸⁹ See FitzGibbon, *supra* note 381, at 715.

Although some feminists support the use of mediation as an empowering and equality-gaining process,³⁹⁰ others believe that informal processes such as mediation are likely to be infused with bias and prejudice.³⁹¹

Mediators . . . exert a great deal of power. When two people are in conflict, having a third, purportedly neutral person take the viewpoint of one or the other results in a palpable shift of power to the party with whom the mediator agrees. . . . The power of the mediator is not always openly acknowledged but is hidden beneath protestations that the process belongs to the parties. . . . There is much room for, but little acknowledgment of, the possibility of the mediator's exhibiting partiality or imposing a hidden agenda on the parties.³⁹²

Mediation may also perpetuate the imbalance of power between the harasser and the victim, or be inappropriate because the less powerful party "cannot negotiate on an equal basis."³⁹³ It is perhaps only through a process that involves fact-finding, such as litigation or arbitration, that the parties may be equal.³⁹⁴

Mediation may have further drawbacks unique to women, some growing out of the fact that it does not center on the assertion of rights.³⁹⁵ A rights-based approach, as Elizabeth Schneider has argued, may "link[] the individual to a broader social group, helping to transcend the dichotomy of individual and community."³⁹⁶ The "assertion of rights can be transformative for many women. . . ."³⁹⁷

Even if mediation is successful in resolving a particular problem of harassment, it precludes the development of coherent, relevant law and provides no public vindication for the victim.³⁹⁸ A quiet resolution may insufficiently deter the employer from permitting future incidents to occur or the harasser from harassing again.³⁹⁹ The requirement that a sexual

³⁹⁰ See, e.g., Gazeley, *supra* note 387, at 633; Harkavy, *supra* note 382, at 160–61; Stamatou, *supra* note 384, at 169.

³⁹¹ Grillo, *supra* note 344, at 1589–90 ("The informal nature of the mediation setting may make it an environment in which prejudices can flourish.").

³⁹² *Id.* at 1585–86.

³⁹³ See Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27, 36 (1993); Gazeley, *supra* note 387, at 633; cf. Gadlin, *supra* note 379, at 150 (recommending modified mediation procedures to "deal with the problem of power imbalances").

³⁹⁴ See Irvine, *supra* note 393, at 37.

³⁹⁵ "[T]he assertion of rights can help women distinguish self from other, and ultimately give them a sense of collective identity." Grillo, *supra* note 344, at 1566–67 (quoting Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from The Women's Movement*, 61 N.Y.U. L. REV. 589, 623–48 (1986)).

³⁹⁶ Schneider, *supra* note 395, at 617–18.

³⁹⁷ See Grillo, *supra* note 344, at 1567 (drawing on Carol Gilligan's work).

³⁹⁸ See Harkavy, *supra* note 382, at 161–62.

³⁹⁹ See Irvine, *supra* note 393, at 51 ("Mediation would leave doubts in the work force

harassment victim participate in mediation, which is suggestive of problem-solving rather than remediation, may also change her perception of herself from a victim to a co-equal party to a conflict.⁴⁰⁰

b. Arbitration

Observers can also expect an increase in the number of employers who attempt to require or encourage arbitration of sexual harassment claims as well,⁴⁰¹ although arbitration is not nearly as prevalent as mediation.⁴⁰² Arbitration does not seem to offer any clear benefits over litigation, since it may be just as costly, adversarial, and time-consuming.⁴⁰³

Several studies of published arbitration cases have been done, most involving challenges by a disciplined employee (usually the harasser) pursuant to a collective bargaining agreement. According to one such study of 122 published arbitration awards in sexual harassment cases, arbitrators tend to be aware of judicial approaches to cases and attempt to mirror them.⁴⁰⁴ The study examined cases challenging the imposition of a penalty on the harasser based on the terms of collective bargaining agreements, and noted the influence of court decisions vacating arbitration awards on public policy grounds where the penalties imposed were deemed too lenient.⁴⁰⁵ Following the issuance of a cluster of decisions vacating arbitral awards, the study found that arbitrators became much more reticent to overturn findings of just cause for discipline.⁴⁰⁶

as to what conduct is permitted," unlike arbitration or litigation).

