

EMPLOYER LIABILITY FOR SEXUAL HARASSMENT—  
NORMATIVE, DESCRIPTIVE, AND DOCTRINAL  
INTERACTIONS: A REPLY TO PROFESSORS BEINER AND  
BISOM-RAPP

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I. INTRODUCTION

In *Meritor Savings Bank v. Vinson*,<sup>1</sup> two decades after passage of the Civil Rights Act of 1964,<sup>2</sup> the United States Supreme Court recognized a federal cause of action for hostile work environment sexual harassment.<sup>3</sup> In the years following *Meritor*, the lower federal courts struggled to define the contours of the claim, including the circumstances under which employers could be held vicariously liable for harassment by a plaintiff's co-workers or supervisors. Although courts reached consensus relatively quickly on the standard of employer liability in cases involving co-worker harassment,<sup>4</sup> the precise circumstances under which employers would be held responsible for harassment by supervisors vexed and fractured federal courts for over a decade.<sup>5</sup> Following their judicial counterparts in many states<sup>6</sup> and the Equal

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1. 477 U.S. 57 (1986).

2. 42 U.S.C. § 2000e (1994).

3. Hostile work environment harassment involves situations in which the plaintiff has suffered no "tangible job detriment." A situation involving tangible job detriment presents what is known as a "quid pro quo" harassment claim. For a discussion of the distinction between these two types of claims, see *Meritor*, 477 U.S. at 64-65.

4. Under this consensus standard, employers are held liable if they knew or should have known of the harassment and failed to take prompt and effective remedial action. This standard, which developed in the circuit courts, pre-dates *Meritor*. See, e.g., *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983); accord, *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1345 (10th Cir. 1990); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989); *Lipsett v. Univ. of P. R.*, 864 F.2d 881 (1st Cir. 1988) (applying the standard in a racial harassment case); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 721, 724 (7th Cir. 1986) (explaining and applying the standard in a racial harassment case).

5. For a discussion of these cases, see *Faragher v. City of Boca Raton*, 524 U.S. 775, 785-86 (1998).

6. E.g., *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510, 526 (Cal. Ct. App. 1998); *Kelly-Zurian v. Wohl Shoe Co.*, 27 Cal. Rptr. 2d 457 (Cal. Ct. App. 1994); *Taylor v. Metzger*, 706 A.2d 685, 691 (N.J. 1998).

Employment Opportunity Commission (EEOC),<sup>7</sup> some courts held that employers were vicariously, that is to say automatically, liable for otherwise actionable harassment of subordinates by supervisors and managers.<sup>8</sup> This approach was generally justified on the ground that, under established principles of agency law, an employer is liable for an employee's misconduct if the employee's ability to engage in the misconduct was in some way assisted by his position with the employer.<sup>9</sup> Other courts took a different tack, and applied the same standard used in co-worker harassment contexts, holding employers liable for supervisor harassment only if the employer's managing agents knew or should have known of the harassment and failed to take prompt and effective remedial action.<sup>10</sup>

In the summer of 1998, the Supreme Court finally addressed the issue. In a pair of cases, *Faragher v. City of Boca Raton*<sup>11</sup> and *Burlington Industries v. Ellerth*,<sup>12</sup> the Court determined, at least as an initial matter, that in cases involving no tangible job detriment, employers could be held vicariously liable for harassment by a supervisor with immediate (or successively higher) authority over the plaintiff. The Court also held that employers can avoid liability for supervisor sexual harassment by establishing a two part affirmative defense. The employer must show first that it "exercised reasonable care to avoid harassment and to eliminate it when it might occur,"<sup>13</sup> and second, that "the complaining employee had failed to act with like reasonable care to take advantage

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7. At the time *Faragher* and *Ellerth* were decided, the EEOC's *Guidelines on Discrimination Because of Sex* provided that employers should be held liable for harassment by supervisors and managing agents "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." 29 C.F.R. § 1604.11(c) (1998).

8. *E.g.*, *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (noting that a harassing supervisor is always assisted in his misconduct by the supervisory relationship).

9. This principle is described in and adopted by THE RESTATEMENT OF AGENCY § 219(2)(d) (1957).

10. *See, e.g.*, *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1345 (10th Cir. 1990) (stating that employers are liable for supervisor harassment of which management-level employees knew, or in the exercise of reasonable care, should have known); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989) (same).

11. 524 U.S. 775 (1998).

12. 524 U.S. 742 (1998).

13. *Faragher*, 524 U.S. at 805. Writing for a seven-justice majority in which Chief Justice Rehnquist joined, Justice Kennedy adopted the same affirmative defense in *Burlington Industries, Inc.*, 524 U.S. at 765.

of the employer's safeguards and otherwise to prevent harm that could have been avoided."<sup>14</sup>

Writing for the majority in *Faragher*, Justice Souter conceded that the Court's decision was hard to reconcile with a long line of cases applying the same agency principles in other contexts,<sup>15</sup> and was also difficult to square with a realistic understanding of the power imbalance inherent in any supervisor-supervisee relationship.<sup>16</sup> Justice Souter nonetheless justified the Court's pronouncement of the new defense on the ground that it would serve Title VII's "primary objective," which, he opined, is "not to provide redress but to avoid harm."<sup>17</sup>

To best advance this broad objective, the *Faragher* majority reasoned, liability standards should be structured so as to provide employers with incentives to prevent legal violations, and employees with corresponding incentives "to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute."<sup>18</sup> An employer's ability to succeed in establishing this affirmative defense, the Court suggested, should turn at least in part on two salient factors: (1) whether the employer had promulgated an anti-harassment policy and a corresponding complaint procedure; and (2) whether the plaintiff had utilized the complaint procedure the employer provided.<sup>19</sup>

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14. *Faragher*, 524 U.S. at 805.

15. For example, noting that its own "scope of employment" analysis, like that employed by lower courts rejecting automatic employer liability for supervisor harassment, was difficult to reconcile with the larger body of agency jurisprudence, Justice Souter conceded: "These cases ostensibly stand in some tension with others arising outside Title VII, where the scope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts that were in no sense inspired by any purpose to serve the employer." *Id.*

16. Specifically, with respect to the "apparent authority" basis for vicarious liability, Justice Souter conceded: "[I]n implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority," and that "there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship." *Id.*

17. *Id.* at 805-06 (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

18. *Id.* at 806 (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982), quoting in turn, CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 127 (1935)). It is important to note that, at least in the anti-discrimination context, a "duty to minimize harm" had never before been applied to limit liability. Both *Ford Motor Co.* and the McCormick treatise that it quoted, concerned only the amount of monetary damages that might be recovered once liability attached. The duty to exercise reasonable care to avoid harm imposed on plaintiffs by *Faragher* thus functions more like the contributory negligence rule, which once operated to limit liability in personal injury cases but fell out of favor for a variety of policy reasons in the 1950s.

