California Western Law Review

Volume 34
Number 1 *Symposium: Law and Psychology*

Article 4

1997

Social Sexual Conduct at Work: How Do Workers Know When it is Harassment and When it is Not?

Richard L. Wiener

Linda E. Hurt

SOCIAL SEXUAL CONDUCT AT WORK: HOW DO WORKERS KNOW WHEN IT IS HARASSMENT AND WHEN IT IS NOT?

RICHARD L. WIENER*

LINDA E. HURT **

Alice and Bob are coworkers who have separate desks that face each other in a somewhat isolated area of the office. Alice notices that Bob, her coworker, is doing that silly thing with his pen again. He sucks on the pen, removes it from his mouth, points it toward her desk and then puts it back in his mouth. When he sees Alice look up, Bob tosses his head in a friendly kind of way and offers her a smile and a barely audible giggle. Alice quickly looks down at her desk and goes back to work but she feels humiliated by Bob's uninvited attention. Alice would like him to stop this silly behavior. Alice is very concerned that some of her other coworkers will notice his attentions and rumors will fly. It is so difficult to know what to do. Should she report the conduct to her boss and make a complaint or should she ignore it and hope he eventually stops? Alice does not feel comfortable confronting Bob. Alice decides to ask Jane, her best friend at work, for some advice.

While many have written on the thorny and imprecise issues surrounding sexual harassment complaints at work, fewer have considered the fundamental question upon which that debate should rest, "How do workers decide when social sexual behavior is harassing?" The theme of this essay is that employer action, Equal Employment Opportunity Commission ("EEOC") response, litigation, and ultimately legal doctrine should start with some understanding of the answer to this question. We do not suggest that there is an absolute answer to the substantive issue of what conduct is harassing and what conduct is not harassing. Instead we focus on the judgment process that men and women use to determine the status of social sex-

---

* Professor of Psychology, Public Policy, and Psychiatry, Saint Louis University; B.A., Cleveland State University; Ph.D., University of Houston; M.L.S., University of Nebraska-Lincoln.

** Doctoral Candidate in Psychology, Saint Louis University, B.S.& M.A., Southern Illinois University at Edwardsville.

The research reported in this manuscript was supported by National Science Foundation Grant No. SBR-9512792.

ual behavior at work. To this end, we report on open ended interviews soliciting opinions on workplace relations that we conducted with 50 full time employees (25 women and 25 men) who answered newspaper advertisements.

Consider the decision process of one female interviewee, Number 12. During a 90 minute semi-structured interview, she outlined her decision process for harassing, nonharassing, and ambiguous behavior. With regard to sexual innuendo, she explained that she first looks to see if the target woman is alone. If the woman is in a group, then sexual innuendo is not harassment. However, if the woman is alone, then interviewee Number 12 examines the intent of the man who engages in the action. If she believes his intention is friendly then the conduct is not harassment. On the other hand, if she believes the intention of the man is other than friendly, she asks whether or not the woman has asked the man to stop the behavior. Interviewee Number 12 believes that sexual innuendo is harassment only if a woman is alone when it occurs, if the man acts with intention that is other than friendly, and if he continues to engage in the conduct after the woman has asked him to stop.

Assume that in the above scenario, Jane, the complainant's coworker is interviewee Number 12. It is likely that Jane would not perceive Bob's conduct as harassing. Although Alice is alone when Bob pulls out his pen and Jane may agree with Alice that the conduct is not motivated by friendly intentions, she would still advise Alice to confront Bob and ask him to stop before taking any further action. According to Jane, the dispositive decision point in the scenario is that Bob has not been told to stop and harassment results only when sexual innuendo occurs after the initiator has refused to stop when asked.

This essay examines social sexual conduct at work from the vantage point of the empirical questions that are implied in the law. Part I reviews federal law that regulates social sexual conduct in the workplace, especially the legal doctrine that makes available hostile work environment causes of action as the remedy for illegal gender discrimination. The paper discusses Title VII of the Civil Rights Act, the regulatory rules promulgated by the EEOC, and case law that determines the rules of conduct that employers are required to enforce at work. We review this well discussed body of law with an eye for psychological assumptions which shape the rules and tests that make up the regulations. It is our position that there is much to be gained by questioning these assumptions and collecting empirical data to test them. Our review comments on two controversies in current hostile work environment policy: the requirement that the social sexual conduct is unwelcome and the standard by which social sexual conduct is measured. In evaluating these controversies, we focus on the subjective quality of hostile work environment judgments.

Part II of this essay introduces social analytic jurisprudence as a tool for exploring the psychological implications of hostile work environment law.

Accordingly, psycholegal research begins with a detailed analysis of an area of law and proceeds with a psychological analysis of those elements of law that permit empirical inquiry. Upon identifying empirical questions, the analyst applies psychological theories, research results and methodologies to answer them. If adequate psychological knowledge is available to satisfy the inquiry, the inquiry stops. More likely, the analyst will uncover significant gaps in psychological knowledge as it applies to specific legal issues and will need to design additional empirical studies to probe or test the psycholegal principles that go to the substantive doctrine. The powerful and diverse methodologies available to the social scientist can be used to gather additional data that speak directly to the legal dispute.

We describe how psycholegal scholars can apply social analytic jurisprudence to study the gaps between the law and the manner in which people evaluate their everyday social interactions (i.e., the adjustment or assessment function), to investigate the implementation of legal doctrine within legal institutions themselves (i.e., the implementation function), and to measure the impact of the law on the lives of people in their everyday lives (i.e., the evaluative function). We describe the role of each of these types of inquiry in the regulation of social sexual conduct in the workplace and suggest the types of investigations that will be both scientifically useful and legally meaningful.

Controversies in hostile work environment doctrine rest upon policy questions whose potential answers assume a great deal about human conduct in and out of the workplace. This essay explains that the debate lacks a body of data that address these assumptions. We argue that the controversies focus on the manner in which women and men evaluate social sexual conduct at work, and that suggested policy changes offered in the literature rest upon intuitive models of processes that men and women use to judge the offensiveness of such conduct.

In Part III we demonstrate how we would supplement and correct the intuitive data base with empirical evidence gathered using a qualitative and quantitative research paradigm. Our data begin to map the judgment processes of employees working in settings similar to those that complainants and alleged perpetrators inhabit. The methodology consists of open ended interviews during which investigators ask employees questions about the types of social sexual conduct they experience at work and whether or not the employees find the conduct to be harassing. Using flow charts, we break conclusions into the cognitive steps and decision points employees traverse to reach their final judgments. The analysis of the decision process goes a long way toward making explicit the rules and principles that men and women apply to social sexual conduct in the workplace. Part III of this essay presents some preliminary results of our research in both graphic and statistical form.

Part IV summarizes the judgment policies that we discovered in our interviews with male and female workers. We describe the important deci-

sion points that are common and unique to men and women. This section discusses the notion of a rational decision policy and the implications of such a policy for both of the controversies outlined in the earlier sections of the essay. Part IV discusses some of the limitations of our work and suggests both avenues for future investigation and policy implications of our preliminary results.

I. FEDERAL LAW

Title VII of the Civil Rights Act of 1964 as amended in 1991 prohibits an employer from discriminating against an individual with respect to compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin.[1] The courts have interpreted Title VII's prohibition against gender discrimination to mean that employers may not exact sexual contact in exchange for compensation or advancement[2] nor may they subject women workers to an intimidating, hostile, or offensive working environment[3] The legal theory underlying the first type of interdiction, commonly referred to as quid pro quo harassment,[4] is well settled law. The focus of this paper is on the hostile work environment theory[5] which underlies the second type of prohibition.

In *Meritor Savings Bank v. Vinson,* the Supreme Court recognized that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination."[6] Instead, the phrase "terms, conditions, or privileges of employment" shows that it was the intent of Congress to "'strike at the entire spectrum of disparate treatment of men and women' in employment." [7] The plaintiff in the case, Mechelle Vinson worked in the same branch of Meritor Savings Bank for four years. During that time she was promoted on her work record from teller, to head teller, and subsequently to assistant branch

1. 42 U.S.C. § 2000c-2(a)(1) (1997). The revised Civil Rights Act of 1991 altered the earlier law by allowing for punitive damages in cases where the "respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a (1997). After the 1991 revision of Title VII, "any party may demand a trial by jury . . . ." *Id.*

2. *See* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979).

3. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987); Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

4. *See Henson,* 682 F.2d at 911 n.22; 29 C.F.R. § 1604.11(a)(1) (1997).

5. *See Meritor,* 447 U.S. at 65; 29 C.F.R. § 1604.11(a)(3)(1990).

6. *See Meritor,* 447 U.S. at 64.

7. *See Meritor,* 477 U.S. at 64 (citing Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 708 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

manager.[8] She complained that Sidney Taylor, a vice president of the bank, invited her out to dinner and during the meal asked her to go to a motel to have sex with him. Vinson refused his initial invitation but eventually gave in to him because she feared losing her position if she did not succumb.[9] Over the years Vinson had sexual intercourse with Taylor on many occasions. She claimed that Taylor fondled her at work in front of other workers, followed her into the rest room, and even raped her at work.[10] Vinson did not complain about these incidents at the time that they occurred. She claimed that she failed to do so because she feared Taylor.[11] The district court held that Vinson and Taylor had engaged in a consensual sexual relationship and therefore Vinson had not been discriminated against because of her sex.[12] The Court of Appeals for the District of Columbia reversed, holding that through the actions of its vice president the bank had subjected Vinson to an abusive working environment.[13] The court also held that Title VII prohibited the bank from subjecting employees to abusive work environments based on their gender.[14] However, on grant of certiorari, the Supreme Court upheld the hostile work environment theory stating that harassment affects a term, condition or privilege of employment if it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[15]

The *Meritor* court relied heavily on the Eleventh Circuit's decision in *Henson v. City of Dundee* [16] to analyze the components of a hostile work environment. Accordingly, the five prong test announced in *Henson* embodies the most common elements in hostile work environment causes of action. The *Henson* court stated that in order to prevail the plaintiff must allege and prove five elements to establish liability:[17]

(1) The employee belongs to a protected group.
(2) The employee was subject to unwelcome sexual harassment.
(3) The harassment complained of was based upon sex.
(4) The harassment complained of affected a "term, condition, or privilege" of employment.[18]

---

8. *See Meritor*, 477 U.S. at 59.
9. *Id.* at 60.
10. *Id.*
11. *Id.* at 61.
12. *Id.* at 61-62.
13. *Id.* at 62.
14. *Id.* at 64; *See* Vinson v. Taylor, 753 F.2d 141 (1985).
15. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).
16. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).
17. *Id.* at 903-05.
18. Following *Meritor*, the harassment must be "sufficiently severe or persuasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor*, 477 U.S. at 60.

(5) Respondeat superior[19]

Since *Meritor*, the test of a hostile work environment claim has been well established.[20] In order to establish a *prima facie* case a woman worker must show that because of her sex she was subjected to *unwelcome* social-sexual conduct and that the conduct was "sufficiently severe or 'pervasive to alter the conditions of her employment and create an abusive working environment.'"[21] In *Meritor*, the Supreme Court held that "the gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome . . . ."[22] The *Meritor* court drew a distinction between consensual sex and welcomed sexual relations. A woman who engages in consensual sexual relations with a supervisor or coworker may succumb to the pressure of unwelcome invitations for reasons of coercion rather than reasons of her own choosing. The Court implied in its language that the plaintiff must prove that she acted in a way that made it clear to the man who initiated social sexual contact that this behavior was unwelcome.[23] The Court went on to announce that testimony about a complainant's provocative speech or dress could be considered as part of the "totality of the circumstances" to determine whether or not the plaintiff welcomed social sexual conduct at work.[24]

In its policy guidelines,[25] the EEOC adopted the following definition of unwelcome from the Eleventh Circuit's decision in *Henson*: the conduct is unwelcome ". . . in the sense that the employee did not solicit or incite it,

---

19. The existence of respondeat superior and employer liability is a complicated finding in its own right. The Court rejected the EEOC's position that employers are always automatically liable for sexual harassment by their supervisors and the petitioner's view that the mere existence of a grievance procedure and a policy against sexual harassment coupled with the respondent's failure to use the procedure protects the employer from Title VII liability. Instead the Court merely directed district courts to look to EEOC agency principles to determine liability. *See Meritor*, 477 U.S. at 71.

20. *See Henson*, 682 F.2d at 897; Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986); Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla 1991); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1196 (1989).

21. *Meritor*, 477 U.S. at 60. While Title VII allows for sexual harassment complaints in which women complain about the conduct of men at work and men complain about the conduct of women, it is much more common for the former to occur than the latter. *See* BARBARA A. GUTEK, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS 49 (1985). This essay considers only those situations in which women complain about the conduct of their male coworkers or male supervisors.

22. *Meritor*, 477 U.S. at 68.

23. *See* Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 510 (1994).

24. *See Meritor*, 477 U.S. at 69.

25. Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. 915-50 (1990).

and in the sense that the employee regarded the conduct as undesirable or offensive."[26] According to one commentator,[27] the courts require women to reject all social sexual conduct advanced toward them in a clear and unmistakable manner. In all instances, if a woman tells a man that the conduct is unwelcome she has fulfilled this obligation. Consistently failing to respond to suggestive behavior is enough in some instances. However, if a woman shows some sign of inconsistent reaction in the presence of such conduct, she may be signaling that the actions are indeed welcome. [28] The EEOC states in its policy guidelines that a woman can best demonstrate that the conduct in question was unwelcome by making a complaint at the time that the conduct occurs.[29]

While most legal commentators see value in the unwelcomeness requirement because it protects consensual social sexual conduct in the workplace,[30] some feminist authors suggest that the courts should assume that social sexual conduct is unwelcome and place on the alleged harasser the burden to prove that the woman welcomed the conduct. [31] More radical reformers would do away with the unwelcomeness test entirely because it focuses the inquiry on the victim and not upon the alleged harasser.[32] Indeed some courts have looked to the plaintiff's past behavior to determine whether or not a woman welcomed advances by men at work. For example, in *Kresko v. Rulli,* a Minnesota Court of Appeals held that it was relevant to look to the fact that an intern and a supervisor frequently ate lunch together and talked about their personal lives.[33] Another court concluded that a waitress welcomed sexual advances from her coworker because she visited him in the hospital, drove with him, and welcomed his visits at her home.[34] Moreover, another court held that a trainee welcomed the advances of her IRS supervisor because she had kissed him on the cheek; this act was captured in a filmed snapshot.[35] There are even some cases in which courts have allowed evidence about a plaintiff's private sex life to determine whether or not she welcomed the social sexual conduct of the alleged har-

---

26. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

27. *See* Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform,* 72 NOTRE DAME L. REV. 621, 628-33 (1997).

28. *See* Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988).

29. Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. 915-50 (1990), EEOC Notice No. 915-050.

30. Weiner, *supra* note 27, at 634.

31. *See* B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims,* 73 B.U. L. REV. 1, 28-30 (1993); Ann C. Juliano, Note, *Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases,* 77 CORNELL L. REV. 1558, 1562 (1992); Miranda Oshige, Note, *What's Sex Got to Do with It?,* 47 STAN. L. REV. 565 (1995); Radford, *supra* note 23.

32. *See* Susan Estrich, *Sex at Work,* 43 STAN. L. REV. 813, 826-34 (1991).

33. Kresko v. Rulli, 432 N.W.2d 764, 768 (Minn. Ct. App. 1988).

34. *See* Sardigal v. St. Louis Nat'l Stockyards, 42 Fair Empl. Prac. Cas. (BNA) 497 (S.D. Ill. 1986).

35. *See* Grubka v. Department of the Treasury, 858 F.2d 1570, 1572 (Fed. Cir. 1988).

asser. For example, in *Gan v. Kepro Circuit Systems,* the court considered the fact that the plaintiff had been fired from a former job because she had asked a married company foreman for a date.[36]

In part to alleviate these concerns, in 1994 Congress amended Federal Rule of Evidence 412 to extend the rape shield laws to civil cases so that evidence offered to prove the plaintiff's sexual predisposition is inadmissible unless "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[37] It is clear that the new rule allows the trial judge a great deal of discretion in determining what evidence to allow and what not to allow. Nonetheless, in at least one case, *Burger v. Litton Industries, Inc.*, the court ruled that a witness did not have to reveal whether she had sexual relations with employees other than the accused harasser. [38]

The unwelcomeness rule and accompanying tests should be considered in the context of the current procedure by which sexual harassment complaints are litigated. The plaintiff must file a complaint with the EEOC, and the EEOC must investigate the charges and seek voluntary compliance from the employer. In the event that the employer refuses to comply with Title VII and cooperate with the EEOC, the EEOC or the complainant may bring suit against the employer.[39] If the employer is sued, then the plaintiff must prove the charges in a neutral forum (i.e., the courtroom) where the employer enjoys all the usual procedural due process protections provided in federal law.[40] The simplest and easiest way for the employer to comply with the law and protect itself against litigation is to act quickly against alleged harassers by either dismissing them or punishing them in some other manner. Although Title VII guarantees the presentation of the charges and a hearing to the employer, it does not address the rights of the alleged harasser in any similar manner. In many cases it is the employer's discretion to determine whether or not to conduct a full investigation of the charges or provide a neutral forum for disposition of the charges before acting against the accused harasser.[41]

Most government workers are protected from being fired without cause through the Federal Civil Rights Act of 1978[42] or similar state statutes.[43] Workers in the private sector often negotiate "just cause" standards for dis-

---

36. Gan v. Kepro Circuit Sys., 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982).

37. FED. R. EVID. 412.

38. Burger v. Litton Industries, Inc., 68 Fair Empl. Prac. Cas. (BNA) 737 (S.D.N.Y. 1995).

39. *See* 42 U.S.C. § 2000e-5(b-f) (1997).

40. *See* Hannah K. Vorwerk, Note, *The Forgotten Interest Group: Reforming Title VII to Address the Concerns of Workers While Eliminating Sexual Harassment,* 48 VAND. L. REV. 1019 (1995).

41. *See id.* at 1020.

42. 5 U.S.C. §§ 7501-7521, §§ 7701-7703 (1988 & Supp. 1989-1990).

43. *See* 2 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 6.5 at 10-13 (3d ed. 1992 & Supp. 1992).

charge in collective bargaining union contracts so that those who are hired under such agreements have some due process protection if they are charged with harassment.[44] However, the due process protections of alleged harassers are not addressed under Title VII even though accusations of violations of Title VII may result in worker dismissal. Therefore, workers in "at will" positions without "just cause" contracts can be dismissed from their positions without any reason (good or bad) provided.[45] In short, a private employer may opt to protect itself by firing a worker who has been accused of harassment without an investigation unless the employee is protected by a "just cause" contract. If the law eliminates the unwelcomeness prong of the hostile worker harassment test or places the burden of proof on the employer, then employers of "at will" workers will be able to fire any worker who has been accused of sexual harassment. Moreover, the employer will not be constrained by the law's requirement that the complainant did not welcome the social sexual conduct in question.

It is clear from our brief analysis that the issues that support and oppose the unwelcomeness test are subtle and complicated. We argue that one piece of information that is missing in the debate is the status of welcomeness determinations in the decision processes of workers. If workers (female or male) make everyday judgments of harassment by looking to the welcomeness status of social sexual conduct at work, then there is good reason for the law to include this test in some form. If the issue of welcomeness is not used by workers then its pivotal status is of less certain value. This is especially true because a welcomeness analysis is likely to focus on the conduct of the complainant. Further, if there are differences in the use of welcomeness by men and women workers in their assessments of harassment, then retaining the welcomeness test in its current form provides some protection against unfounded dismissal of men in "at will" positions who are without procedural protections. If companies learn that women need not demonstrate the unwelcomeness of the alleged harasser's conduct, then the employer is best served by discharging men accused of any social sexual conduct regardless of whether the action was invited or not. For these reasons, the question of whether men and women use the welcomeness standard to evaluate social sexual conduct at work is an empirical question of major importance. In addition, the relative weighing of the welcomeness criteria by men and women is also an interesting psychological issue in its own right.

Determining when sexual misconduct is sufficiently severe or pervasive to reach the *Meritor* threshold is a difficult decision upon which turn the outcomes of many grievances. Most courts and the EEOC agree that isolated instances of misconduct do not satisfy the test. [46] Instead, patterns of

---

44. *See* Vorwerk, *supra* note 40, at 1032.

45. *Id.* at 1032.

46. *See* Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV.

frequently occurring behaviors that are judged to be offensive must be demonstrated unless a particularly severe incident of sexual misconduct such as unwelcome, intentional touching of intimate body parts has occurred. In general, the frequency of unwelcome sexual conduct needed to satisfy the "severe or pervasive" rule is negatively related to the severity of the harassment.[47] The Supreme Court reiterated this logic in its recent holding in *Harris v. Forklift Systems, Inc.*[48]

The president of Forklift Systems, an equipment rental company, told a female manager on several occasions, "You're a woman, what do you know" and "We need a man as the rental manager."[49] President Hardy called manager Harris a "dumb ass woman."[50] Evidence at trial revealed that Hardy had asked Harris and other female employees to retrieve coins from his front pants pockets, and had thrown objects on the ground in front of the women and asked them to pick up the objects.[51] Hardy had made sexual innuendoes about Harris and other women's clothing.[52] Hardy commented to Harris after she had closed a deal, "What did you do, promise the guy . . . some [sex] Saturday night?"[53] The district court found that although some of Hardy's comments would be offensive to a reasonable woman they were not "so severe as to be expected to seriously affect [Harris'] psychological well-being," and therefore did not reach the level of harassment.[54] The Sixth Circuit affirmed the district court's findings. However, the Supreme Court reversed the decision.[55] Justice O'Connor writing a unanimous opinion for the court, stated "[s]o long as the environment would reasonably be perceived, *and is perceived*, as hostile or abusive, there is no need for it to also be psychologically injurious."[56] Justice O'Connor defined a hostile or abusive work environment as one that "a reasonable person would find hostile or abusive."[57] She also stated that there is no Title VII violation ". . . [i]f the victim does not subjectively perceive the environment to be abusive . . . ."[58] In other words, the test for a hostile work environment includes both an objective prong,—sufficient severity or pervasiveness from the perspective of a reasonable person—and a subjective prong—abusiveness from the perspective of the complainant.

773, 793 (1993).

47. *See generally* EEOC Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(b) (1997).

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

49. *Id.* at 19.

50. *Id.*

51. *See id*

52. *See id.*

53. *Id.*

54. *Id.* at 20.

55. *Id.*

56. *Id.* at 22 (emphasis added).

57. *Id.* at 21.

58. *Id.* at 22.

From a legal point of view the subjective prong denies the legitimacy of complaints made about work environments by workers who observe social sexual conduct among others but who are not subjectively offended by the conduct. For example, a coworker would have to show that a relationship between two other employees was offensive to her or himself before making a successful *prima facie* case of hostile work environment harassment. It is not enough that such behavior may be offensive to a reasonable person (i.e., the would be complainant) if it is not offensive to the target of the conduct. Further, workers who complain about social sexual behavior targeted at themselves must show that they not only found the behavior unwelcome but also subjectively offensive.

From a psychological perspective this analysis makes the subjective decision process of female and male workers not only theoretically interesting but also pragmatically important. In Part III below, we present some preliminary data that provide such an analysis of this subjective process. We are convinced that the courts and legislatures could only benefit from a psychological analysis that describes and explains how women and men reach these subjective judgments about social sexual conduct at work.

It is perhaps less obvious how employers would benefit from such an analysis. However, we believe that the best way to educate employees about the risks of offensive conduct is to replace a list of "do's and don'ts" with an empirically based description of the similarities and differences in the processes that women and men use to evaluate social sexual conduct at work. From such a list it should be possible to distill principles that predict what kinds of conduct will be offensive and what kinds will be seen as not offensive in different workplace contexts and circumstances. For example, there is little to be gained by telling male workers not to tell offensive jokes, but there is much to be gained by uncovering and explaining the factors that women look to when they evaluate the offensiveness of jokes told in workplace contexts. We believe it is these principles that must ultimately become part of the workplace subculture if men and women are ever going to eliminate abusive sexual conduct from the workplace.

In applying the sufficiently "severe or pervasive" test the courts have attempted three different approaches with varying amounts of success. First, following the lead of the Sixth Circuit,[59] the Supreme Court adopted ". . . the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances."[60] Thus, the law generally asks whether the unwelcome social-sexual behavior was so pervasive or severe as to create a hostile or abusive working environment from the view point of the objective, reasonable person.[61] Although the law considers this approach to be an "objective" one (i.e., the law adopts a point of view that

59. *See* Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986).
60. *Harris*, 510 U.S. at 21-22.
61. *See* EEOC Policy Guidelines, 29 CFR § 1604.11(a) (1997).

does not take into consideration the idiosyncratic sensitivities of the complainant), it falls far short of operationalizing the construct of sexual harassment with the specificity commonly found in social science research. The legal definition of sexual harassment does not and can not enumerate which specific behaviors or patterns of behaviors, independent of context, rise to the level of harassment.

Summarizing the case law, the EEOC outlined a number of factors that triers of fact should look to in determining whether the conduct complained of was so objectively offensive that it crossed the line of actionable conduct.[62] These include: "(1) whether the conduct was verbal or physical or both; (2) how frequently the conduct was repeated; (3) whether the conduct was hostile or patently offensive; (4) whether the alleged harasser was a coworker or a supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual."[63]

We argue here and elsewhere[64] that these factors constitute a normative judgment model comprised of a set of decision points that individuals ought to traverse when reaching a harassment decision. These factors along with examples in the case law are helpful in that they direct decision makers to the types of contextual information that they should look to in order to reach the objective decisions required by law. However, they fail to inform the decision maker how to weigh specific types of conduct to reach final judgments. They also do not explain how to adjust the weights according to the contextual factors (e.g., intentions of the workers, status of the workers, location of the conduct, or reactions of the woman) that engulf episodes of social sexual conduct at work.

Psycholegal researchers have exerted a great deal of effort to try to understand the impact of specific factors in the perception of harassment.[65] As helpful as these efforts have been, they do not provide practical advice because it is not possible to present a complete list of social sexual behaviors and surrounding contexts for workers to evaluate. For such a list to be ex-

---

62. *See* EEOC Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. 915-050 (1990).

63. *Id.*

64. *See* Richard L. Wiener et al., *Perceptions of Sexual Harassment: The Effects of Gender, Legal Standard, and Ambivalent Sexism*, 21 LAW & HUM. BEHAV. 71 (1997) [hereinafter *Sexual Harassment*]; Richard L. Wiener, *Social Analytic Jurisprudence in Sexual Harassment Litigation: The Role of Social Framework and Social Fact*, 51 J. SOC. ISSUES 167 (1995) [hereinafter *Social Framework*]; Richard L. Wiener et al., *Social Analytic Investigation of Hostile Work Environments: A Test of the Reasonable Woman Standard*, 19 LAW & HUM. BEHAV. 263 (1995) [hereinafter *Reasonable Woman*].