⁴⁰⁰ See Riger, *supra* note 352, at 502; see also Irvine, *supra* note 393, at 51 ("Victims of sexual harassment must know that their harassers will be punished and that they will not be prodded to minimize their abuse in the guise of mediation and reconciliation"). *But cf.* Stamato, *supra* note 384, at 169 (praising mediation because it "affords each party an opportunity to see the other's perspective without having to agree with it, and presumably to reach an agreement that satisfies future needs and interests").

⁴⁰¹ The enforceability of mandatory arbitration agreements has been at the center of a long and convoluted debate among federal courts. Current law suggests that pre-dispute agreements to arbitrate Title VII claims are probably not enforceable if made through a collective bargaining agreement, see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-60 (1974), but enforceable if agreed to individually, see *EEOC v. Waffle House*, 534 U.S. 279 (2002).

⁴⁰² See FitzGibbon, *supra* note 381, at 719 (noting that U.S. General Accounting Office study found only nineteen percent of employers with more than one hundred employees utilize arbitration to resolve workplace discrimination complaints, while eighty percent utilize mediation); *cf.* Williams, *supra* note 359, at 1219 (recommending, as part of the American Arbitration Association's Model Sexual Harassment Claims Resolution Process, that arbitration be used only after mediation has failed).

⁴⁰³ See, e.g., Harkavy, *supra* note 382, at 154 (claiming that "arbitration does not materially save time or expense in prosecuting civil cases, and the parties' satisfaction with this ADR device . . . does not appear to be so high as to outweigh its uncertainties").

⁴⁰⁴ See Donald J. Petersen, *Issues and Standards in Arbitral Approaches to Sexual Harassment Cases*, 7(2) J. INDIVIDUAL EMP. RTS. 127, 142 (1998-99).

⁴⁰⁵ See *id.*

⁴⁰⁶ See *id.*

Another study attempted to measure the influence of Title VII on labor arbitration decisions growing out of sexual harassment charges. In this study of 132 arbitral awards, the authors concluded that external law influenced many decisions, but was completely ignored in others.⁴⁰⁷ Interestingly, unions fared better in the decisions where external law was not mentioned, suggesting that arbitrators who do take law into account take the obligations of employers to prevent and correct harassment seriously.⁴⁰⁸

Several studies have tried to develop a predictive model for arbitrated sexual harassment cases. These studies tend to show that the same factors dictate outcomes both in arbitrations and litigation. Based on a review of eighty-six published arbitrations, the author of one study concluded that three factors were associated with discharge of the offender: witnesses, the victim's filing a complaint, and other EEOC claims filed against the employer.⁴⁰⁹

An earlier study, using a similar methodology, found that arbitrators upheld discharge as a remedy when the harasser had been warned, when the conduct continued over a significant period of time, when the offender had an otherwise imperfect work record, and when the harassment was severe.⁴¹⁰ Another study found that while discharge is almost always upheld for cases involving physical contact, it is rarely upheld without clear evidence that the offender knew or should have known of the rules prohibiting sexual harassment.⁴¹¹

These studies suggest that arbitrators rely on factors similar to judges and juries in determining whether sexual harassment occurred (and thus whether the discipline imposed on the union workers was supported by just cause).

Although relatively few arbitrations involve claims brought by victims, at least one study has suggested that they do not fare well before arbitrators.⁴¹² It also found that arbitrators are particularly hesitant to uphold claims arising out of consensual relationships.⁴¹³

Regardless of the case outcomes, arbitration may inhere fewer process dangers than mediation because of its similarities to litigation.⁴¹⁴ It

⁴⁰⁷ See Helen Elkiss, *And the Winner Is . . . ? External Law and Its Influence on Arbitration of Sexual Harassment Grievances*, 7(2) J. INDIVIDUAL EMP. RTS. 149, 155 (1998-99).

⁴⁰⁸ See *id.*

⁴⁰⁹ See Helen LaVan, *Decisional Model for Predicting Outcomes of Arbitrated Sexual Harassment Disputes*, 1993 LABOR L.J. 230, 235 (1993).

⁴¹⁰ See Jonathan S. Monat & Angel Gomez, *Decisional Standards Used by Arbitrators in Sexual Harassment Cases*, 1986 LABOR L.J. 712, 714-17 (1986).

⁴¹¹ William A. Nowlin, *Sexual Harassment in the Workplace: How Arbitrators Rule*, 43 ARB. J. 31, 39 (1988).

⁴¹² See *id.* at 40.