19. Specifically, the Court provided on this point:

Thus, for the first time in Title VII's history, the Supreme Court imposed on a group of discrimination plaintiffs an affirmative duty, albeit a potentially qualified one,<sup>20</sup> to utilize an employer's internal grievance procedure before filing an administrative or judicial discrimination complaint. Viewed more broadly, the Court's decision in *Faragher*<sup>21</sup> for the first time imposed on a subclass of Title VII plaintiffs a duty to exercise reasonable care to avoid being damaged by sexism in the workplace.

Moreover, the *Faragher* Court elevated what legal sociologist Lauren Edelman has termed "symbolic compliance structures" to the level of an affirmative defense to an otherwise meritorious sexual harassment claim.<sup>22</sup> These compliance structures include anti-harassment policies, training programs, and grievance procedures, which before *Faragher* had little, if any, direct effect on liability.<sup>23</sup> Thus, after *Faragher*, an employer can limit its potential harassment liability not only probabilistically, by taking steps to reduce the likelihood that harassment will occur and result in the filing of a lawsuit, but also directly, by instituting and then using symbolic compliance structures to establish a legally efficacious defense to an otherwise actionable claim.<sup>24</sup> As Professors Beiner<sup>25</sup> and Bisom-Rapp<sup>26</sup> suggest, these are

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[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

*Id.* at 807-08.

20. The Court speaks not of any failure, but only of an unreasonable failure to utilize a complaint procedure as satisfying the second element of the employer's affirmative defense. *Faragher*, 524 U.S. at 807-08.

21. Much of my analysis pertains to the Court's decisions in both *Ellerth* and *Faragher*, which overlap analytically in numerous important respects. However, for ease of expression, I refer here primarily to *Faragher*.

22. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1542-47 (1992) (describing process by which organizations respond to the legal environment by developing symbolic indicia of compliance with ambiguous legal mandates).

23. *Id.* at 1547. It should be noted, however, that Edelman and her colleagues found moderate rates of judicial deference to employer grievance procedures even before *Faragher* and *Ellerth*. Lauren B. Edelman, Christopher Uggen, & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 439 (1999).

24. As Professor Bisom-Rapp observes, and as is described in greater detail below, *Faragher* in this regard provides remarkable empirical validation of Lauren Edelman's theory of socio-legal endogeneity. Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1 (2001)

dramatic developments, and they carry broad implications for socio-legal scholarship on employer compliance with and employee mobilization of equal employment opportunity laws.

If we examine *Faragher* closely, we see that the Court's analysis reflects three different accounts of victim response to sexualized workplace conduct. First, and most obviously, we find in the Court's opinion a doctrinal account: to be entitled to a Title VII remedy for sexual harassment, a woman must respond (assuming the employer's showing under the first prong has been made) by utilizing an available grievance procedure early in a sequence of harassing events. The key phrase here is "must respond." If a person wishes to obtain a particular legal outcome, she must act in a particular way.

Second, we find embedded in *Faragher* a normative account: a woman exposed to unwelcome sexualized conduct in the workplace should respond by filing an internal harassment complaint early in a sequence of harassing events. The key word here, of course, is "should." It unambiguously signals the presence of a normative claim.

Finally, the Court's analysis in *Faragher* is premised on a particular descriptive account of women's responses to sexualized workplace conduct. The account goes something like this: absent some unreasonableness on her part, some sort of personality quirk or flaw, a woman who is truly exposed to unwelcome sexualized workplace conduct can be expected to complain about it to her employer, especially if a formal complaint procedure is available (this, of course, being a central question addressed in connection with the first prong). The critical phrase is "can be expected to respond." We are dealing here with a positive account of victim response, an empirical claim about what people in certain situations will do.

Significantly, in the *Faragher* Court's analysis, the Court's doctrinal, normative, and descriptive accounts closely cohere. Women legally must respond, should respond, and can be expected to respond to unwanted sexualized workplace conduct in precisely the same way, by reporting the unwelcome conduct to their employers early in an escalating sequence of harassing events.

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(exploring application of Edelman's theory of socio-legal endogeneity to *Faragher* and *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999)); Edelman et al., *supra* note 23, at 445-49 (elaborating theory of socio-legal endogeneity).

25. See generally Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117 (2001).

26. See generally Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147 (2001).

*Faragher's* first prong can be parsed out in similar fashion. We can extract from the Court's analysis a doctrinal account, a normative account, and a descriptive account of employer response to the problem of unwelcome sexualized workplace conduct.

First, the doctrinal account: to avoid liability for hostile work environment harassment by supervisors, an employer must respond to the problem of unwanted sexualized workplace conduct by taking reasonable care to prevent such conduct from occurring and by dealing with it swiftly if and when it does occur. As before, the key phrase is "must respond." The decision tells us how a relevant legal actor must act to obtain a desired legal outcome.

Second, we find embedded in the first prong a normative account of employer conduct: an employer should respond to the problem of unwelcome sexualized workplace conduct by taking reasonable care to prevent harassment from occurring. Here again, the word "should" indicates that we are dealing with a normative claim.

Third, as Professor Bisom-Rapp demonstrates, the first prong incorporates an implicit descriptive account as well. By promulgating policies against harassment, establishing harassment complaint procedures, and conducting anti-harassment trainings, employers *will* prevent harassment from occurring, or will at least greatly reduce its incidence. Thus, in the world according to *Faragher*, anti-harassment policies and complaint procedures work. For this reason, they equate to reasonable care. As should be clear, the success of the entire prophylactic project undertaken in *Faragher* depends on the accuracy of this simple positive claim: anti-harassment policies, grievance procedures, and training programs prevent sexual harassment from occurring.

As was true with respect to victim response, the doctrinal, normative, and descriptive accounts reflected in the first prong neatly cohere. Title VII-compliant employers *must have* anti-harassment policies, grievance procedures, and training, *should have* anti-harassment policies, grievance procedures, and training, and *will have* anti-harassment policies, grievance procedures, and training. Moreover, those policies, procedures, and training will reduce the incidence of harassment and discrimination. They will operate to prevent harm.