65. For reviews of this research literature, see Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 AM. PSYCHOL. 1070 (1993); Patricia A. Frazier et al, *Social Science Research on Lay Definitions of Sexual Harassment*, 51 J. SOC. ISSUES 21 (1995); Barbara A. Gutek & Maureen O'Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. SOC. ISSUES 151 (1995); Wiener, *Social Framework, supra* note 64.

haustive, it would need to include a very large number of actions, contexts, and combinations of actions and contexts. Therefore, we have abandoned the more traditional psychometric approach in which researchers have tried to catalogue and measure the influence of specific factors in the perception of social sexual conduct in favor of an approach in which we try to map out the decision process that men and women naturally employ when they think about social sexual conduct at work.

Like the EEOC, we are interested in the types of factors that men and women use to reach harassment judgments. However, we examined these factors by asking workers to evaluate their own examples of social sexual conduct rather than looking to case law. From their answers we constructed decision trees that display the thinking and logic that went into these subjective judgments. One of the goals of our work is to compare the empirical decision structures that we find to the normative structures that make up the law. We believe that the differences in the two represent the misfit between the law and the manner in which men and women interact in the workplace.

In dealing with the ambiguity inherent in the law, one jurisdiction unsuccessfully tried to narrow the range of behaviors that constitute sexual harassment by adopting the view that offensive conduct must cause some "psychological harm" for it to reach the level of abuse prohibited by Title VII.[66] In *Harris*, the Supreme Court ruled that such a narrow definition of harassment was not an accurate reading of *Meritor*. Clarifying the Supreme Court's position, Justice O'Connor wrote, "there is no need for [offensive conduct] . . . to be psychologically injurious."[67] Although lower courts may still consider whether sexual misconduct affects the psychological well-being of the plaintiff, they must look to the totality of the circumstances rather than to any single factor such as psychological injury to determine what constitutes a hostile work environment.[68]

Other courts have more successfully fashioned a "wider" definition of harassment by adopting the "reasonable victim or woman" test. In 1990, the EEOC endorsed a more liberal definition of harassment following legal commentators who argued that work is a distinctively different experience for women than it is for men. Women are relative newcomers to the work place and view their jobs as marginal or precarious, they hold a more restrictive view of appropriate sexual encounters at work, and they are less likely than men to believe that social-sexual encounters at work are mutually desired.[69] Recognizing the significance of the divergence of views be-

66. *See* Rabidue v. Osceola Refining, Co., 805 F.2d 611, 619 (6th Cir. 1989). The Sixth Circuit held that only unwelcomed social sexual misconduct "that affected seriously the psychological well-being of the plaintiff" reached the level necessary to create a hostile work environment. *See also* Downes v. FAA, 775 F.2d 288 (Fed. Cir. 1985); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1512 (11th Cir. 1989).

67. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

68. *See id.* at 22.

69. *See* Abrams, *supra* note 20.

tween women and men, the Ninth Circuit switched from the gender neutral reasonable person approach and adopted a reasonable woman standard, ruling "that a female plaintiff states a prima facie case of hostile environment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[70] Other jurisdictions including the Third Circuit,[71] the Sixth Circuit,[72] and at least two district courts[73] have also adopted the reasonable woman standard.

Although there are some exceptions, the empirical research supports the view that men and women workers hold divergent perspectives concerning what constitutes hostile work environment harassment.[74] Few researchers

---

70. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

71. *See* Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990).

72. *See* Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987).

73. *See* Austen v. State of Hawaii, 759 F. Supp. 612 (D. Haw. 1991); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

74. *See* Louise F. Fitzgerald & Alayne J. Ormerod, *Perceptions of Sexual Harassment: The Influence of Gender and Academic Context,* 15 PSYCHOL. WOMEN Q. 281 (1991); Ricki Garlick, *Male and Female Responses to Ambiguous Instructor Behaviors*, 30 SEX ROLES 135 (1994); Amy H. Gervasio & Katy Ruckdeschel, *College Students' Judgments of Verbal Sexual Harassment*, 22 J. APPLIED SOC. PSYCHOL. 190 (1992); Barbara A. Gutek et al., *Predicting Social-Sexual Behavior at Work: A Contact Hypothesis*, 33 ACAD. MGMT. J. 560 (1990); Masoud G. Hemmasi & Gail S. Russ, *Gender-Related Jokes in the Workplace: Sexual Humor or Sexual?*, 24 J. APPLIED SOC. PSYCHOL. 1114 (1994); 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); Tricia S. Jones & Martin S. Remland, *Sources of Variability in Perceptions of and Responses to Sexual Harassment*, 27 SEX ROLES 121 (1992); Sylvia Kenig & John Ryan, *Sex Differences in Levels of Tolerance and Attribution of Blame for Sexual Harassment on a University Campus*, 15 SEX ROLES 535 (1986); Michelle A. Marks & Eileen S. Nelson, *Sexual Harassment on Campus: Effects of Professor Gender on Perception of Sexually Harassing Behavior*, 28 SEX ROLES 207 (1993); Donald B. Mazer & Elizabeth F. Percival, *Ideology or Experience? The Relationships Among Perceptions, Attitudes, and Experiences of Sexual Harassment in University Students*. 20 SEX ROLES 135 (1989); Kathleen McKinney, *Sexual Harassment of University Faculty by Colleagues and Students*, 23 SEX ROLES 421 (1990); Kathleen McKinney, *Contrapower Sexual Harassment: The Effects of Student Sex and Type of Behavior on Faculty Perceptions*, 27 SEX ROLES 627 (1992); Kathleen McKinney, *Sexual Harassment and College Faculty Members*, 15 DEVIANT BEHAV. 171 (1994); Audrey J. Murrell & Beth L. Dietz-Uhler, *Gender Identity and Adversarial Sexual Beliefs as Predictors of Attitudes Toward Sexual Harassment*, 17 PSYCHOL. WOMAN Q. 169 (1993); Steven C. Padgitt & Janet S. Padgitt, *Cognitive Structure of Sexual Harassment: Implications for University Policy*, 27 J. C. STUDENT PERSONNEL 34 (1986); Paula M. Popovich et al., *Perceptions of Sexual Harassment as a Function of Sex of Rater and Incident Form and Consequence*, 27 SEX ROLES 609 (1992); Gary N. Powell, *Effects of Sex Role Identity and Sex on Definitions of Sexual Harassment*, 14 SEX ROLES 9 (1986); John B. Pryor, *The Lay Person's Understanding of Sexual Harassment*, 13 SEX ROLES 273 (1985); Linda J. Rubin & Sherry B. Borgers, *Sexual Harassment in Universities During the 1980s*, 23 SEX ROLES 397 (1990); Russel J. Summers, *Determinants of Judgments of and Responses to a Complaint of Sexual Harassment*, 25 SEX ROLES 379 (1991); Suzanne Valentine-French & H. Lorraine Radtke, *Attributions of Responsibility for an Incident of Sexual Harassment in a University Setting*, 21 SEX ROLES 545 (1989); Karen B. Williams & Ramona R. Cyr, *Escalating Commitment to a Relationship: The Sexual Harassment Trap*, 27 SEX ROLES 47 (1992). For a review of gender effects in the perception of sexual harassment, see Wiener et

fail to find gender differences in studying the decisions of men and women,[75] however some argue the size of the difference is small and that men and women view most harassing conduct from a similar point of view.[76] We have argued elsewhere that those who fail to find meaningful gender differences often present either very mild examples of social sexual misconduct or very severe examples.[77] Indeed some of the studies that find small gender differences present fact patterns that would likely result in quid pro quo harassment complaints in addition to, or instead of, hostile work environment causes of action. We argue that when applying the law's objective standard, men and women use their own personal perspectives as the reference point for reasonable conduct. Because gender is central to one's definition of self, gender effects on reasonableness are almost unavoidable except under conditions of extremely mild or severe conduct. Under the former conditions the evaluator may find it difficult to imagine herself or himself offended enough to lodge a complaint, and under the latter conditions she or he may find it difficult to imagine herself or himself the object of such hostile activity. In these cases, the evaluator may apply the rule, "any conduct so benign as to inhibit an image of a formal complaint does not reach the level of harassment and any conduct so severe that it inhibits the image of oneself as a victim automatically reaches the level of harassment."[78] We carefully examined gender differences in the decision trees we constructed from the open ended interviews that we report below.

The gender debate withstanding, we have conducted two empirical studies in which we asked respondents to read fact patterns from two important sexual harassment cases, *Ellison v. Brady* and *Rabidue v. Osceola Refining Co.* In addition, we supplied them with either the reasonable person or reasonable woman standard to use when evaluating the conduct.[79] In the first study we found differences in the process that evaluators used to reach harassment judgments, but no differences in their final decisions as a result of type of legal standard. However, in the second study, in which we included a measure of hostile and benevolent sexism, we found that under

---

al., *Sexual Harassment*, *supra* note 64; Wiener et al., *Reasonable Woman*, *supra* note 64; Fitzgerald, *supra* note 65.

75. For important examples of studies that have failed to find gender differences or have found weak ones, see Douglas D. Baker et al., *Perceptions of Sexual Harassment: A Re-Examination of Gender Differences*, 124 J. PSYCHOL. 409 (1990); Wilbur A. Castellow et al., *Effects of Physical Attractiveness of the Plaintiff and Defendant in Sexual Harassment Judgments*, 5 J. SOC. BEHAV. & PERSONALITY (1990); J. Michael Egbert et al., *The Effect of Litigant Social Desirability on Judgments Regarding a Sexual Harassment Case*, 7 J. SOC. BEHAV. & PERSONALITY 569 (1992); Pryor, *supra* note 74; Daniel A. Thomann & Richard L. Wiener, *Physical and Psychological Causality as Determinants of Culpability in Sexual Harassment Cases*, 17 SEX ROLES 573 (1987).

76. *See* Frazier et al., *supra* note 65; Gutek & O'Connor, *supra* note 65.

77. *See* Wiener et al., *Sexual Harassment*, *supra* note 64.

78. *Id.* at 88-89.

79. *See* Wiener et al., *Reasonable Woman*, *supra* note 64; Wiener et al., *Sexual Harassment*, *supra* note 64.

some conditions the reasonable woman standard, as compared to the reasonable person standard, resulted in some respondents finding more evidence of harassment. For example, men low in hostile sexism were more likely to conclude that the actions in both cases constituted hostile work environment harassment when they applied the reasonable woman standard as opposed to the reasonable person standard. In a third study in which we presented video taped reenactments that show affirmative action officers interviewing complainants, the accused, and witnesses in the above cases, we found stronger evidence that the reasonable woman standard is more likely to result in judgments of harassment. Finally, across all three studies, we found strong gender effects such that women were more likely to reach harassment judgments than men.[80]

One commentator rejects entirely the logic and confusion that she believes is inherent in the debate between the reasonable person and reasonable woman standards.[81] She maintains that the current law requires a "normative" judgment in each case to determine whether the harassing conduct is offensive enough to constitute an abusive environment. Regardless of the perspective taken (i.e., either the gender neutral reasonable person or the point of view of the victim), the law currently requires a judgment of how much "women should put up with at work."[82]

Rejecting the idea that women should put up with any discrimination at work, Professor Hadfield argues that gender discrimination under Title VII need not be based on unwelcome sexual conduct at all. Instead, she argues that the law should replace sexual harassment principles with the view that sex based discrimination is a cost of employment for women at work and that the cost will cause women to make decisions that are different from those that men make in similar work environments.[83] The fact that sex-based harassment offers economic costs to women and not to men is enough to find an actionable Title VII claim regardless of whether or not the conduct was sufficiently offensive from either a subjective or objective standard. Professor Hadfield argues that among the more serious costs of social-sexual conduct at work are constraints on the career choices of women who would avoid such conduct; limitations in career advancement as a result of reduction in the woman worker's flexibility, productivity, and ambition; and high rates of female turnover and lower levels of workplace attachment. It is the anticipation of sex based harassment that is the heavy operative in shaping the economic choices that women make with regard to job choices.

---

80. *See* Richard L. Wiener & Linda E. Hurt, Gender Differences in the Evaluation of Social Sexual Conduct at Work (May 1997) (unpublished paper presented to the Annual Convention of the American Psychological Society).

81. *See* Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151 (1995).

82. *Id.* at 1167.

83. *See id.* at 1169.

As rational actors, women choose to avoid sex based harassment in their careers, all other things being equal.[84] In other words, a woman on the margin, one who is "indifferent between the job she is doing and switching to her next best alternative,"[85] will weigh the costs and benefits of switching jobs against those of not leaving her current position. If the cost of experienced or expected sex-based harassment is great enough, it will cause the rational woman to decide to stay in her current job or move to another to avoid the costs.

Based upon her economic analysis Professor Hadfield would replace the current standard for sexual harassment with the following "rational woman" test: "*Non-job-related sex-based conduct constitutes sex discrimination in violation of Title VII if a rational woman's choice between two jobs offering her substantially equivalent benefits would be influenced by the fact that such conduct is present in one job but not the other.*"[86] The test is offered as a hypothetical, so that it is not necessary to determine whether an individual woman found the behavior in question harassing, or even if a reasonable woman would find the conduct offensive. It is enough to determine whether there are costs that women must weigh in their career decision calculus that men do not need to consider. The only subjective component of the test would be in those cases in which the defendant could show that a particular plaintiff actually initiated the behavior that she later found offensive.[87] Presumably in that narrow situation the plaintiff could not treat the experience or anticipation of that social sexual conduct as a cost in her career decisions.