⁴¹³ See *id.*

⁴¹⁴ See Irvine, *supra* note 393, at 50; cf. Sharon L. Oswald & Steven B. Caudill, *Experimental Evidence of Gender Effects in Arbitration Decisions*, 4 EMPLOYEE RESP. & RTS. J. 271, 276 (1991).

may also serve the victim's interest in vindication if the process is made public. A panel of arbitrators recently awarded \$3.2 million to a female stockbroker for sexual harassment she experienced while working in the infamous "Boom-Boom Room" at Salomon Smith Barney, the first of hundreds of women likely to go before the same panel. The plaintiffs who have already brought suit were given the choice of accepting a fixed settlement or proving their claims before arbitrators in a public forum.⁴¹⁵

Based on the available studies, it is hard to draw a firm conclusion about the relative merits of ADR in the sexual harassment context. To ensure adequate compensation for victims, arbitration should be preferred over mediation (the opposite of the current hierarchy), but only used in lieu of litigation on a voluntary basis. Unfortunately, employers have no incentive to design claims resolution processes to meet this goal as long as they can assemble proof of adequate "corrective measures" for purposes of the affirmative defense.

c. Judicial Dispute Resolution

One final empirical question is whether victims who litigate their claims will fare better or worse than they did before *Faragher* and *Elzerth*. Before these decisions, David Terpstra and Douglas Baker ran a regression analysis of sexual harassment cases in federal court to identify case variables that were related to outcomes. In that study, the authors found five significant variables: severity of harassing behavior, presence of witnesses, notice to management of conduct, availability of supporting documents, and whether the employer took investigative or remedial action.⁴¹⁶ Another study found that type of harassment, reaction of the victim, and presence of coercion explained the decisions of most federal judges in sexual harassment cases.⁴¹⁷ These variables obviously overlap to a significant degree with the factors courts are supposed to consider when applying the affirmative defense. It may be that outcomes will not

⁴¹⁵ Alan J. Wax, *Grumman Parcel Up for Sale*, NEWSDAY, Dec. 23, 2002, at 49 (describing settlement).

⁴¹⁶ David E. Terpstra & Douglas D. Baker, *Outcomes of Federal Court Decisions on Sexual Harassment*, 35 ACAD. MGMT. J. 181, 187-88 (1992); David E. Terpstra, *The Process and Outcomes of Sexual Harassment Claims*, 1993 LABOR L.J. 632, 634-35 (1993) (finding, based on a study of EEOC charges, that cases were "significantly more likely to be resolved in favor of the complainants when the harassment behaviors were of a more serious nature, when the complainants had witnesses to support their allegations, and when they had given notice to management prior to filing formal charges"); see also Gowan & Zimmerman, *supra* note 165, at 613 (finding, in a study designed to assess juror reactions to sexual harassment cases, that those "individuals who had been victims of sexual harassment were more likely to award higher monetary damages, regardless of the severity level of the scenarios, than were individuals who had not been sexually harassed").

⁴¹⁷ Kenneth M. York, *A Policy Capturing Analysis of Federal District and Appellate Court Sexual Harassment Cases*, 5 EMPLOYEE RESP. & RTS. J. 173, 181-82 (1992).

vary tremendously under the newly articulated legal standard, in light of the fact that courts were already basing decisions on similar variables.

A third study, looking at published decisions over a twelve-year period, found the most successful plaintiff to be one who "alleged conduct directed specifically at her by both supervisors and coworkers and complained within the organization in some manner about the conduct."⁴¹⁸ Based on a regression analysis, the authors of this study found several factors to be predictive of plaintiff success, including an allegation of physical harassment, harassment involving supervisors, objection by plaintiff to the harassment, and the lack of policies and procedures specific to sexual harassment.⁴¹⁹

There have been very few studies looking at outcomes since *Faragher* and *Ellerth*, but those few support concern about encouraging compliance rather than prevention. One study, which analyzed federal court decisions in the first eighteen months following *Faragher* and *Ellerth*, concluded that "employers attempting to limit their liability should exercise reasonable care, but not too much care because employers can be punished when employees feel comfortable enough to use the procedures."⁴²⁰ The study revealed that employers who gamed the system in this way—by aiming precisely at rule compliance but no higher—fared the best in litigation.