Professors Beiner and Bisom-Rapp show us, however, that with respect to both the first and second prongs, the Court's descriptive accounts have serious problems. Consider the descriptive account underpinning the first prong. The Court simply assumes, unconstrained by empirical inquiry, that if an organization institutes anti-harassment policies and training programs, it will prevent harassment from

occurring, or at least significantly reduce its occurrence. For this reason, the Court finds it logical to conclude that Title VII should be interpreted in a manner that encourages employers to establish such policies and programs.<sup>27</sup> And yet, as Professor Bisom-Rapp describes, there exists no empirical evidence supporting this assumption, on which both an emerging civil rights jurisprudence<sup>28</sup> and a multi-billion dollar personnel training industry now rest.

With respect to the second prong, the problem is more serious still. As Professor Beiner describes,<sup>29</sup> the basic assumption underlying the second prong—namely, that “rational” harassment victims necessarily utilize available internal grievance procedures—is not only empirically unsupported, it has actually been empirically disconfirmed.

My own work with Shawna Parks and Priya Sridharan<sup>30</sup> came to much the same conclusion. There now exists a robust social science literature investigating how women respond to and cope with sexualized workplace conduct. This literature indicates that women rarely report such conduct, that they often have sound reasons for not doing so, and that they deploy a variety of alternative strategies in an effort to avoid the harm such behavior inflicts. Because these findings have such significant implications for the prophylactic efficacy of the *Faragher-Ellerth* affirmative defense, I take the time to elaborate upon them here.

## II. WOMEN’S RESPONSES TO SEXUALIZED WORKPLACE CONDUCT: THE VIEW FROM SOCIAL SCIENCE

Empirical research conducted in a wide variety of settings and studying women from many different racial, ethnic, and socio-economic groups demonstrates that, in fact, few women ever report sexual

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27. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (describing how the affirmative defense, by providing employers with incentives to create such policies and programs, will serve Title VII’s primary objective of “avoiding harm”).

28. Professor Bisom-Rapp refers to this emerging hermeneutic as the “jurisprudence of education and prevention.” See Bisom-Rapp, *supra* note 26, at 156.

29. Beiner, *supra* note 25, at 130; see also Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273 (2001) [hereinafter Beiner, *Sex, Science, and Social Knowledge*].

30. Linda Krieger, Shawna Parks, & Priya Sridharan, *Employer Liability for Sexual Harassment: Normative, Descriptive, and Doctrinal Interactions* (May 2000) (unpublished paper presented at the Law & Society Association Annual Meeting, Miami, on file with author); see also Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 722-28 (2000) (reviewing literature).

harassment to employers through official channels, especially at the early stages of an escalating harassment situation. Instead, women devise strategies for coping with sexual harassment by drawing on a far wider range of possible responses than that assumed by the *Faragher* Court. Moreover, women often revise these coping strategies over time, adapting to changes in the sexual harassment situation as it progresses.

At the outset, it bears mention that studies of harassment response patterns necessarily confront the difficult tasks of defining sexual harassment and of phrasing survey questions in a way that will not systematically bias subjects' responses. Specifically, to determine how women respond to sexual harassment, researchers must describe particular behaviors, and then ask subjects how they responded in the past to, or anticipate that they would respond in the future to, such behaviors. Describing the behavior in question as "sexual harassment" could conceivably skew subject responses towards particular patterns of response, particularly anticipated response. As a general rule, women refer to only the most extreme forms of sexualized workplace conduct as "sexual harassment."<sup>31</sup> Patterns of response to sexualized workplace conduct positively covary with the perceived severity of the conduct in question. Indeed, survey questions referring to incidents of sexualized workplace conduct as "sexual harassment" appear to skew patterns of response in a more assertive direction. For this reason, researchers generally avoid describing sexualized workplace conduct as "sexual harassment,"<sup>32</sup> referring to it instead as "sexual conduct."

This is no idle observation. To the contrary, it has important implications for the judicial elaboration and application of *Faragher's* second prong. By the time a court is applying the *Faragher* affirmative defense, it has already determined that the conduct complained of was "sufficiently severe or pervasive so as to alter the conditions of the victim's employment and create an abusive working environment."<sup>33</sup> Having characterized the conduct in question as "sexual harassment,"

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31. See, e.g., Linda Brooks & Annette R. Perot, *Reporting Sexual Harassment: Exploring a Predictive Model*, 15 PSYCHOL. WOMEN Q. 31, 33 (1991) (reporting that the vast majority of women subjects were unwilling to apply the term "sexual harassment" to the all but the most extreme forms of sexualized workplace behavior).

32. See, e.g., James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED PSYCHOL. 543, 549 (1995) ("The words *sexual harassment* were not used so that the interviewees' replies would not be influenced by their perception of these types of attention as harassment.").

33. For sexualized workplace conduct to be actionable as sexual harassment under Title VII, it must satisfy this standard, adopted by the Supreme Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)).



a court is apt to view highly assertive strategies, such as the utilization of an employer's complaint procedure, as the most "reasonable" response strategy.

However, a woman responding to particular conduct at the time it occurs will necessarily view the situation from a different temporal and evaluative standpoint. Particularly where discrete episodes of harassment occur over time, only eventually compounding to constitute actionable harassment, incidents occurring earlier in the sequence may not be viewed by the victim as "sexual harassment" at all—and reasonably so. As one commentator has noted:

In order to properly assess a woman's reasonableness vis-à-vis the second prong of the affirmative defense, a trier must judge her inaction, if it need be judged at all, from the vantage point of one who is (1) currently employed at the corporation and (2) has no way of ascertaining that she will be believed and validated in a public forum. Indeed, it appears as though courts that judge victims as unreasonable in such a mechanized way are looking at the victims through the eyes of one prescient enough to know that the prima facie case has been taken to court and successfully made out before a tribunal.<sup>34</sup>

As this commentator's observation reflects, post-*Faragher*, both the characterization of conduct as "sexual harassment" and the impact of that characterization on an observer's expectations of how the target of the conduct should respond have become highly significant. Courts are now being asked to accept, and indeed are often accepting, employer arguments to the effect that a plaintiff's otherwise meritorious sexual harassment case should be dismissed because the plaintiff, although she eventually did file a formal harassment complaint with her employer, did not do so *soon enough*.<sup>35</sup>

#### A. Patterns of Response to Sexualized Workplace Conduct: Alternative Classification Schemes

Any empirical investigation of women's responses to sexualized workplace conduct requires a classification scheme capable of defining and ordering alternative responsive strategies in a theoretically useful

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34. Kerri Lynn Bauchner, *From Pig in a Parlor to Boar in a Boardroom: Why Ellerth Isn't Working and How Other Ideological Models Can Help Reconceptualize the Law of Sexual Harassment*, 8 COLUM. J. GENDER & L. 303, 317 (1999).