Professor Hadfield's analysis is thoughtful and internally consistent. However, like many economic analyses in law, it is based upon assumptions about the decision processes of people that can be challenged with empirical data. The career calculus of a rational woman includes specific assumptions that may or may not stand up to empirical investigation. Namely, the economic analysis she sets out suggests that sex based conduct is always considered a cost to women unless the woman initiates the conduct. It is not obvious that a rational woman would necessarily make decisions in this manner. It is possible, indeed likely, that for a substantial number of women, social sexual conduct at work contains rewards as well as costs and that the overall valence of the conduct depends upon the context and considerations of the women involved. For example, the experience of an unmarried heterosexual woman being asked out on a date by a man at work whom she finds interesting is not likely to have the same cost/benefit structure as the experience of a married woman being repeatedly pursued by a man she dislikes and whom she has repeatedly told to discontinue the invi-

84. *See id.* at 1177.
85. *Id.*
86. *Id.* at 1180-81 (emphasis added).
87. *See id.* at 1183.

tations. For the first woman, the net worth of the sex based conduct may actually include more rewards than costs. The only way to avoid the normative analysis that Professor Hadfield protests is to assume that all social sexual conduct at work is costly (i.e. offensive) to women.

We believe that the decision processes that women and men use to analyze social sexual conduct at work should be empirically evaluated before concluding that social sexual conduct is normatively treated as a cost. The research we report below is designed to map out the decision strategies that "rational" men and women use to analyze social sexual conduct at work. Of particular interest is the question of whether workers consistently emphasize the costs and de-emphasize the rewards of social sexual conduct at work. In this section we have raised several empirical questions that are central to some of the liveliest debates in sexual harassment law. In the next section, we lay out the philosophy of our approach to gathering information that will help answer some of the questions that we have raised.

II. SOCIAL ANALYTICAL JURISPRUDENCE

In a series of papers [88] we have laid out a model of psycholegal analysis that is the product of an interdisciplinary methodology. We have termed the model "social analytic jurisprudence" because it combines empirical investigation of social and psychological reality with traditional legal analysis. Our approach is to provide empirical knowledge to legislative function of the courts and other law making bodies. Social analytic jurisprudence makes three important assumptions about the role of psychology in law and public policy.

First, psychology as it relates to law is an empirical science.[89] There exists a collection of psycholegal scientists who share a common commitment to a set of scientific beliefs and values and who agree upon the particular problems and solutions that are relevant to issues of law. These beliefs constitute a scientific research paradigm[90] and it is the product of the work of these scientists that ought to influence judicial and legislative decision making.

Second, the psycholegal scholar can best contribute to the legal debate by presenting the tested results of psychological research. The legitimacy with which psychological knowledge can be applied to issues of law is directly related to the psychological facts that are tested and accumulated. Legal psychologists ought to base their conclusions more on data and less

88. *See, e.g.*, Richard L. Wiener, *Social Analytic Jurisprudence and Tort Law: Social Cognition Goes to Court*, 37 ST. LOUIS U. L. J. 503 (1993) [hereinafter *Social Analytical Jurisprudence*]; Wiener, *Social Framework, supra* note 64; Wiener et al., *Reasonable Woman, supra* note 64 ; Wiener et al., *Sexual Harassment, supra* note 64.

89. *See* Wiener, *Social Analytical Jurisprudence, supra* note 88, at 510-15.

90. *See* ROY LACHMAN ET AL., COGNITIVE PSYCHOLOGY AND INFORMATION PROCESSING (1979); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

on the shared social and political ideologies that make up the scientific paradigm. When psychologists rest their arguments on a value consensus rather than a reliable data base, they risk the danger of forming a political platform which is adhered to by only some members of the paradigm and which is not driven by the growth of psychological knowledge.[91]

Finally, the proper role of the scientific psychologist in policy debate and conflict resolution is that of a consultant rather than an advocate.[92] Advocates use the product of psychological knowledge to support one side of a debate, the side that is consistent with the advocates' political or ideological value positions. Advocates adopt confirming perspectives in which they search psychological knowledge for research results that support a chosen position. Of course, it would be naïve to suggest that any psycholegal scholars conduct value free research. It is unquestionable that value positions impact the choice of research questions, methods, data interpretations, and final conclusions. However, a consultant adopts a disconfirming point of view and searches research results for evidence that can refute all plausible rival explanations including and especially his or her own. It is in the best interest of the research scientist to expose her or his own disconfirming data because the peer review process will likely uncover this evidence if the researcher fails to do so. The adversarial approach that is at the heart of our legal system supplements the peer review process for psycholegal scholars who communicate psychological knowledge in the form of expert testimony.

Social analytic jurisprudence begins with an analysis of legal doctrine carefully looking for assumptions that the law makes about human behavior.[93] To be useful for adjudicative or legislative decision making, psycholegal research must address questions of substantive law. The language and concepts used in the investigation should track closely the language and concepts that make up the law. The work of psychological researchers is most useful in legal analysis if the investigators understand the law and pose research questions in a way that bears directly on the legal issues that give rise to the questions.

The second stage of social analytic jurisprudence consists of a careful psychological analysis of the law.[94] Statutory and common law are comprised of legal tests that are decided on the social facts presented in specific cases. The tests are often framed in language that invites a social scientific and perhaps a psychological investigation. Further, some judicial decisions require a balancing test among conflicting legal principles about which social scientists can gather probative information. After identifying the empirical issues in the law, the psycholegal scholar reviews the psychological

91. *See* Wiener, *Social Analytical Jurisprudence*, *supra* 88, at 511.
92. *See* LAWRENCE S. WRIGHTSMAN, PSYCHOLOGY AND THE LEGAL SYSTEM (1991).
93. *See* Wiener, *Social Analytical Jurisprudence*, *supra* note 88, at 511-13.
94. *See id.* at 512-13.

literature to identify theories, research results, and methodologies that are most suitable to answer the legal questions. It is at this stage in the analysis that the investigation takes on a psychological flavor.

While it may be helpful to apply the powerful research methodologies of the social sciences to test intuitive answers to empirical questions, that process by itself falls short of realizing the interdisciplinary promise that psychology makes to the interaction of law and social science. Psycholegal scholarship is based on the discipline of psychology as much as it is founded in the law. Therefore researchers should be comfortable with turning to the substantive literature in psychology to find metaphors, theories, and hypotheses that offer tentative answers to legal questions or that offer models of analysis that researchers can use to find answers. Psycholegal scholarship should take advantage of the sophisticated methodologies available to social scientists but it should also take advantage of the knowledge base of the social sciences.[95] Section I in this paper is an example of a psycholegal analysis that follows the assumptions and methods of the first two stages of our model. We have laid out the law with an eye for current topics of debate, and we have identified several empirical questions that bear directly on those topics. Finally, we have adopted the hierarchical decision model metaphor from social cognitive psychology to describe the decision processes of men and woman as they evaluate social sexual conduct at work.

The third stage of social analytic jurisprudence follows directly from the first two. It is likely that a psycholegal analysis of the knowledge base related to any area of law will point out wide gaps of understanding. There may be a dearth of information on topics that speak directly to the legal issues at debate or more likely there will be relevant studies that researchers conducted without benefit of a thorough legal analysis, so that the results may not be directly relevant to the substantive legal issues.[96] In the third stage of social analytic jurisprudence, psycholegal scholars conduct research that tests the psychological theories and models they applied to answer the empirical issues identified in stages 1 and 2. It is at this point that the powerful methodological and statistical tools of the behavioral scientist may be used to gather data that speak directly to the legal issues at debate.[97]

There are three ways in which social science can be brought to bear upon the law of sexual harassment or any other legal doctrine: it can assume an adjustment or assessment role, an implementation role, or an evaluative role. Law presents normative theories of behavior as depicted in the language of statutes, court opinions, and administrative rules and regulations. Psychological research can and does study the actual conduct of people to measure the fit between the law's normative model and actual behavior.

95. *See id.* at 511-13.
96. *See id.* at 514.
97. *See id.*

The goal of social science acting in this capacity is to offer suggestions of how the normative model might be adjusted to better fit social reality. Perhaps the best known examples of psychology acting in this capacity are the study of eyewitness memory[98] and lineups.[99] The study of procedural justice provides a less well known but equally valid example of psychology attempting to adjust the normative model inherent in the law.[100] The data presented in Part III of this manuscript are an example of psychology serving the adjustment role in sexual harassment law.

Second, psychology can and does assist with the implementation of current law. It is perhaps in this role that research psychology has had its most direct impact. Examples include the study of police discretion,[101] jury decision making,[102] judicial decision making,[103] parole decision making,[104] and sentencing.[105] It is not a coincidence that each of these areas focuses on the decision making and/or judgment capability of significant actors in the legal process because the implementation of law is closely tied to making decisions under the constraint of substantive and procedural rules. Acting in its implementation role, psychology measures against statutory, administrative, and judicial principles the effectiveness of the people who execute the law. The purpose of this research is not only to improve the quality of legal process but also to apply our knowledge of social and cognitive behavior to understand how people function as lawyers, jurors, judges, administrators, legislators, and so on. With regard to sexual harassment law, psychological investigation of jury decision making in hostile work environment cases would be particularly fruitful following the 1991 revision of Title VII which makes jury trials available at the request of plaintiffs and defendants.[106]

---

98. *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995).

99. *See* Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups,* 1 PSYCHOL., PUB. POL'Y, & L. 765 (1995).

100. *See* Tom R. Tyler & E. Allan Lind, *Procedural Processes and Legal Institutions, in* 1 SOCIAL JUSTICE IN HUMAN RELATIONS 71 (Riel Vermunt & Herman Steensma eds., 1991).

101. *See* Michael T. Nietzel & Cynthia M. Hartung, *Psychological Research on the Police: An Introduction to a Special Section on the Psychology of Law Enforcement,* 17 L. & HUM. BEHAV. 151 (1993).

102. *See* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING (Reid Hastie ed., 1993).

103. *See* Arthur J. Lurigio et al., *Understanding Judges' Sentencing Decisions: Attributions of Responsibility and Story Construction, in* 3 APPLICATIONS OF HEURISTICS AND BIASES TO SOCIAL ISSUES: SOCIAL PSYCHOLOGICAL APPLICATIONS TO SOCIAL ISSUES 91 (Linda Heath et al. eds., 1994).

104. *See* John S. Carroll & Pamela A. Burke, *Evaluation and Prediction in Expert Parole Decisions,* 17 CRIM. JUST. & BEHAV. 315 (1990).

105. *See* Richard L. Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases,* 80 J. APPLIED PSYCHOL. 455 (1995); Richard L. Wiener et al., *The Role of Declarative and Procedural Knowledge in Capital Murder Sentencing,* J. APPLIED SOC. PSYCHOL. (forthcoming 1998).

106. The National Science Foundation has awarded a grant to Barbara Gutek at the University of Arizona to examine this issue.

Finally, in its evaluative function social science measures the impact of the law on the everyday lives of citizens. Psychological research can either directly test the effects of legislation or judicial holdings on the behavior of those citizens targeted by the law or it can examine how different formulations of law influence the social and cognitive behavior of those citizens. Two well known examples are studies of the influence of the breathalyser crackdown in Great Britain[107] and the effects of custody laws on children.[108] With regard to sexual harassment, the studies we conducted and described above[109] examine the differences in the "reasonable person" and "reasonable woman" standards on the perception of social sexual conduct in the work place.[110] We argue that the evaluative function is at least as important as the implementation function because the manner in which legal decisions are made affects fewer citizens than does the substance of the decisions. In other words, the most important impact of the reasonable person vs. reasonable woman standard lies not in how the actual language influences the resolution of conflicts at trial, but rather in the manner in which the promulgated rules influence the behavior of men and women in the workplace. As we have argued elsewhere, the pragmatic difference in these two standards is to be found in the impact of the standards on the perceptions of men and women in the workplace.

For the purposes of the present article, we are concerned more with the adjustment or assessment function of social science. It is undeniable that one purpose of sexual harassment law is to regulate social sexual conduct in the workplace. The rules of conduct that the law promulgates originate from a normative model of how workers interact at work. The normative expectations are laid out in the language of the rules. For example, it is clear from the current standards in sexual harassment doctrine that the law expects workers (especially women) to be offended by uninvited social sexual attention in the workplace. Moreover, if the attention is severe and pervasive, it will cause enough discomfort to interfere with the work performance and satisfaction of workers. Social science, especially psychology, is well suited to study the manner in which people actually do behave. Therefore social science can take on an adjustment role in which research uncovers the mechanisms that govern behavior in the target domain and tests the adequacy of the fit between the normative model implied in the law and the

---

107. *See* Hugh L. Ross et al., *Determining The Social Effects of a Legal Reform: The British "Breathalyser" Crackdown of 1967*, 13 AMER. BEHAV. SCIENTIST 493 (1970).

108. *See* Patricia J. Falk, *The Gap Between Psychosocial Assumptions and Empirical Research in Lesbian-mother Child Custody Cases, in* REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT 131 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994).

109. *See* Wiener et al., *Reasonable Woman*, *supra* note 64; Wiener et al., *Sexual Harassment*, *supra* note 64.

110. The National Science Foundation has awarded a grant to the first author of this paper to continue this work.

social reality of human interaction.[111] Psychologists can and should point out the discrepancies between how people actually behave and the way in which the law assumes that they behave. At times research may demonstrate that the central proposition in the law's normative model is in error. At other times research may show that the model is somewhat or mostly correct but that certain adjustments are needed to correct flaws in the law's implicit theory. Such adjustments may influence future changes in the law by informing legislatures and courts.

The normative model of Title VII hostile work environment harassment law assumes that workers rely on assessments of unwelcomeness when determining whether social sexual conduct is harassing. It assumes that the severity and pervasiveness of social sexual misconduct is related to whether the conduct was verbal or physical, its frequency of occurrence, the power differential between the workers, whether the conduct was offensive, whether others were involved, and toward whom the conduct was directed.

In Part III we report on some initial qualitative and quantitative data that describe the process by which people reach rational judgments concerning social sexual conduct at work. We are particularly interested in any gaps between the manner in which our respondents make these judgments and the manner in which the law expects that they do. We believe exploring these discrepancies will help direct the legal and policy debates of the future regarding the role of unwelcomeness in harassment law and the type of severity and pervasiveness standard (objective and subjective) that will best fit the actual conduct of men and women in the workplace.