CONCLUSION

The rules of liability for sexual and other forms of harassment have created an elaborate scheme of incentives. Employers must attempt to prevent harassment by enacting anti-harassment policies and communicating them to their work force. They must also attempt to remedy harassment with prompt and effective internal investigations. Victims must file prompt, internal complaints when harassment occurs. In litigation, response to these incentives is cause for reward, while failure to respond is cause for penalty. Thus, rule compliance has become the benchmark by which employers and victims are measured.⁴²¹

However, social science literature suggests that a near-perfect state of rule compliance can peaceably co-exist with an uncomfortably high level of harassment. The problem is that the rules of liability were developed in a vacuum, without consideration of the real-world problem of harassment and its causes. While some of the preventative efforts encour-

⁴¹⁸ See Juliano & Schwab, *supra* note 9, at 570. The study also found that "[b]lue-collar and clerical workers were more successful than management, white-collar, or professional employees," in lawsuits, and "plaintiffs in sex-segregated workplaces fared better than those in integrated workplaces." *Id.*

⁴¹⁹ *Id.* at 571.

⁴²⁰ David Sherwyn et al., *supra* note 56, at 1294.

⁴²¹ Susan Bisom-Rapp has described this problem with respect to anti-discrimination law generally as "masking rather than eliminating workplace bias." Bisom-Rapp, *Bullet-proofing the Workplace*, *supra* note 76, at 1037.

aged by the law may have the incidental effect of reducing harassment, the same is not true of all of them. In fact, the only measure with any proven ability to affect the level of harassment—anti-harassment training—is encouraged, but not required by the law. Even there, the type of training that satisfies any legal duty may not be the same type that works. Those measures that are considered legally sufficient have little evidence to support their effectiveness.

The same criticism holds for legally required corrective measures. The requirement that victims complain immediately upon experiencing unwelcome sexual conduct does not account for the reality that very few report, nor is it accompanied by any measures to improve the level of reporting. Moreover, the emphasis on internal investigations is made without consideration of the problems endemic to them. The responses of the typical employer (who will likely respond to the incentives given) and the typical victim (who will not) create no assurance that harassment will be addressed, either in terms of prevention or correction. Both sets of rules overlook the significant control employers exercise over the workplace and their ability to establish norms of respect and equality, to respond to problems in a manner that both resolves them and encourages future victims to come forward, and to discipline offenders.

The reevaluation of the current legal regime dictates both doctrinal reform and extralegal efforts. Three doctrinal changes can take the focus away from rule compliance and toward effective prevention and adequate compensation: elimination of the affirmative defense, greater availability of punitive damages, and the recognition of individual liability.⁴²² The affirmative defense is doctrinally unjustifiable for a variety of reasons. It thwarts Title VII's stated purposes, misallocates risk to victims rather than employers, deprives victims of attorneys' fees that make civil rights enforcement possible, and is inconsistent with the treatment of other victims of discrimination.⁴²³ The lessons learned from social science about employer, harasser, and victim behavior countenance its elimination as well.

Research suggests that the affirmative defense rewards compliance without ensuring success. A rule of automatic liability, without such a defense, will produce the same set of incentives for employers to combat harassment, but will reward them only if their actions work. Such an approach will induce employers not only to take their preventative and corrective efforts seriously, but also to adapt standard measures to idiosyncratic problems they may face and to take additional measures to establish workplace norms that are inhospitable to harassment. They may also

⁴²² Because the Supreme Court has established the affirmative defense, and every federal appellate court has agreed that the text of Title VII does not support individual liability, both of these recommended changes would require Congressional action.

⁴²³ See Grossman, *supra* note 5, at 720–35.

be spurred to evaluate the efficacy of the measures they do adopt—something rarely done—and to continue to experiment with potentially more effective strategies.

This approach will not garner support from most commentators, many of whom have either praised the affirmative defense as a fair and appropriate interpretation of Title VII or have criticized it for imposing *too much* liability on employers. The bulk of this commentary has been critical of the second prong of the affirmative defense,⁴²⁴ which makes the employer's liability turn on the independent actions of the victim. The possibility exists that even if the employer has acted reasonably in its preventive and corrective measures, it may nonetheless be held liable for harassment if the victim files a prompt complaint.⁴²⁵ That strikes many as unfair,⁴²⁶ including several courts that have simply refused to apply the second prong of the affirmative defense for fear of "punishing" an employer who has, in their view, done nothing wrong.⁴²⁷