35. Beiner, *Sex, Science, and Social Knowledge*, *supra* note 29 at 273-74 (discussing lower court interpretation of *Faragher's* second prong).

way. Over the past two decades, sexual harassment researchers have developed a number of such schemes, broadly dividing into two overarching categories. Each of these categories reflects a particular theoretical perspective and illuminates a different aspect of the problem being studied.

1. *Schemes Designed Around Externally Focused Response Modalities: The Assertiveness Continuum*

The earliest and, in many ways, most influential harassment response classification system was developed by David Terpstra and Douglas Baker in 1989.<sup>36</sup> The Terpstra and Baker scheme differentiates response modalities along a continuum, with relatively passive responses at one end and relatively assertive modalities on the other. The scheme posits the following response categories:

- (1) Ignore/Do Nothing
- (2) Avoidance (avoid person or area in which they might be located)
- (3) Positive Verbal Confrontation (talk or discuss; explain why behavior is bothersome, etc.)
- (4) Negative Verbal Confrontation (verbally attack; embarrass, ridicule, etc.)
- (5) Alteration (changes in self-presentation, such as clothing; alterations of the environment)
- (6) Tell Others/Enlist Help (tell and/or enlist help from friends, co-workers, spouse)
- (7) Physical Reaction (slap, hit, shove, physically resist or retaliate, etc.)
- (8) Internal Report (report to supervisor, manager, or other company official)
- (9) External Report (report to EEOC, state or local agency, contact police, take legal action)
- (10) Leave Field (quit job, transfer)<sup>37</sup>

Obviously, various assertiveness "sub-continua" exist within this broad array. For example, the variety of positive and negative verbal confrontation strategies suggests a subcontinuum of assertiveness within the larger continuum. Direct communication has its own place on the assertiveness continuum of response behaviors generally, and

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36. David E. Terpstra & Douglas D. Baker, *The Identification and Classification of Reactions to Sexual Harassment*, 10 J. ORG. BEHAV. 1 (1989).

37. *Id.* at 4.

varying direct communication methods create a sub-continuum of assertiveness in the direct communication domain.

In 1989 James Gruber developed a similar assertiveness continuum-based system,<sup>38</sup> which he applied in a 1995 study analyzing harassment response patterns in a large sample (n=1990) of Canadian women.<sup>39</sup> The Gruber classification scheme includes the following response categories:

- (1) Ignore
- (2) Avoid
- (3) Change Ways
- (4) Spoke to Someone
- (5) Direct Response
- (6) Report
- (7) Quit<sup>40</sup>

In a similar vein, Gutek and Koss have proposed a two dimensional system, which classifies responses both by degree of assertiveness and according to whether the response involved seeking help from others.<sup>41</sup>

## 2. *Classification Systems Incorporating Internally Focused Coping Strategies*

The Terpstra & Baker, Gruber, and Gutek & Koss classification schemes distinguish primarily between various externally focused strategies, and then organize these strategies according to their judged degree of assertiveness. Although these systems provide a useful starting point, they fail to include a wide variety of internally focused cognitive strategies, which harassment victims may also deploy to cope with unwanted sexualized workplace conduct. In the externally focused systems, these internal strategies are generally subsumed within a broad, and somewhat misleading, heading of "ignoring" or "doing nothing."<sup>42</sup>

The first of the internally focused classification systems was developed by Louise Fitzgerald in connection with a large study of

38. James E. Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 SOC. & SOC. RES. 3 (1989).

39. Gruber & Smith, *supra* note 32, at 549.

40. *Id.* at 552.

41. Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28 (1993).

42. See, e.g., Terpstra & Baker, *supra* note 36, at 5.

actual responses of sexual harassment victims conducted in 1988.<sup>43</sup> Fitzgerald's system consists of ten responsive strategies, classified as either internally focused or externally focused. The externally focused strategies include *avoidance*, *appeasement*, *assertion*, *seeking institutional or organizational relief*, and *seeking social support*. The internally focused strategies include *endurance* (which may be externally manifested as "ignoring the behavior" or "doing nothing"); *denial* (pretending the situation is not happening or has no effect on one's self); *detachment*; *illusory control* (self-blame); and *retribution* ("reinterpreting the situation in such a way that it [is] not defined as harassment").<sup>44</sup>

As a theoretical matter, Fitzgerald's focus on internally focused coping strategies bears a close resemblance to more generalized psychological models of cognitive strategies people use to cope with aversive life situations, such as those posited by Lazarus and Folkman.<sup>45</sup> This approach, as Fitzgerald and her collaborators have noted, "reconceptualize[s] responses within the context of modern cognitive approaches to understanding stressful life situations . . . and . . . invoke[s] the extensive body of stress and coping research to analyze responses to harassment."<sup>46</sup>

### 3. *Patterns of Response to Sexualized Workplace Conduct: General Distributions by Response Modality*

The *Faragher* affirmative defense, both as it was originally posited by the *Faragher* majority, and as it is being elaborated and applied by the lower federal courts, defines the "reasonableness" of a woman's response to sexualized workplace conduct primarily in terms of her utilization of formal, internal employer complaint procedures. In short, when confronted with sexualized conduct in the workplace, *Faragher's* reasonable woman reports early and often. But even the most cursory review of the social science literature investigating women's responses

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43. Louise F. Fitzgerald, Suzanne Swan, & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 119 (1995) (discussing Louise F. Fitzgerald's paper, *Assessing Strategies for Coping with Harassment: A Theoretical/Empirical Approach*, which she presented at the Midwinter Conference of the Association for Women in Psychology in Tempe, Arizona).

44. *Id.* at 119-20.