III. SOCIAL ANALYTICAL INVESTIGATION

The research team conducted in-depth interviews with 25 men and 25 women full-time employees residing in the St. Louis metropolitan area. Participants were recruited through advertisements placed in local newspapers. We used the 1995 St. Louis Regional Commerce and Growth Association's Demographics of the St. Louis Metro Area to collect a stratified random sample based on age and race. Qualified respondents were scheduled for 90 minute open-ended interviews on the Saint Louis University campus and were reimbursed $25 for their time. The average age of the 50 participants was 39 years and six months. Eighty percent of this sample were Caucasian, 16% were African-American, 2% were Asian, and 2%

111. Many legal commentaries try to test the fit between the normative models in the law and the author's intuitive or principled theory of human behavior. *See, e.g.*, Hadfield, *supra* note 81. Professor Hadfield's introduction of the "rational woman" test in harassment law challenges the notion that only uninvited and offensive social sexual conduct impacts negatively the work experience of women. The rational woman theory proposes that any social sexual conduct in the work place is a cost to women and will impact work place behavior in a negative manner. Therefore, the rational woman test would prohibit any sex-based activity that a hypothetical rational woman could consider a cost.

were Hispanic. Twenty-eight percent of the women in this sample claimed they had been victims of sexual harassment in the workplace, and 6% of the men in this sample admitted they had been accused of sexual harassment at some time.

The 50 participants answered each of the following questions: (1) Describe those work place behaviors that men direct toward women which are sexual in nature and which *you firmly believe are* examples of sexual harassment; (2) Describe those work place behaviors that men direct toward women which are sexual in nature but which *you firmly believe are not* serious enough to reach the level of sexual harassment; and (3) Describe those work place behaviors that men direct toward women which are sexual in nature but which *you believe are ambiguous* with regard to whether or not they reach the level of sexual harassment. Respondents were not given a definition of sexual harassment, but instead were told to use their own. We did not want to bias or restrict our interviewees' cognitive representations of sexual harassment by imposing a defining structure on their answers. Our goal in interviewing these full-time workers was to explore their subjective experiences of social sexual conduct in the workplace and describe the manner in which they determined whether the behaviors were harassing, non-harassing, or ambiguous. The interviewers probed the respondents' initial answers and asked the participants to clarify and support their responses with the circumstances surrounding the behaviors and the reasons why they considered each of the behaviors they mentioned to be harassing, non-harassing, or ambiguous.

We used structured, open-ended questions with specific probes in our interviews in order to elicit as much information from each respondent as possible. We chose not to limit interview responses by asking close-ended or fixed-choice response questions. Research has shown that close-ended questions give directions to respondents both for response format and response content.[112] We did not want to direct our interviewees' responses. Instead our intention was to collect rich, descriptive responses to our queries. The interviewers carefully recorded the answers to each of the questions, preserving the original language of the respondents. Female interviewers interviewed female respondents, and male interviewers interviewed male respondents. After answering the interview questions, each respondent completed a written survey sheet asking for demographic information and any previous experience they may have had with sexual harassment. Upon

112. *See* HOWARD SCHUMAN & STANLEY PRESSER, QUESTIONS AND ANSWERS IN ATTITUDE SURVEYS (1981). These researchers reported a series of comparisons between open-ended and close-ended questions in surveys using national probability samples of adults. Results showed that close-ended questions produced a more uniform response pattern than did open-ended questions, and close-ended questions determined the content of the respondents' answers. Open-ended questions allowed the response format to vary more freely from respondent to respondent. As a result, open-ended questions are preferable when the goal of the researcher is to describe the actual content of the decision makers' judgment process, especially in the early stages of research.

conclusion of each interview, the interviewer reviewed his or her notes and entered the respondent's answers to each of the questions into a computer database.

We analyzed the open-ended questions using both qualitative and quantitative methodologies. Our interviewees' narratives were converted first into descriptive tables listing behaviors and qualifiers for those behaviors and then into decision process flowcharts for quantitative analysis. We used both qualitative and quantitative methodologies because the multiple method approach to research results in a more accurate and vivid portrayal of the human experience.[113] First, the interviewers recorded the three types of behaviors for each respondent: (1) those that the interviewee considered to be definitely harassing; (2) those that did not reach a level of sexual harassment; and (3) those that were ambiguous behaviors. Examples of harassing behaviors were "inappropriate touching," "telling dirty/sexual jokes," and "making sexual advances." Examples of non-harassing behaviors were "appropriate touching," "telling dirty/sexual jokes," and "requests for a date." Examples of ambiguous behaviors were "touching," "making sexual advances," and "complimenting a woman."

We found that many of our participants mentioned the same behaviors in all three categories and we were able to interpret their answers only in the context of the reasons they gave for why the behaviors fell into a particular category. For example, female interviewee Number 5 mentioned "touching" as a behavior which could be harassing, non-harassing, or ambiguous depending upon the context within which the behavior occurred. She considered touching of a personal body part, "breast or buttocks," in the workplace to be harassment—regardless of the status of the person touching the woman (i.e., boss or coworker). On the other hand, she considered touching of a non-personal body part, "just on the back or arm," ambiguous when done by the boss and not harassing when done by a coworker. The descriptive context surrounding the behaviors enabled the research team to map out the respondents' complex decision processes when categorizing social sexual workplace conduct.

The research team recorded all circumstances that the respondents mentioned as qualifying as any of the three types of behaviors. A qualifier was defined as any reason that the respondent provided for calling a behavior harassing, non-harassing, or ambiguous. Examples of responses which qualified behaviors as harassing include: This behavior *is* sexual harassment because (1) it makes the woman feel uncomfortable; (2) it happens in the work setting; and (3) the woman does not want the behavior. Examples of

---

113. For arguments endorsing the multiple methodologies of combined qualitative and quantitative research paradigms, see for example QUALITATIVE AND QUANTITATIVE METHODS IN EVALUATION RESEARCH (Thomas D. Cook & Charles S. Reichardt eds., 1979); 3 MICHAEL Q. PATTON, EVALUATION AND PROGRAM PLANNING MAKING METHODS CHOICES (1980); Lee J. Cronbach, *Beyond the Two Disciplines of Scientific Psychology*, 30 AMER. PSYCHOL. 116 (1975).

responses which qualified behaviors as non-harassing include: This behavior is not sexual harassment because (1) the man and woman are friends; (2) it does not violate workplace norms; and (3) the man did not intend to harm the woman. Finally, examples of qualifiers of ambiguous categories include: (1) the woman does not know the man's intentions; (2) the behavior starts out reasonable but the man takes it too far; and (3) it is not directed toward a particular woman.

Next, we collapsed across all 50 interviewees' coded narratives to create six sets of tables, three separate tables for men and three for women. For each gender we included a summary table for harassing behaviors, non-harassing behaviors, and ambiguous behaviors. Each entry included the interviewee number, the type of behavior mentioned, an example, and attachments for all qualifying information. Qualifying information included the circumstances surrounding the behavior, the relevance of the status of the people involved in the social sexual conduct, the relevance of the frequency of occurrence of that behavior, and the reason the behavior was harassing, non-harassing or ambiguous. As an example of a table entry, consider female respondent Number 1's response in our table of sexually harassing behaviors. Listed as a type of behavior was *touching at the office,* with the example "when a man squeezes you in the office." The circumstances she mentioned surrounding this behavior were "it is inappropriate so it is always sexual harassment." Respondent Number 1 believed that status of the man (boss vs. coworker) was irrelevant for categorizing this behavior. She commented on the frequency of the behavior with the following language, "once makes it harassment." The reason why she thought inappropriate touching was harassing was that "the average guy should know not to do this without being told." In each of the six tables we entered data lines similar to this one but each described a unique combination of gender by harassing, non-harassing, or ambiguous conduct. There were multiple entries for each respondent because most respondents reported several behaviors in each category. We used the data entries in the six tables to construct flowcharts to represent the decision structures for each behavior that each respondent mentioned.

A decision flowchart is defined as a detailed graphic representation of a sequence of hierarchical decision points leading to a judgment regarding which category (i.e., harassing, non-harassing, or ambiguous) best fits a particular behavior. We adopted a social inference model[114] to outline and examine this decision making process. The model enables the researcher to describe hierarchical decision points that capture the respondents' judgments of social sexual conduct. Previously, one of the authors used this approach to outline a normative theory of negligence decisions.[115] In general,

---

114. *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 346-404 (2d ed. 1991) (explaining that a social inference model is the sequence of decision points and judgments that a decision maker goes through to reach an inference about another individual).

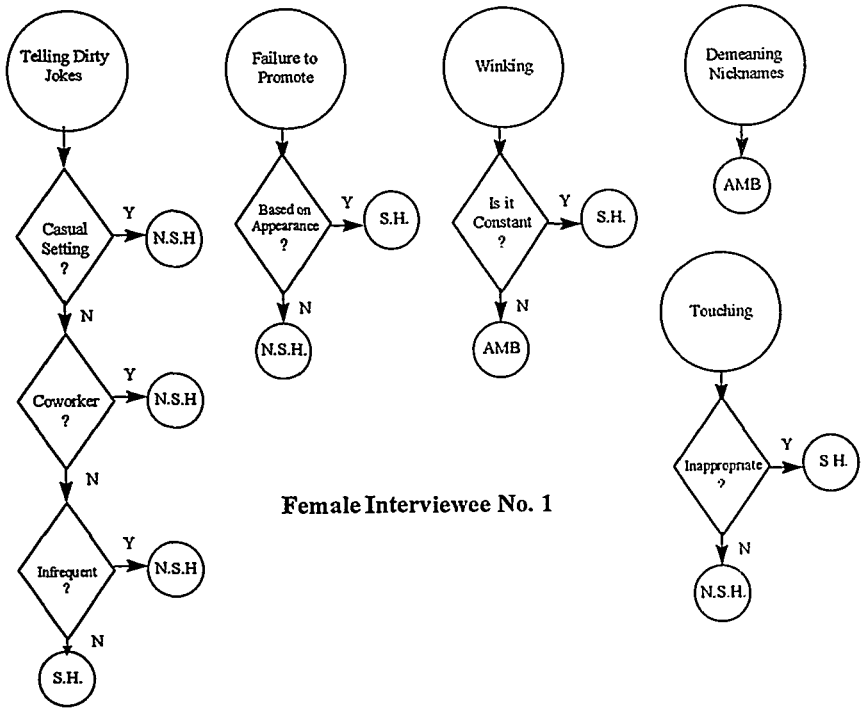
115. *See* Wiener, *Social Analytical Jurisprudence, supra* note 88. (A hierarchical flow-

hierarchical social inference models permit a great deal of precision while allowing for maximum flexibility in describing legally relevant judgments.

To complete the flowcharts, we pictorially represented behaviors by large circles, decision points by diamonds, and categories of harassment by small circles ("S.H." representing sexual harassment, "N.S.H." representing not sexual harassment, and "AMB" representing ambiguous). Recall that many behaviors were mentioned in more than one category and some were even listed in all three categories by the same respondent. The research team used the information the participants provided in their comments concerning the circumstances surrounding the behaviors, the status of the individuals involved, the frequency of the behaviors, and the reasons why the behaviors fit one of the three categories to trace each respondents' judgment process and thereby created the decision points that connect behaviors to the final judgment categories (i.e., harassing, non-harassing, or ambiguous).

As an example of one of the flowcharts, let us turn again to female interviewee Number 1. Figure 1 is a flowchart of her decision process.

Figure 1



Female Interviewee No. 1

chart decision model is used to present a depiction of negligence law from the perspective of social cognitive psychology.)

She mentioned five behaviors in her interview. These were "touching," "failure to promote," "demeaning nicknames," "telling dirty jokes," and "winking." Her only decision criterion for the behavior "touching" was "is it inappropriate?" You will remember from our discussion of this interviewee's table entry above, that she reported the behavior "touching" to be harassing only if it was inappropriate for the workplace. Her reason for this was that "the average guy should know not to do this without being told." Another behavior she mentioned was "failure to promote." Her only decision criterion for this behavior was "is the promotion based upon a woman's appearance?" If it was, then she judged the behavior to be sexual harassment. If it was not, then she judged the behavior was not harassing. In her interview she stated that "promoting a woman because of her appearance or not promoting a woman because she doesn't look sexy enough is always sexual harassment. The average boss should know not to do this without being told." The next behavior mentioned by interviewee Number 1 was "demeaning nicknames—like men calling women at the office . . . girls." She used no decision points for this behavior, stating that no matter what the circumstances, this behavior was ambiguous because "this is a common behavior with vague implications which might be thought by some to be sexual harassment, or it might just be something that bothers me." In her interview regarding ambiguous behaviors, she listed "winking." Her decision process about "winking" was "if the winking was constant and occurred every time the woman encountered the man" then it would be harassment, otherwise, it was ambiguous. Finally, interviewee Number 1's most complex decision process involved the behavior "telling dirty jokes." For this behavior, her first decision point was "if the behavior is done in a casual setting such as at the water cooler or in the lunchroom" then it is not sexual harassment. She also stated that "telling dirty jokes is not harassment if it is among coworkers." Finally, she said that "if the boss tells an infrequent joke it would not be harassment." "However, if the boss told a joke a day, or if he never quit doing it, then it would be harassment."

After creating a flowchart of behaviors and decision points for each interviewee, we began statistical analyses of the decision making process by counting occurrences of each type of behavior and each type of common decision point that the men and women reported. Table 1 illustrates the results of the tabulations for the behaviors. Table 1 suggests that men and women are concerned with similar actions. However, our later analyses show that interpretations of these behaviors vary significantly by gender.