This concern, however, is overstated and, in any event, both descriptively and normatively unjustified. It is unlikely that an employer who has done "nothing wrong" will be sanctioned, because employer liability accrues only when actionable harassment occurs. An employer who responds quickly and adequately to a victim's complaint of harassment is likely to prevent the harassment from rising to that level and thus avoid liability for the initial harassment.⁴²⁸ Only when an initial act of harassment is so severe as to independently create a hostile environment prior to a victim's prompt complaint will an employer be held liable despite its "reasonable" conduct.⁴²⁹

Moreover, an empirical study of federal court decisions in the first eighteen months following *Faragher* and *Ellerth* revealed that employer behavior heavily influenced not only the first prong of the affirmative

⁴²⁴ Early on, commentators criticized the affirmative defense because they feared it would preclude the granting of summary judgment. See, e.g., Francis Achampong, *Employer Liability for Hostile Environment Sexual Harassment by a Supervisor: A Critical Assessment of the Supreme Court's New Vicarious Liability Standard*, 28 SW. U. L. REV. 45, 66–67 (1998); Paul Buchanan & Courtney W. Wiswall, *The Evolving Understanding of Workplace Harassment and Employer Liability: Implications of Recent Supreme Court Decisions Under Title VII*, 34 WAKE FOREST L. REV. 55, 64–65 (1999). This fear has not been borne out by subsequent cases.

⁴²⁵ See Grossman, *supra* note 5, at 715–19 (describing possible scenarios and likely ruling with respect to liability for each).

⁴²⁶ See, e.g., Sherwyn et al., *supra* note 56, at 1301 (advocating for a rule that would exonerate employers who behaved responsibly, even though it may result in a victim receiving no compensation for actionable harassment); Rachel Schacter, *Creating Equitable Outcomes Through Remedies: When Reasonable Employers Must be Held Liable for Sexual Harassment under Title VII*, 8 VA. J. SOC. POL'Y & L. 567 (2001) (proposing reform that would alleviate problem of holding employers liable when both employer and victim behaved reasonably).

⁴²⁷ See *supra* note 23 (collecting cases).

⁴²⁸ See Grossman, *supra* note 5, at 717–18.

⁴²⁹ See *id.* at 718.

defense, but the second prong as well.⁴³⁰ In cases where the employer behaved responsibly, courts were more likely to find that the victim behaved unreasonably. Based on a content analysis of these opinions, the authors of this study concluded that “[s]uch factors as whether an employer has a good sexual harassment policy and responds well to an allegation may prove sufficient to satisfy prongs one and two, independent of what an employee may or may not do.”⁴³¹ Thus, plaintiffs in those cases were found to have acted unreasonably when they delayed even a short time before reporting the harassment or complained to the wrong party.⁴³²

Even if courts were not influenced by employer conduct, liability on the employer is appropriate for harassment that becomes actionable before the victim can complain. Because the employer is in a better position to prevent such acts by screening and monitoring supervisors, it should bear the risk of loss when those measures fail.⁴³³

Others have praised the affirmative defense for preventing victims from remaining silent in the face of harassment and then later complaining when nothing was done to help them.⁴³⁴ This criticism would be more convincing if the legal regime were calculated to increase victim reporting.⁴³⁵ Instead, as discussed above, the regime punishes victims for failing to report harassment without building in any incentives to increase the likelihood that they will.⁴³⁶

Short of eliminating the affirmative defense, there are two smaller changes that may also improve the likelihood that employers will take measures that successfully combat the problem of harassment. First, the standard for punitive damages should be changed. The Supreme Court, in *Kolstad*, adopted a good-faith standard, holding that employers should not face punitive damages if they had made a good-faith effort to comply with Title VII.⁴³⁷ Enacting anti-discrimination policies and procedures were precisely the measures the Court mentioned as constituting “good-faith.” This standard reinforces the problem with the underlying liability

⁴³⁰ See Sherwyn et al., *supra* note 56, at 1285-86.

⁴³¹ *Id.* at 1286.

⁴³² *Id.* at 1298.

⁴³³ See Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Doctrines*, 101 HARV. L. REV. 563, 607 (1988) (arguing that strict liability for employers is justified on efficiency grounds); Justin P. Smith, Note, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace After Faragher and Burlington Industries*, 74 N.Y.U. L. REV. 1786, 1816 (1999); cf. Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*, 26 SAN DIEGO L. REV. 41, 80-81 (1999) (arguing that an employer should be held liable when the victim fails to complain about harassment that could not have been prevented by a complaint).