45. See, e.g., RICHARD S. LAZARUS & SUSAN FOLKMAN, *MANUAL FOR THE WAYS OF COPING QUESTIONNAIRE* (1989); RICHARD S. LAZARUS & SUSAN FOLKMAN, *STRESS, APPRAISAL, AND COPING* (1984).

46. Fitzgerald, Swan, & Fischer, *supra* note 43, at 123.

to sexual harassment reveals that women confronted with such conduct rarely report it through formal channels, especially at early stages of an escalating harassment scenario. Indeed, according to one recent review of the relevant literature, the reporting of sexual harassment through an employer's official, internal complaint process is among the least frequently utilized of all defined responsive strategies, with studies reporting a range of between two percent at the low end and fifteen percent on the high end.<sup>47</sup>

The available empirical research, in short, reveals an understanding of women's responses to sexual harassment quite different from the doctrinal and normative frameworks *Faragher* constructs. This literature suggests not only that the reporting of sexual harassment through official complaint channels is rare, but also that women select from a wide range of less drastic and arguably quite "reasonable" response modalities in their attempts to cope with sexualized conduct in the workplace. This range of behaviors includes both internally focused behaviors, designed to manage the psychic stress experienced by women when they are subjected to such conduct, and externally focused behaviors, geared to resolve the external situation causing that psychic stress.

Ignoring, or at least appearing to ignore the harassing behavior is an extremely common response to sexual harassment,<sup>48</sup> as is avoiding the harasser or harassers.<sup>49</sup> Importantly, however, what may appear to sexual harassment researchers, employers, or federal judges as the passive response of ignoring the harassing behavior or the harasser, may actually signal the use of active, but internally focused, coping mechanisms.

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47. Patricia A. Frazier, *Overview of Sexual Harassment from the Behavioral Science Perspective*, paper presented at American Bar Association National Institute on Sexual Harassment (Oct. 15-18, 1997), available at WESTLAW, N97SHCB ABA-LGLED, at \*B-1, \*B-5.

48. See, e.g., Caroline C. Cochran, Patricia A. Frazier, & Andrea M. Olson, *Predictors of Responses to Unwanted Sexual Attention*, 21 PSYCHOL. WOMEN Q. 207, 217 (1997) (observing that ignoring harassing behavior was the most common response, elicited in sixty percent of surveyed employees at a large Midwestern university); see also David E. Terpstra & Douglas D. Baker, *A Framework for the Study of Sexual Harassment*, 7 BASIC & APPLIED SOC. PSYCHOL. 17, 26 (1986) (noting that sixty-one percent of United States Merit Systems Protection Board Study respondents' responses included "ignored/did nothing").

49. Cochran, Frazier, & Olson, *supra* note 48, at 217 (observing that avoiding the harasser was a very common response, deployed by forty-five percent of surveyed employees at a large Midwestern university).

In a 1982 investigation, Gruber and Bjorn found that ten percent of the "blue collar" subjects they studied had used reattribution, that is, the reinterpretation of the situation in such a way that it was not defined as harassment, as a response to sexualized workplace conduct.<sup>50</sup> More recent studies continue to document the use of this strategy. So, for example, harassing workplace conduct may be attributed by its victim to "extenuating circumstances" such as the harasser's presumed loneliness, may be blamed on one's own actions,<sup>51</sup> or may be recast so as to seem otherwise benign.<sup>52</sup>

Finally, many women respond to sexual harassment by confronting or communicating directly with the harasser outside of the purview of an employer's formal complaint procedure. This direct communication may take many forms. It may include what some researchers refer to as "appeasement,"<sup>53</sup> or "deflective" responses, such as using humor or stalling.<sup>54</sup> Direct communication may also assume a more "assertive" character, such as asking the harasser to stop,<sup>55</sup> attacking him verbally, or responding to his behavior physically.<sup>56</sup>

By far, across a variety of studies spanning a number of years and a range of occupations, the *least* frequent response to sexualized workplace conduct involves seeking organizational relief, that is,

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50. James E. Gruber & Lars Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 WORK & OCCUPATIONS 271 (1982).

51. See, e.g., Vita C. Rabinowitz, *Coping with Sexual Harassment*, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 103, 106-07 (Michele A. Paludi ed., 1990) (noting that this response is common); see also Inger W. Jensen & Barbara A. Gutek, *Attributions and Assignment of Responsibility in Sexual Harassment*, 38 J. SOC. ISSUES 121 (1982) (finding that twenty-five percent of female harassment victims attributed the harassment in some way to their own behavior).

52. See, e.g., Rabinowitz, *supra* note 51, at 108-09 (discussing harassing behavior in the context of student-faculty relationships); see also BARBARA A. GUTEK, *SEX AND THE WORKPLACE* (1985).

53. Fitzgerald, Swan, & Fischer, *supra* note 43, at 120 (defining appeasement as "an attempt to 'put off' the harasser without direct confrontation (i.e., humor, excuses, delaying, etc.)," and noting that "humor is particularly common in less serious situations").

54. See Gruber & Bjorn, *supra* note 50, at 280 (reporting in their study of blue collar women's responses to sexualized workplace conduct that fifteen percent of subjects verbally attacked their harassers and that seven percent attacked them physically).

55. See, e.g., UNITED STATES MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* 24 (1988) [hereinafter USMSPB, AN UPDATE] (reporting that forty-four percent of women in the studied sample of federal employees reported having directly requested of the harasser that he desist in his behavior and leave her alone).

56. Fitzgerald, Swan, & Fischer, *supra* note 43, at 121.

bringing a formal complaint against the harasser.<sup>57</sup> In a meta-analysis combining the results of numerous studies, Dansky and Kilpatrick calculated an average formal complaint rate of five percent.<sup>58</sup> The highest rate observed was fifteen percent, in a national sample consisting only of cases judged to meet the EEOC definition of actionable harassment.<sup>59</sup>

Although its reporting rate falls at the low end of the spectrum, the following data illustrate the relative distribution of official report in relation to other responsive strategies:

*Table 1. Occurrence of Externally Focused Response Behaviors<sup>60</sup>*

<i>Externally Focused Response Behaviors</i>	<i>Percentage of Women Employing the Response Behavior</i>
Reporting through official mechanisms	2%
Ignore the harasser/harassing behavior	60%
Avoid the harasser	45%
Direct communication	25%

In evaluating the low rate of internal complaint-filing as a response to sexual harassment, it is important to note that there exists a wide gap between how women actually respond to sexual conduct in the workplace and what observers say a woman facing such a situation *should* do, or what they themselves anticipate they *would* do if faced with a similar situation.<sup>61</sup> So for example, in one study, when subjects were presented with a hypothetical sexual harassment scenario, ninety-

57. *Id.*

58. Bonnie S. Dansky & Dean G. Kilpatrick, *Effects of Sexual Harassment, in* SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 152, 158 (William O'Donohue ed., 1997).