Table 1: Types of Social Sexual Conduct Mentioned Most Often by Male and Female Interviewees

Men		Women	
Behavior	# of Times Mentioned	Behavior	# of Times Mentioned
Touching	21	Touching	24
Date Requests	15	Comments on Appearance	17
Comments on Appearance	9	Dirty Jokes	12
Dirty Jokes	8	Nicknames	6
Quid pro quo	8	Sexually Explicit Talk	5
Sexually Explicit Talk	7	Quid pro quo	4
Lewd Comments	5	Dirty Pictures	4
Innuendoes	4	Innuendoes	4
Sexual Advances	4	Sexual Advances	4
Flirting	4		
Leering	4		
Compliments	4		

Note: The behaviors listed above include only those listed as harassing, non-harassing, or ambiguous by four or more people.[116]

Table 2 illustrates the most commonly mentioned types of qualifiers or decision points that our respondents used to make their judgments. Entries in Table 2 are expressed in the form of the questions that our respondents appeared to ask as they classified behaviors as harassing, non-harassing, or ambiguous. For example, the entry "wanted?"[117] refers to the question, "Was the behavior wanted by the woman?"; the entry, "coworker?" refers to the question, "Was the behavior initiated by a coworker (as opposed to a supervisor)?"; the entry "woman targeted?" refers to the question, "Was the behavior targeted toward a particular woman?"; and the entry "benign intent?" refers to the question, "Were the man's intentions benign?" As illustrated in

116. The behaviors not listed in this table which were mentioned by men were: dirty pictures (3), gossip (2), winking (2), derogatory comments (2), criticism (1), teasing (1), joking (1), nicknames (1), personal questions (1), treating women as helpless (1), contacting a woman outside of work (1), practical jokes (1), lunch invitations (1), discussing personal relationships (1), and whistling (1). The behaviors not listed in this table which were mentioned by women were: flirting (3), leering (3), requests for a date (2), teasing (2), joking (2), dating the boss (2), invading personal space (2), lewd comments (2), compliments (1), gossip (1), lunch invitations (1), discussing personal relationships (1), failure to promote (1), requests for personal favors (1), sexist comments (1), and backrubs (1).

117. We use the word "wanted" instead of the more legally accurate language "welcomed" because our respondents tended to talk about "wanted" and "unwanted" behaviors. In fact, no respondent used the words "welcomed" or "unwelcomed."

Figure 1 above, each decision point requires a "yes" or "no" response. Table 2 shows that men relied most often on the decision points: "Was the behavior wanted by the woman?"; "Did the behavior stop upon request?; and "Was the behavior initiated by a coworker?" On the other hand, women relied upon, "Were the man's intentions benign?"; "Was the behavior initiated by a coworker?"; and "Did the behavior stop upon request?".

Table 2: Decision Points Used Most Often by Male and Female Interviewees

Men		Women	
Decision Point	# of Times Mentioned	Decision Point	# of Times Mentioned
Wanted?	32	Benign Intent?	31
Stop upon Request?	27	Coworker?	17
Coworker?	20	Stop upon Request?	12
Benign Intent?	12	Infrequent?	8
Infrequent?	10	Woman Targeted?	8
Inappropriate?	9	Inappropriate?	6
Degrading?	5	Personal Body Parts?	6
Woman Targeted?	4	In the Workplace?	5

Note: The decision points listed here were mentioned four or more times.[118]

In order to examine in more detail gender differences in men's and women's decision criteria for sexual harassment judgments, we developed four ratios that represented four common decision points (e.g., "Was the behavior wanted by the woman?"; "Were the man's intentions benign?"; "Was the behavior initiated by a coworker [or a supervisor]?" and "Did the man stop upon request?"). For each interviewee, we calculated the total number of decision points and the total number of each type of decision point (i.e., wanted?, benign intent?, coworker?, and stop upon request?) that each respondent used. We expressed this value as a percentage with the total number of decision points as the denominator and the number of a particular type of decision point as the numerator. We averaged the ratio (percentage scores) scores separately across the 25 men and the 25 women in our sample. In this manner, we calculated means of the *rate of benign*

118. Decision points used by men fewer than four times were: personal body parts? (3), violate workplace norms? (3), workplace setting? (3), sexual? (3), intentional? (3), aggressive (2), woman incompetent? (1), woman uncomfortable? (1), man married? (1), woman offended? (1), behavior reciprocated? (1), okay for TV? (1), dirty? (1), male dominated workplace? (1). Decision points used by women fewer than four times were: woman uncomfortable? (3), wanted? (3), woman offended? (2), interested in the man? (1), compliment? (1), sexual? (1).

intention decisions to total decision point, the *rate of wanted decisions to total decision points,* the *rate of coworker decisions to total decision points* and the *rate of stop upon request decisions to total decision points.* Table 3 lists the means for men and women.[119]

Table 3: Decision Ratios for Male and Female Interviewees

Ratio	Men	Women
"Was the behavior wanted by the woman?"	.19*	.01*
"Were the man's intentions benign?"	.08*	.26*
"Was the behavior initiated by a coworker?"	.10	.16
"Did the man stop upon request?"	.14	.11

Note: * indicates that the men's and women's values are different from each other at the .01 level of significance.

Statistical analyses indicated that while men more than women used "Was the behavior wanted by the woman?", women more than men relied upon "Were the man's intentions benign?" as decision points. Finally, there were no significant gender differences in the use of "Was the behavior initiated by a coworker?" or "Did the man stop upon request?" as a decision point.[120] The decision structures of both women and men included these latter two decision points at a rate of between 10 and 16 percent of all the decision points used. These results show that men focused more on whether the behavior was wanted by the woman when making a judgment about the harassing status of social sexual behavior. Consider, for example, male interviewee Number 27 who discussed two behaviors as sexually harassing in

119. Ratios were used to control for possible differences in the total number of decision points used by men and women.

120. A 2 (Gender: Male, Female) x 4 (Type of Decision: Wanted, Intentions, Coworker, Stop upon Request) Mixed Analysis of Variance with Gender as the between subjects factor and Type of Decision as the within subjects factor was performed to see if there were any significant differences between men's and women's decision strategies regarding social sexual conduct. We used the Huynh-Feldt correction for degrees of freedom for all within subjects effects. Results indicated that there were no overall gender effects, F (1, 47) = 0.10, *ns*, or type of decision effects, F (3, 141) = 1.13, *ns*. However, there was a significant gender by decision type interaction, F (3, 141) = 7.78, $p < .001$. Simple effects tests of this interaction revealed that men used the decision point, "Was the behavior wanted by the woman?" more than women, F (1, 47) = 20.02, $p < .01$; and that women used the decision point, "Were the man's intentions benign (friendly)?" more than men, F (1, 47) = 9.03, $p < .01$. There were no significant differences between men and women's use of "Was the behavior initiated by a coworker?" F (1, 47) = 1.40, *ns* or "Did the man stop upon request?", F (1, 47) = .40, *ns*.

his interview. These were "touching" and "commenting on a woman's appearance." He judged these behaviors to be sexually harassing "if they were unwanted by the woman involved." Male interviewee Number 35 listed "touching" and "requests for dates" as possible harassing behaviors. He stated that "once a woman has made it clear to the man that the behavior is not wanted, continued occurrence of the behavior is harassment." We conclude that many men try to ascertain whether a woman wants a social sexual behavior to occur before determining whether the behavior constitutes sexual harassment.

On the other hand, many women look to the intent of the man involved when judging whether a behavior is harassing or not. For example, female interviewee Number 8 mentioned three behaviors as not sexual harassing. These were "using nicknames like 'dear' or 'honey' at the office," "comments about a woman's clothes," and "friendly, non-sexual touching." She stated that "intention determines if a behavior is harassment or not—friendly intent is not sexual harassment." She concluded that the three mentioned behaviors were not harassing if the man's intentions were benign. Similarly, female interviewee Number 12 listed "telling dirty jokes" and "sexual innuendo" as not sexually harassing. She said, "these are friendly office behaviors. The man's intention is to be friendly, a camaraderie thing, so they are not harassment."

To explore the hypothesis that women's decision rules are more likely to culminate in harassment conclusions, we calculated a ratio of the number of sexual harassment judgments divided by the number of non-harassment judgments for each of our interviewees. Statistical analysis revealed that women (Mean = 1.57) had significantly higher ratios of harassing to non-harassing behaviors than men (Mean = .87).[121] In fact, while the women were almost 1.6 times more likely to judge behavior samples as harassing as opposed to non-harassing, men were about 1.15 times more likely to judge behavior samples as non-harassing as opposed to harassing. These data lend direct support to the conclusion that women use broader or more inclusive harassment definitions and men use narrower or less inclusive harassment definitions. However, the variance within women ($S^2 = 2.36$) was significantly greater than the variance within men ($S^2 = .17$)[122] suggesting that women, as compared to men, show much greater latitude with regard to how broadly they define harassment. In other words, while there is a great deal of disagreement among women in their harassment judgments, there is much less disagreement among men.

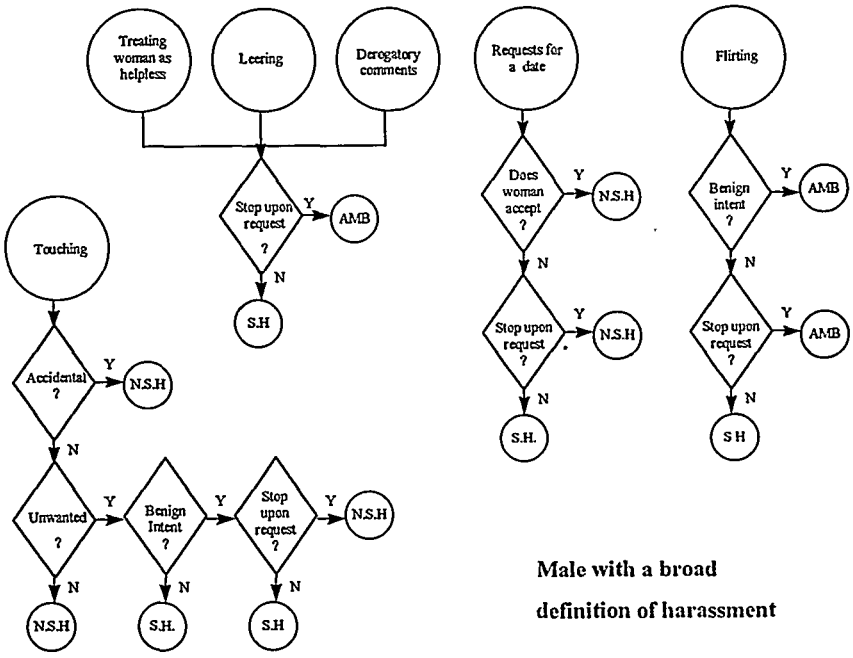
After completing the statistical analyses of the flowcharts and decision making process, the research team looked at the different ways in which men and women made decisions regarding social sexual behaviors in the

121. An independent t-test of gender by ratio of harassing to non-harassing behaviors was significant, $t(1, 48) = 2.21, p = .032$.

122. Levene's test for equality of variances produced an $F(1,48) = 18.55, p < .001$.

workplace. We chose one woman's flowchart and one man's flowchart to illustrate decision processes that frame broad definitions of sexual harassment. A broad definition is one that includes many behaviors as sexually harassing because it consists of more decision points that lead to judgments of sexual harassment than decision points that lead to judgments of not sexual harassment. We also selected one woman's flowchart and one man's flowchart that illustrate narrow definitions of sexual harassment. A narrow definition consists of many decision paths that culminate in judgments of non-harassment, but few that lead to harassment.

Figure 2



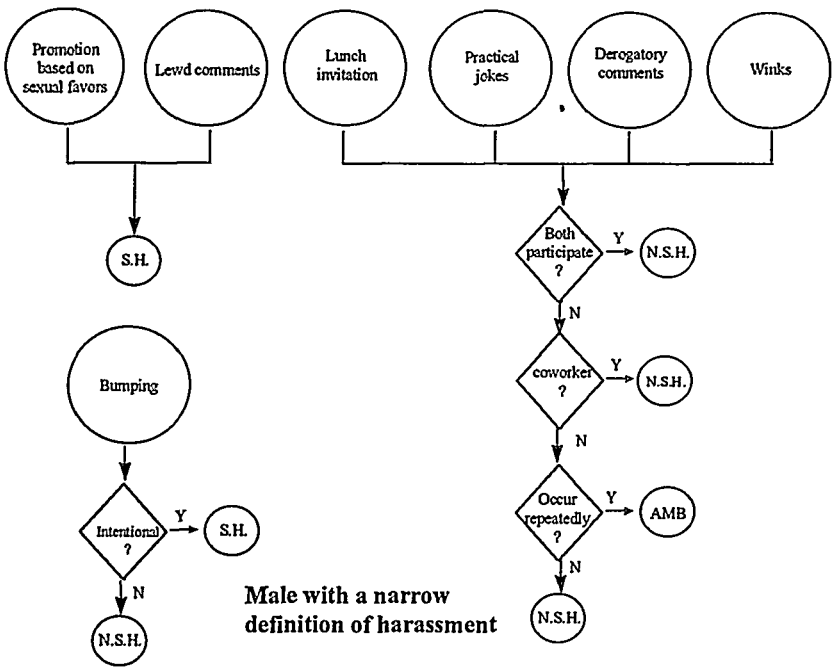
Male with a broad definition of harassment

Figure 2 is an example of a man with a broad definition of harassment. It shows seven decision points leading to a judgment of sexual harassment and only five ways in which a behavior can be judged as not harassment. Looking more closely at this decision process, one can see that this respondent considers "treating a woman as helpless," "leering" and "derogatory comments" all to be sexual harassment if they do not stop upon request. If these behaviors *do* stop upon request, he does not judge them to be non-harassing, but merely considers them ambiguous. "Requests for a date" are sexual harassment if the woman does not accept the date *and* the man does

not stop asking her upon request. This respondent sees "Flirting" as sexual harassment if the intent is not benign *and* the man does not stop flirting with the woman when asked. "Flirting" does not constitute harassment if the intent is benign or if the flirting stops upon request, but merely becomes ambiguous. Finally, the man, with a broad definition of harassment, has a complex decision making process regarding "touching." If the touching is accidental, then he judges it as non-harassing. If it is not accidental, but is "wanted," then it is also non-harassing. If the touch is not accidental and not wanted, and the intent is not benign, then he sees it as harassing. If the intent is benign and the touching does not stop upon request, again it is harassing. However, if it does stop upon request, then it is not harassing. One can see from this man's flowchart that his decision analysis includes more harassing paths than non-harassing decision outcomes.