⁴³⁴ Cf. Krieger, *supra* note 131, at 194-95 (questioning whether evidence that victims in fact do not report harassment is sufficient to justify a rule that they should not be required to).

⁴³⁵ See *supra* text accompanying notes 330-332.

⁴³⁶ See *id.*

⁴³⁷ 527 U.S. 526, 545 (1999).

standard: an employer can be relieved of liability because it made some effort to prevent or remedy harassment, even if its efforts were so ineffective that a serious incident of harassment nonetheless occurred. Punitive damages, instead, should be evaluated on a case-by-case basis, leaving juries free to punish employers who have perhaps paid mere lip service to prevention while permitting a culture of harassment to proliferate.

Finally, establishing individual liability, in addition to vicarious liability for employers,⁴³⁸ for harassment under Title VII⁴³⁹ may also target the underlying problem of harassment more directly than holding employers vicariously liable. Although the research on deterring harassers is scant, it is certainly reasonable to hypothesize that the threat of monetary damages and attorneys' fees may have some impact. Employers ultimately have the resources, foresight, and power necessary to address the problem of harassment—tools that individuals do not have. Increasing the number of individuals and entities who can be held accountable for problems of harassment, however, can only increase the likelihood of deterring harassing behavior or compensating victims if it occurs.

Beyond these doctrinal changes, extralegal changes may help as well,⁴⁴⁰ particularly with the problem of victims underreporting harassment. Because the existing framework does not contain any incentives to increase victim reporting, other approaches that target victim behavior may be necessary. As long as the affirmative defense survives, it is incumbent upon women's and employees' advocates to disseminate greater information about the responsibilities the affirmative defense imposes on victims to file prompt complaints about sexual harassment. Potential victims need to be educated about what constitutes sexual harassment, why it is wrong and should not happen, and how to respond when it does occur. Greater education could, at a minimum, improve levels of compensation for victims to the extent they fulfill their obligations imposed by this new regime.

While the changes proposed in this Article may help reduce workplace harassment, they will not eliminate it. Perhaps one of the most important lessons from social science is that law cannot, by itself, change culture or behavior. While legal incentives have some capacity to produce

⁴³⁸ Cf. Paul S. Greenlaw & Lieutenant William H. Port, *Military Versus Civilian Judicial Handling of Sexual Harassment Cases*, 1993 LABOR L.J. 368, 373 (1993) (noting that a military system, which allows individual liability but not entity liability, may not provide sufficient incentives for military higher-ups to prevent harassment).

⁴³⁹ As discussed above, no federal court has permitted individuals to be held liable under Title VII, although they can be under many state anti-discrimination laws. See *supra* note 25 (collecting authorities). Individuals can also be held criminally liable for some physical harassment and, some have argued, liable in tort for all forms of harassment. See Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES MAG., Oct. 13, 2002, at 52 (advocating for redress of same-sex harassment claims in tort rather than anti-discrimination law).

⁴⁴⁰ See Sharon A. Lobel, *Sexuality at Work: Where Do We Go from Here?*, 42 J. VOCATIONAL BEHAV. 136, 146 (1993) (exploring whether it is feasible to eliminate sexuality from the workplace and whether it would reduce the level of harassment).

a response, they work less effectively on disaggregated groups like victims than they do on mobilized, well-advised employers. And they only work in a meaningful way on employers if the incentives induce effective responses to combating harassment. It may thus be that advocating for doctrinal change may reveal the same myopia that effected the creation of the legal regime in the first instance.⁴⁴¹

That the law has limited power to change the workplace culture in which harassment thrives is evidenced by many things, including survey data that show no decrease in the prevalence of unwanted sexual attention despite more than twenty years of litigation and the development of stronger and stronger rules of liability. In the context of discrimination law, courts seem confident in their ability to change workplace culture through the development of liability rules. Yet, experience with anti-discrimination laws shows that they sometimes have the effect of simply replacing overt acts of discrimination with covert ones. And, while those who point out that the under-enforcement of legal rights creates a background that allows discrimination to occur are surely right, the converse is not necessarily true. The faithful, even strong enforcement of anti-discrimination laws may be insufficient to change a culture in which sexual harassment thrives.

⁴⁴¹ I credit George Lovell, University of Washington, for pointing out my legal myopia in thinking about ways to effectuate real change in the sexual harassment context.