59. *Id.*

60. See Cochran, Frazier, & Olson, *supra* note 48, at 217. It should be noted that the percentages reflected in this figure do not add up to 100% because many subjects employed more than one response modality.

61. See, e.g., Douglas D. Baker et al., *Perceptions of Sexual Harassment: A Re-Examination of Gender Differences*, 124 J. PSYCHOL. 409 (1990); Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 AM. PSYCHOLOGIST 1070 (1993); Gutek & Koss, *supra* note 41.

two percent of subjects responded that, if confronted with certain types of sexualized conduct, they *would* report through official channels. Yet among those subjects who had actually been subjected to conduct of the type described, not one had actually filed an official complaint.<sup>62</sup>

Federal judges and jurors applying *Faragher's* "reasonable response" defense, of course, stand in a position analogous to subjects asked how they think they *would* respond, or how they think a woman *should* respond if faced with a particular harassment scenario. They may well, like the subjects in these empirical studies, overestimate the likelihood that they would respond by filing an official complaint, and then impose this idea of what is "reasonable" on harassment plaintiffs.

A sexual harassment plaintiff, in contrast, stands in the position of a research subject reporting her *actual* response to a *real* situation involving sexualized workplace conduct. She is far less likely to have filed an official complaint of sexual harassment than her post-hoc evaluators think they would have, or think she should have.

#### B. Women's Reported Explanations for Selecting Particular Responsive Strategies

In addition to classifying response modalities and quantifying the relative frequency with which such modalities are employed, the literature also examines the reasons women give for employing, or declining to employ, differing response strategies. In many of these studies, women's stated reasons for not reporting sexual harassment through formal channels included beliefs that informal channels were adequate, that a formal report was unnecessary, that the conduct was not sufficiently serious, or that the conduct might not legally constitute harassment.<sup>63</sup> In explaining their decisions not to report, many subjects

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62. See, e.g., Jean W. Adams et al., *Sexual Harassment of University Students*, 24 J. C. STUDENT PERSONNEL 484 (1983). Adams and her colleagues note:

Most respondents, especially women, said they would report personal experiences of physical advances, explicit sexual propositions, or sexual bribery; only 8% of the females . . . indicated that they would not report such behavior. Among those students, however, who had experienced these behaviors, no one had reported it to any university official . . . Thus, there seems to be a marked contrast between what students think they would do and what students actually do when confronted with these behaviors.

*Id.* at 488-89; accord, Fitzgerald, Swan, & Fischer, *supra* note 43, at 119 ("Actual victims have been shown to behave quite differently than research participants or the general public say they would behave.").

63. Frazier, *supra* note 47, at \*B-5.



cited concerns that reporting harassment would negatively effect their work environment, causing them to be blamed or retaliated against. In many studies, women stated that they declined to report because they did not think that filing a report would do any good. These women commonly reported fears that nothing would be done about the harassment even if they complained, or that their factual account would not be believed.<sup>64</sup>

Indeed, in a recent study, Rudman, Borgida, and Robertson demonstrated not only that many women exposed to sexualized workplace behavior stated that they did not file a formal complaint because they believed that it would not do any good, but also that a woman's beliefs about the efficacy of complaining was the best predictor of internal complaint-filing behavior.<sup>65</sup>

### C. Situational and Individual Variables as Predictors of Response Modality

In addition to describing women's stated reasons for not reporting sexual harassment through an employer's official, internal complaint mechanism, many studies explore the relationship between the assertiveness of subjects' responses to sexual harassment and a variety of potentially predictive factors, including situational variables characterizing the harassment scenario and individual/personal characteristics of the harassment victim. Although many of these studies employ simple correlations rather than multivariate analytical methods and are therefore of limited predictive utility,<sup>66</sup> a brief description of their basic findings is useful.

#### 1. *The Influence of Situational Variables on Response Modalities*

Both the correlative and the multivariate studies of women's responses to unwanted sexual conduct find, with little variation, that conduct severity is the strongest predictor of subjects' responses.<sup>67</sup> The

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64. Amy Culbertson & Paul Rosenfeld, *Assessment of Sexual Harassment in the Active-Duty Navy*, 6 MIL. PSYCHOL. 69 (1994) (eliciting this response from thirty percent of subjects).

65. Laurie A. Rudman et al., *Suffering in Silence: Procedural Justice Versus Gender Socialization Issues in University Sexual Harassment Grievance Procedures*, 17 BASIC & APPLIED PSYCHOL. 519 (1995).

66. Frazier, *supra* note 47, at \*B-3 (observing that many studies simply examine statistical correlations and do not construct multivariate models).

67. See, e.g., Gruber & Smith, *supra* note 32, at 552-53 (examining the responses

effect of this factor is sufficiently strong that its presence confounds the effect of other variables, making their impact difficult to gauge.

For example, various studies show that women are more likely to report harassment by supervisors than harassment by co-workers.<sup>68</sup> However, other studies indicate that harassment by supervisors tends to be objectively more severe than harassment by co-workers.<sup>69</sup> Hence, without more statistically sophisticated analysis, it is impossible to determine from the first group of studies whether harasser status in fact predicts formal complaint behavior, or whether the observed correlation is merely a by-product of conduct severity. In any event, it is significant for present purposes to note that women harassed by supervisors generally report being less satisfied with the outcome of formal complaint procedures than do women harassed by co-workers.<sup>70</sup>

The duration of the sexual harassment may also affect subjects' response strategies, although studies investigating this issue show mixed results and are in various ways difficult to interpret. Some investigations reveal that the longer harassment persists, the more likely women are to develop aggressive response strategies, such as reporting through official complaint mechanisms.<sup>71</sup> Other studies indicate that greater duration of harassment may prompt avoidance of the harasser, or going along with the harassment, responses traditionally categorized as passive.<sup>72</sup> These results are difficult to interpret, however, because

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to sexual harassment of a representative sample of Canadian women); see also Douglas D. Baker et al., *The Influence of Individual Characteristics and Severity of Harassing Behavior on Reactions to Sexual Harassment*, 22 *SEX ROLES* 305, 320 (1990) ("[T]he severity of the sexual harassment situations had a relatively strong influence on reaction type.") For a discussion of other studies finding the same effect, see Fitzgerald, Swan, & Fischer, *supra* note 43, at 121.