The man with a narrow definition (See Figure 3) of sexual harassment has only three paths leading to a judgment of harassment and 13 paths leading to a judgment of not harassment.

Figure 3



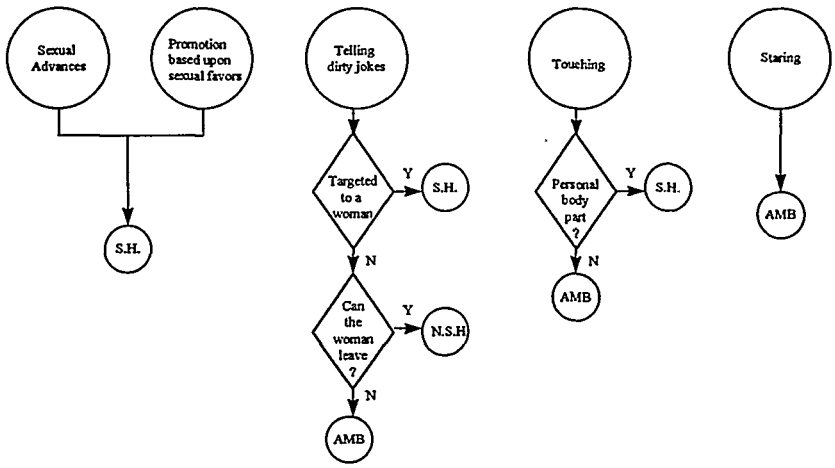
"Promotions based upon sexual favors,"[123] "intentional bumping" and

123. We used the language of the participants, "promotions based upon sexual favors"

"lewd comments" are the only behaviors he finds sexually harassing. In fact, for the behaviors, "lunch invitations," "practical jokes," "derogatory comments," and "winks," there is no path leading to sexual harassment. If both the man and the woman are not participating in the behavior, *and* the boss initiates the behavior, *and* it occurs repeatedly, this man merely judges these behaviors to be ambiguous. He never considers these behaviors to be harassing. Therefore, his decision tree displays a narrow definition of sexual harassment because it includes few paths leading to sexual harassment and many paths leading to a judgment of not sexual harassment.

Figure 4 presents our example of a woman with a broad definition of harassment. It shows four decision points that lead to a judgment of sexual harassment and only one that culminates in a behavior that is not harassing. This woman sees "sexual advances" and "promotions based upon sexual favors" to always constitute sexual harassment. She judges "touching of a personal body part" and "telling dirty jokes targeted to a particular woman" to be sexual harassment. It is only when "dirty jokes" are not targeted to a particular woman" and the "woman can leave the area" that this respondent views off color comments as non-harassing. Finally, "staring," "touching of a non-personal body part," and "telling dirty jokes which are not targeted to a particular woman, when the woman cannot leave" are always ambiguous.

Figure 4



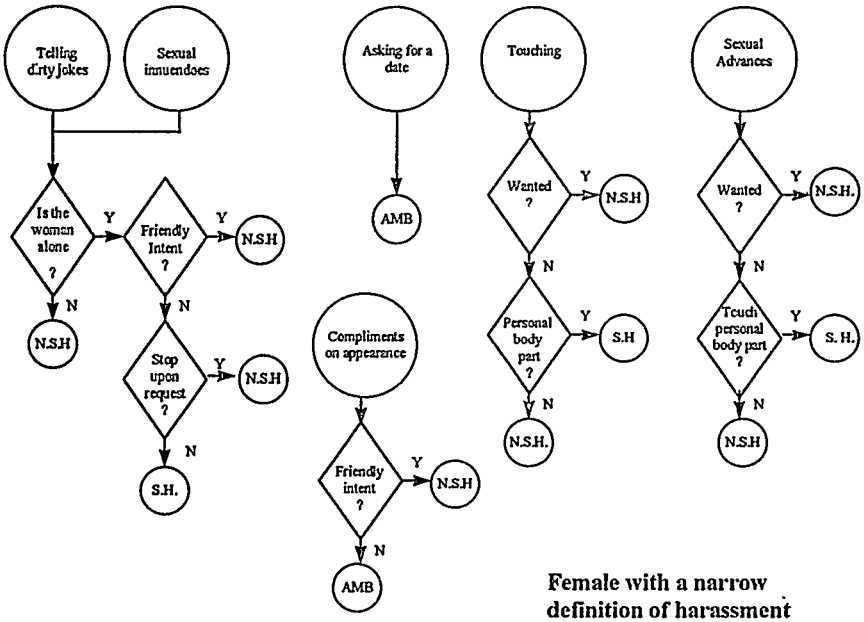
Female with a broad definition of harassment

rather than the legal term quid pro quo.

Our analysis shows that this woman exhibits a broad definition of sexual harassment. That is, her decision tree includes many paths leading to a judgment of harassment and few paths leading to non-harassment.

The woman with a narrow definition of harassment (See Figure 5) has four paths leading to sexual harassment and 11 paths leading to not harassment. This interviewee views "telling dirty jokes" or "sexual innuendoes" as harassment only when the woman is alone, *and* the man's intent is not friendly, *and* he does not stop when asked. "Touching" and "sexual advances" are sexual harassment only if the woman does not want the behaviors and the man is touching a personal body part. Otherwise, these behaviors are non-harassing. "Asking for a date" and "compliments on appearance" with "unfriendly intent" are ambiguous. In short, this woman views very few behaviors as sexual harassment compared to the behaviors she views as non-harassing. Therefore she exhibits a narrow definition of sexual harassment.

Figure 5



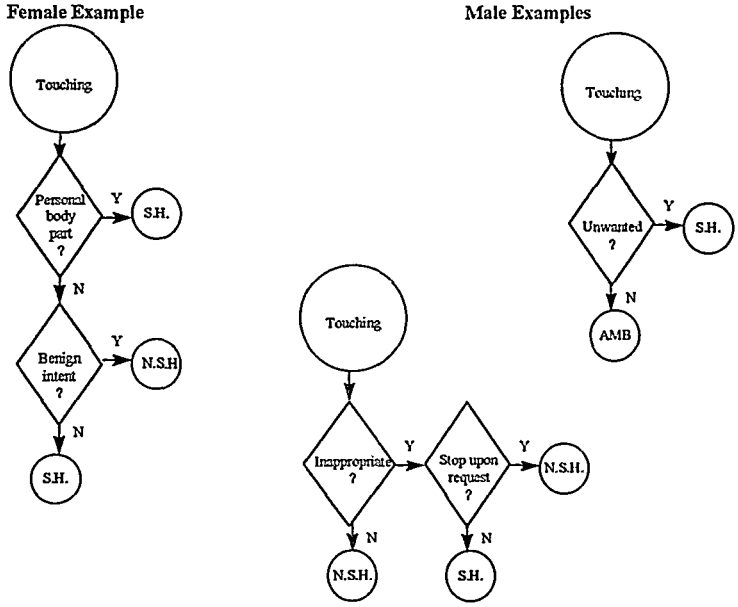
Female with a narrow definition of harassment

As we have already shown, men and women had somewhat different decision structures for making judgments of sexual harassment. Table 1 shows that the four most frequently mentioned behaviors by both genders were "touching at work" (N=45), "making comments on physical appearance" (N=26), "telling dirty jokes" (N=20), and "sexually explicit talk"

(N=12).[124] Figures 6 through 9 illustrate some common differences in the decision structures that specific men and women used to evaluate these behaviors. These flowcharts were selected as examples of common decision structures that some individual men and woman used to evaluate the four most frequently mentioned behaviors. The research team counted the number of each type of decision point used in the decision structure for each of these behaviors. Next, we ranked the decision points based upon their frequency of use. The results of this ranking determined the examples of specific decision trees we selected to represent the most common types of decision structures. After determining the most frequently occurring decision points, we selected as examples some male and female flowcharts with decision strategies that best captured the most frequently used decision points.

Figure 6

Decision Structures for Touching at Work



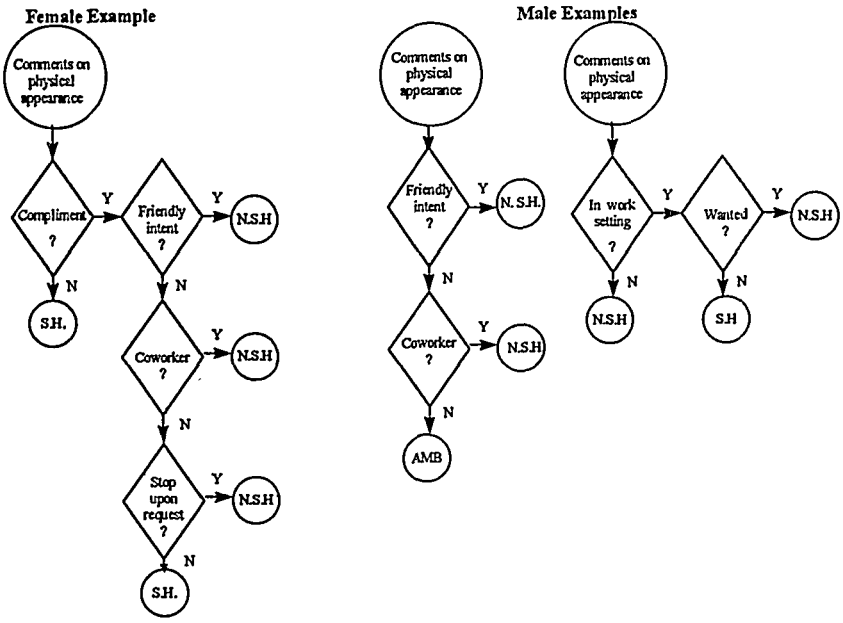
124. Eight of the male respondents and four of the female respondents listed "promotions based upon sexual favors" as harassing behavior. Therefore, there were a total of twelve people who mentioned this behavior. Only one respondent qualified the conduct. All the rest automatically categorized it as sexually harassing. (See Figures 3 and 4 for examples of these decision structures.) The one woman who did qualify this behavior suggested that it is harassment if it happens more than once. We did not create a representative decision tree for this behavior because there is no decision point involved. Further, this behavior would result in a quid pro quo cause of action and we limit our discussion in this essay to hostile work environment violations of Title VII.

For example, Figure 6 displays the most common decision strategy women employed to describe "touching at work" and the two most common decision trees that captured the men's analyses. One can see that this woman focuses on which part of her body is being touched, and then looks at the intent of the man touching her to make her harassment decision. On the other hand, these two men *either* look to whether the behavior is unwanted *or* whether it is inappropriate for the workplace *and* stops upon request when they make harassment judgments.

The decision structures for "comments on physical appearance" indicate (See Figure 7) that our female example first decides whether the comment is a compliment, then whether the intent of the man complimenting her is friendly, then whether he is a coworker, and finally, if the behavior stops upon request. The male representatives make their decisions about this behavior in one of two ways. One structure begins with whether the man's intent is friendly, and then asks whether the man is the woman's coworker. The other example begins with whether the comment is made in the work setting and then continues by assessing whether the comment is wanted by the woman.

Figure 7

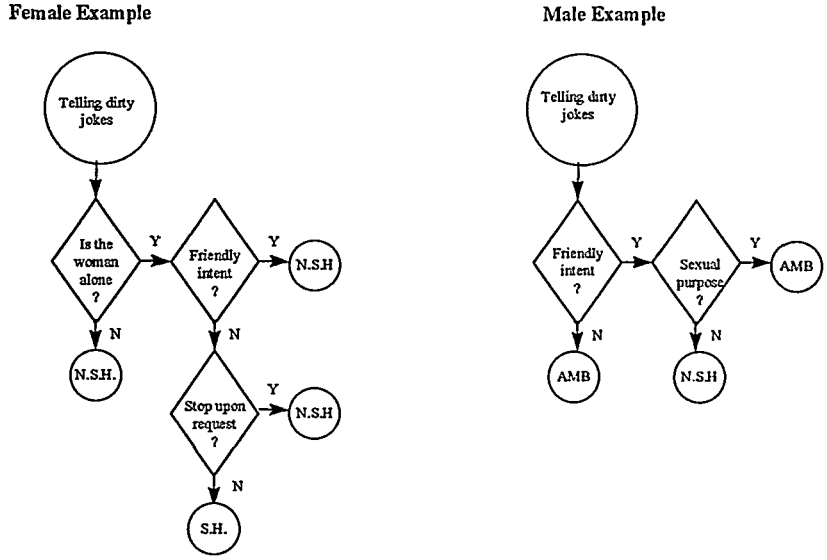
Decision Structures for Comments on Physical Appearance



The decision structures for "telling dirty jokes" show (See Figure 8) that our representative woman when making harassment judgments looks to whether the woman is alone, whether the intent of the man telling the joke is friendly, and whether he stops when asked. The man representing this decision structure focuses on whether the intent of the man telling the joke is friendly *and* if the purpose of telling the joke is sexual.