68. Cochran, Frazier, & Olson, *supra* note 48 at 218; J. Livingston, *Responses to Sexual Harassment on the Job: Legal, Organizational, and Individual Actions*, 38 *J. SOC. ISSUES* 5 (1982).

69. See, e.g., Gruber & Bjorn, *supra* note 50; see also Pamela Hewitt Loy & Lea P. Stewart, *The Extent and Effects of Sexual Harassment of Working Women*, 17 *SOC. FOCUS* 31 (1984).

70. Shereen G. Bingham & Lisa L. Scherer, *Factors Associated with Responses to Sexual Harassment and Satisfaction with Outcome*, 29 *SEX ROLES* 239 (1993); Livingston, *supra* note 68.

71. See, e.g., Cochran, Frazier, & Olson, *supra* note 48, at 218 (noting that duration of harassment was directly related to the perception of the harassment as severe, which was directly related to aggressiveness of response strategies).

72. See Rebecca A. Thacker, *A Descriptive Study of Situational and Individual Influences Upon Individuals' Responses to Sexual Harassment*, 49 *HUMAN RELATIONS* 1105 (1996). Thacker observes:

The significant and positive relationship between duration of the harassment and avoidance/going along responses suggests that individuals give up after

their research designs did not control for other variables, such as attempts to enlist institutional/organizational support, which, depending on outcome, might have influenced the selection of response modalities over time.

Other environmental factors appear to influence harassment response behaviors, including the decision whether or not to file a formal internal harassment complaint. So, for example, a recent study by James Gruber and Michael Smith indicates that women are significantly more likely to mobilize an internal complaint procedure when the employer's sexual harassment policies have been presented to employees in at least four different ways.<sup>73</sup> Gruber and Smith's analysis suggests that the type of policy or procedure is less important in influencing complaint behavior than the number of ways in which the policy or procedure has been presented to employees. Merely presenting the policy on one occasion, such as in an employee handbook that the employee is instructed to read and sign, or by simply placing posters in the work environment, does not significantly influence utilization of formal complaint procedures.<sup>74</sup> These findings are highly significant to an evaluation of post-*Faragher* decisions in the lower courts, which with increasing frequency hold that the simple promulgation of an anti-harassment policy in an employee handbook will satisfy *Faragher's* "employer duty of reasonable care to prevent harassment from occurring."<sup>75</sup> In general, after harassment severity is controlled, organizational factors such as those described by Bjorn and Smith appear to be the best predictors of victim response.<sup>76</sup>

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a while, becoming passive rather than active in trying to rid their environment of the unwanted social-sexual behavior. The longer the harassment continues, the more likely the organization sends a signal that harassers will be tolerated, which in turn, prompts avoidance or going along responses.

*Id.* at 1117.

73. Gruber & Smith, *supra* note 32, at 553.

74. *Id.*

75. The most outrageous of these cases is undoubtedly *Leopold v. Baccarat, Inc.*, 82 Fair Empl. Prac. Cas. (BNA) 105. The plaintiff in *Leopold* argued that the employer could not establish the affirmative defense because Baccarat had failed to take reasonable care in preventing harassment from occurring or in stopping it should it occur. Citing Baccarat's employee handbook, which contained an anti-harassment policy, the court found that the defendant had satisfied its duty of care, stating, "[t]he law is very clear that any reasonable policy will do." *Id.* at 107.

76. See, e.g., Denise H. Lach & Patricia A. Gwartney-Gibbs, *Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution*, 42 J. VOCATIONAL BEHAV. 102 (1993); M. Hesson-McGinnis & L. F. Fitzgerald, *Predicting the Outcomes of Sexual Harassment: A Preliminary Test* (1992) (paper presented at the 2d

## 2. *The Influence of Individual Target Characteristics on Response Modalities*

A great deal of research has focused on attempts to identify individual target characteristics capable of predicting women's responses to sexualized workplace conduct. On the whole, this research has proven disappointing. In contrast to situational variables, individual target characteristics appear to exercise at best a weak effect on harassment responses.

Many studies have investigated the relationship between targets' job status and women's responses to sexualized workplace conduct. Gruber and Smith's 1995 investigation, for example, examined the utility of occupational status in predicting responses to sexual harassment, comparing white collar, blue collar, and mid- and low-level white-collar workers' responses.<sup>77</sup> Although Gruber and Smith hypothesized that women with more organizational authority would respond more assertively to harassment than their low-authority counterparts, the observed difference, controlling for other factors, was insignificant.<sup>78</sup>

Various investigations of the effect of individual target characteristics on responses to sexualized workplace conduct incorporate a sociocultural account, which posits that both sexual harassment and responses to sexual harassment result from culturally legitimated power and status differentials.<sup>79</sup> Along these lines, Gruber and Bjorn noted that

[w]hile women as a group are victimized by sexual attacks, not all women are equally vulnerable. Specifically, women who lack cultural power and status advantages are especially apt to be the targets of sexual harassment. Young, unattached (single or divorced), and minority women have been found to be the targets of severe and/or frequent harassment.<sup>80</sup>

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APA/NIOSH Conference on Stress and the Workplace, Washington D.C., on file with author).

77. Gruber & Smith, *supra* note 32, at 552-53.

78. *Id.* at 555. Curiously, the study did reveal slightly greater differences between white and blue-collar workers' tendencies toward assertive responses; as compared with mid- and low-level white-collar workers, blue collar workers were somewhat more likely to demonstrate assertive responses. *Id.* at 554.

79. Gruber & Bjorn, *supra* note 50, at 274-75; *cf.* Cochran, Frazier, & Olson, *supra* note 48, at 222 ("In terms of understanding power, researchers must look not only at power associated with one's position in an organization but also at power associated with one's status in society.").