Figure 8

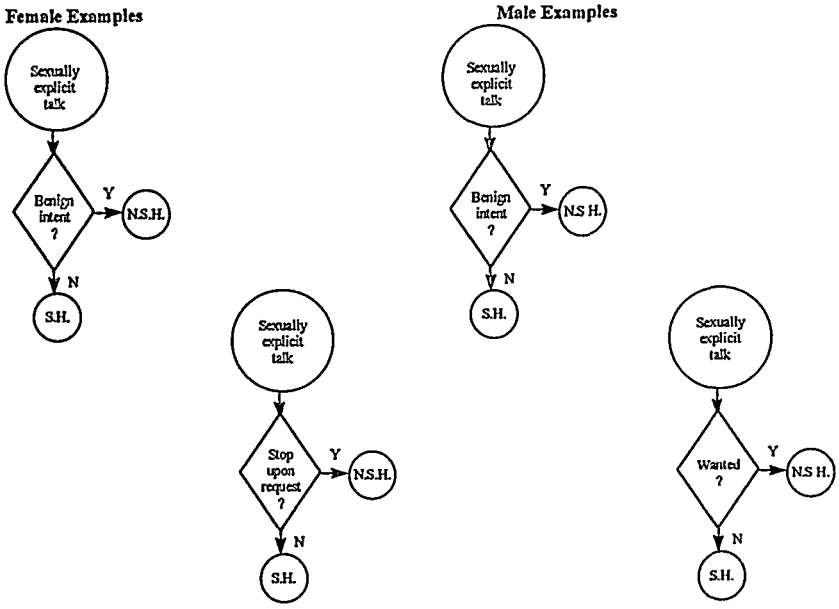
Decision Structures for Telling Dirty Jokes



The final example of the decision structures for a behavior that both men and women mentioned frequently is "sexually explicit talk." Figure 9 shows the female examples go to either the intent of the man, or whether the man stops upon request, while the male examples focus either on the intent of the man or on whether the woman wants the behavior.

Figure 9

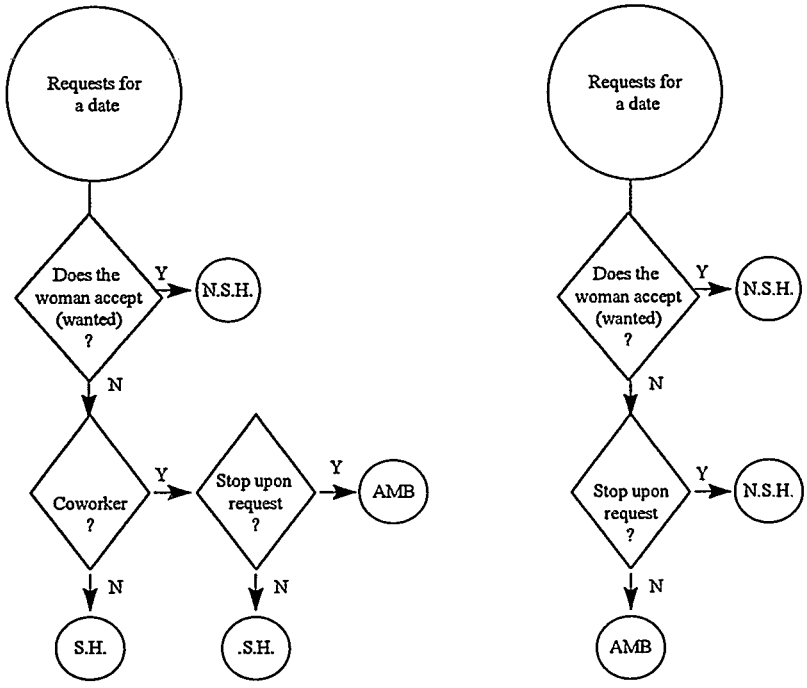
Decision Structures for Sexually Explicit Talk



The last two figures analyze behaviors that were common to men or women but not both. Figure 10 gives examples of the common decision structures our representative men used to judge harassment with regard to "requests for a date." Figure 11 gives examples of representative decision structures women used in judging harassment for "nicknames." It is interesting to note that 15 of the 25 men (60%) interviewed and only two of the 25 women (8%) mentioned "requests for a date" when asked about social sexual conduct in the workplace. Six women (24%) and only one man (4%) mentioned "nicknames" during their interviews.

Figure 10

Examples of Males' Decision Structures for Requests for a Date



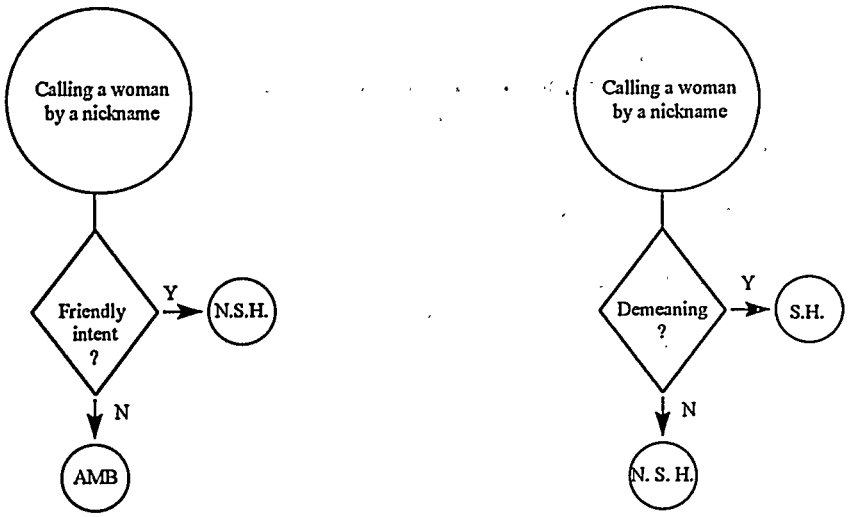
There were two commonly used decision structures for men judging "requests for dates." In the first structure, if the woman accepts the request, it is not harassment. However, if the woman does not accept *and* the man requesting the date is a coworker *and* he stops when asked, then the behavior is ambiguous, but not harassment. On the other hand if he does not stop, then the behavior is harassment. It is also harassment if the boss requests the date and the woman does not want to be asked. The other male decision structure for "requests for a date" was more commonly used by our interviewees. In this decision tree, if the woman accepts the date, it is not harassment. If she does not accept, but the man stops asking upon request, it is also not harassment. If he does not stop upon request, then the behavior is ambiguous, but still not harassment. It was unusual for the men in our sample to find "requests for a date" harassing.

There are two female examples of decision structures for "calling a woman a nickname at work." If the intent of the man is friendly, then it is not harassment. If the intent is not friendly, then most women judged "nicknames" to be ambiguous. The only way that "nicknames" become

harassing is if they are demeaning to the woman.

Figure 11

Examples of Females' Decision Structures for Nicknames



IV. CONCLUSION

In Part III we used social analytic investigation to assess the fit between the normative model of social sexual conduct at work embodied in harassment law and the manner in which a sample of men and women workers actually make harassment judgments. We found that although men and women are concerned with similar types of conduct, they interpreted the behaviors somewhat differently. The judgment strategies of both genders considered together tend to include as important decision points: 1) Was the behavior wanted by the woman?; 2) Were the man's intentions benign?; 3) Did the behavior stop upon request?; and 4) Was the behavior initiated by a coworker or a supervisor? However, women focused more on the issue of the intentions of the man and men looked more to whether the woman welcomed the social sexual conduct.

These strategies led to different outcomes in that women were more likely to find behavior harassing and men were more likely to find behavior non-harassing. In other words, women used broader definitions of harassment and men used narrower definitions. Equally important, we found much greater variability among women as compared to men with regard to the breadth of the definition of harassment. In short, the men in our sample

consistently used narrow definitions of harassment and some women used narrow definitions, while other women relied upon much broader definitions. Our flowcharts illustrate how many different ways men and women workers make these judgments. The rule seems to be that workers rely on very different types of decision strategies to reach their judgments and as a result there is great disagreement about the conditions that render behaviors offensive (and therefore costly). In other words, it is not the conduct *per se* that results in perceptions of harassment but rather it is the interaction of conduct and circumstances. For the most part the respondents' judgments were rational, but very subjective. They were rational in the sense that women and men followed implicit but discoverable rules when evaluating social sexual conduct at work and they were subjective in that the rules themselves varied extensively within and between genders.

Our data suggest that current hostile work environment law in some ways fits the judgment processes of our interviewees well and in some ways fits it poorly. The normative model found in the law is based upon five assumptions about sexual harassment: 1) the conduct is unwelcome; 2) the conduct is severe (and/or); 3) the conduct is pervasive; 4) the conduct is offensive from an objective and subjective point of view;[125] and 5) the intentions of the alleged harasser are secondary.[126] We conducted interviews to assess the fit between the normative model assumed in the law and the manner in which full time workers evaluate social sexual conduct on the job. We found that workers rely on unwelcomeness ("Was the behavior wanted by the woman?"), pervasiveness ("Did the man stop upon request?"), and the intentions of the man ("Were the man's intentions benign?") to reach their decisions. It is perhaps no surprise to some that men in our sample were more concerned about the welcomeness status of social sexual conduct than were women. It could be argued that the men used determinations of welcomeness to justify what otherwise might be offensive conduct. However, it might also be the case that men have learned to pay close attention to the welcomeness factor in order to better monitor the appropriateness of their own actions. In any case, our data draw into question the conclusion that welcomeness determinations should have less weight in harassment policy. The unwelcomeness evaluation does not automatically favor the complainant and in fact results from a rather a complex judgment process.

Our data suggest that the decision process is indeed a subjective one. There is great variation between men and women and within both genders with regard to the definition of harassment. It is doubtful that an enumerated code of conduct could be used to regulate social sexual behavior in the workplace because the offensiveness of behavior varies considerably by

125. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

126. Because the law is modeled after tort decisions, the psychological motivation of the accused harasser is not considered as an element in the final judgment.

gender. Further, while men and women used the power status of the actors ("Was the behavior initiated by a coworker?") as a decision criterion, they weighed power no more than any of the other decision points. We did not find that women were more sensitive to the power relationship than were men. Apparently, power considerations may not be as important in the evaluation of workplace social sexual conduct as some would argue.

For these reasons, it is unlikely that a gender-neutral standard (the reasonable person test of severity and pervasiveness) can capture the subjectivity that we found in our flowcharts. It is also doubtful that the reasonable woman standard without further clarification can offset gender differences in these judgments and perceptions.[127] The reasonable woman standard presented as an abstract construct with little definition is not likely to provide very much guidance in the assessment of social sexual conduct for men and women in the workplace or in the jury box. However, as we have argued elsewhere, presenting empirically based definitions of reasonableness from a woman's perspective offers great promise as a solution to this problem.[128] Such a definition of reasonableness would need to take into consideration the considerable variability in decision strategies that we have outlined in this essay. Some empirical average of narrow and broad definitions of harassing conduct as displayed by women workers in our sample will need to be developed.

Although the law considers the severity of the conduct as an important criterion, our respondents did not show much variation in their reactions to behaviors per se. They found quid pro quo conduct to be harassing without qualification but we could find no observable patterns that tied severity of the behavior to judgments of hostile work environment harassment. Instead, the men based their decisions more on welcomeness and the women more on the perceived intent of the men.

Any reforms in hostile work environment law should consider restructuring the test to emphasize more the intentionality of the accused and deemphasize the role of the severity of the conduct. In other words, so called benign behaviors may be considered more offensive under certain situations than so called severe behaviors, and severe behaviors may result in less perceived harassment than mild behaviors delivered with hostile intent. Unquestionably, some behaviors (i.e., quid pro quo and criminal actions such as sexual assault or rape) are automatically offensive, however the offensiveness of other behaviors depends more upon "Was the behavior wanted by the woman?"; "Were the man's intentions benign?"; "Was the behavior initiated by a coworker?"; or "Did the man stop upon request?" than upon the absolute severity of the conduct.

Our data suggest that not all uninvited social sexual conduct is costly to

127. *See* Wiener et al., *Reasonable Woman*, *supra* note 64; Wiener, *Sexual Harassment*, *supra* note 64.

128. *See* Wiener, *Social Framework*, *supra* note 64; Wiener et al., *Sexual Harassment*, *supra* note 64.

women. It is clear that some of the women workers in our sample viewed behavior that was unwanted as harassment, but others were more concerned with the intentions of the men initiating the conduct. We would find it very difficult to conclude that all rational women would assign similar cost/benefit structures to social sexual conduct at work. Instead, we must conclude that the judgment of cost is a subjective evaluation. There are differences between men and women and among women that need to be taken into consideration when establishing the costs of even unwelcome social sexual conduct at work. There is a great deal to be learned by investigating in more detail the cost/benefit structures that female and male workers assign to these behaviors. Any construction of a rational woman standard[129] should be based upon the results of such investigations.

Like all social science investigations, ours has identifiable limitations. Our work requires extension and replication. Admittedly, our sample of 50 workers needs to be enlarged to include more respondents and our interview methods should be corroborated with alternative methodologies. Nonetheless, we believe this essay has opened the door to an entirely different approach to studying social sexual conduct at work and ultimately hostile work environment harassment. We used social analytic jurisprudence to identify some of the naturally occurring decision processes of workers. We did not try to extend the list of behaviors that constitute harassing or nonharassing conduct, but rather we focused on the judgment strategies of women and men who inhabit everyday work environments. Learning more about how common folk make these judgments can only enhance our understanding of harassment in the workplace and possibly offer some solutions to the problem. The challenge to psycholegal scholarship is to educate the law and employers by describing actual behavior rather than presumed normative models of social sexual conduct at work. Social analytic jurisprudence is especially well suited to help us achieve this objective.

129. *See* Hadfield, *supra* note 81.