80. Gruber & Bjorn, *supra* note 50, at 275.

Extending this point further, Gruber and Bjorn hypothesize that women who are harassed because of low sociocultural power (i.e., youth, lack of male "protection," or racism) would be more likely to exhibit powerlessness in their responses to harassment.<sup>81</sup> Their data however did not strongly support this hypothesis. Gruber and Bjorn noted that

[t]hough black women receive more severe harassment than whites, and young and nonmarried women are attacked more frequently than their peers, these women do not respond differently than others. It seems, then, that while some women are targets of harassment because of differences in sociocultural power, they tend to respond in a fairly similar manner regardless of these differences in sociocultural power.<sup>82</sup>

The one evident exception to this general observation that social location exercises at best a weak influence on response modality is a finding in some well-designed studies that older and better-educated women tend to respond more assertively to unwanted sexualized workplace conduct than do younger, less well-educated women.<sup>83</sup>

Although few individual characteristics have proven capable of predicting responses to sexualized behavior in the workplace, attitudes towards sexual harassment, and feminist ideology more generally, appear in many studies to exercise a significant effect. For example, in their 1995 investigation of Canadian women, Gruber and Smith found that women's responses to sexualized workplace conduct were significantly influenced by their attitudes about sexual harassment.<sup>84</sup> Specifically, women who reported believing that sexual harassment was about male power or male dominance avoided or ignored harassing

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81. *Id.* at 276.

82. James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOC. SCI. Q. 814, 819 (1986). It is important to note that Gruber and Bjorn's valuable study of racial power differentials' effects on responses to sexual harassment focused exclusively on comparing the experiences and response behaviors of black women and white women. Furthermore, Gruber and Bjorn's conclusion that black women and white women respond "the same" to sexual harassment may be tempered by other studies' consistent findings that harassment of a greater severity should prompt a more assertive response. Given that black women are targets of more frequent and more severe sexual harassment, these studies suggest that black women should respond *more* assertively, and not *as* assertively, as white women.

83. See, e.g., Cochran, Frazier, & Olson, *supra* note 48, at 218 (using status at university as proxy for age); Rudman et al., *supra* note 65, at 531.

84. Gruber & Smith, *supra* note 32, at 555.

conduct significantly less frequently than women who did not report this belief.<sup>85</sup> Moreover, women who reported viewing harassment as a power issue reported harassment at a rate twice as high as the rate at which other women reported.<sup>86</sup> Other studies find that generalized feminist beliefs are associated with more assertive responses to harassing conduct, including decisions to report,<sup>87</sup> while high sex role traditionality and tendencies toward self-blame are associated with more passive responses.<sup>88</sup>

#### D. Assessing the Effectiveness of Various Harassment Response Modalities

As we have seen, women utilize a variety of responses to cope with unwanted sexual behavior in the workplace, and they provide a variety of explanations for their choices among various response modalities. As we have further seen, a cluster of situational and individual variables, most significantly harassment severity, the frequency of employer expressions of intolerance for harassing behavior, women's beliefs regarding the efficacy of internal complaint procedures, and women's attitudes towards harassment specifically and feminist beliefs more generally, prove modestly but significantly predictive of women's choices among various available response modalities.

Many women decide not to report incidents of sexual harassment through official internal complaint mechanisms because they believe that other strategies, including direct communication with the harasser, will prove effective in remedying the situation. In fact, there exists a great deal of evidence indicating that this belief is correct.

For example, in all three studies of federal female employees conducted by the Merit Systems Protection Board, women who had experienced and taken action to remedy unwanted sexual conduct in the workplace reported confronting the harasser directly as the most effective response, with fifty to sixty percent of women reporting that this strategy was effective.<sup>89</sup> Similar results were obtained in two recent

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85. *Id.*

86. *Id.* (comparing rates of 9.4% and 5%, respectively).

87. *See, e.g.,* Brooks & Perot, *supra* note 31.

88. Jensen & Gutek, *supra* note 51, at 134 (noting that sex role traditionality and self-blame are predictors of passive response modalities).

89. UNITED STATES MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1981) [hereinafter USMSPB, PROBLEM]; UNITED STATES MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES (1995) [hereinafter

studies of harassment in educational settings.<sup>90</sup> In the earlier of these two studies, direct communication with the perpetrator was the only responsive strategy associated with high outcome satisfaction. In contrast, mobilization of formal complaint procedures did not appear to help resolve harassment situations to the satisfaction of harassed employees or students.<sup>91</sup>

Many women decline to confront their harassers or report incidents of unwanted sexualized workplace conduct through official grievance procedures because they fear that doing so will make their situation worse, either by negatively affecting their relationships with co-workers or by triggering retaliation by supervisors or managers.<sup>92</sup> In fact, there is a good deal of evidence suggesting that these fears are often well-founded. In a nationwide study conducted in 1992, approximately twenty-five percent of women who had confronted a harasser reported that they had subsequently been retaliated against.<sup>93</sup> In a study of Connecticut workers who had confronted their harasser or filed formal harassment grievances, sixty-two percent reported that they had been retaliated against. Among less tangible things, this perceived retaliation took the form of lowered evaluations (12%), denial of promotion (7%), unwanted transfer (2%), and termination (5%).<sup>94</sup> Other more recent studies have yielded similar results.<sup>95</sup>

Studies indicate particularly low levels of satisfaction with the filing of formal harassment complaints through internal employer grievance procedures. Fully thirty percent of the women in the first Merit Systems Protection Board study who had filed formal harassment complaints reported that the strategy had made the situation worse.<sup>96</sup> A 1992 study of women in the Navy also found that approximately thirty percent of women who complained had experienced negative outcomes, including being "humiliated in front of others."<sup>97</sup> And as late as the

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USMSPB, TRENDS]; USMPB, AN UPDATE, *supra* note 55.

90. Bingham & Scherer, *supra* note 70, at 264; Cochran, Frazier, & Olson, *supra* note 48, at 224.

91. Bingham & Scherer, *supra* note 70, at 263.

92. See *supra* text accompanying note 64.

93. Frazier, *supra* note 47, at \*B-6 (discussing a paper by Bonnie S. Dansky and others presented at the annual meeting of the American Psychological Association entitled *Sexual Harassment: I Can't Define It, But I Know It When I See It*).

94. Loy & Stewart, *supra* note 69, at 31.

95. See, e.g., AMY L. CULBERTSON ET AL., NAVY PERSONNEL RESEARCH & DEVELOPMENT CENTER, ASSESSMENT OF SEXUAL HARASSMENT IN THE NAVY: RESULTS OF THE 1989 NAVY-WIDE SURVEY 17 (1992); Hesson-McGinnis & Fitzgerald, *supra* note 76.

96. USMSPB, PROBLEM, *supra* note 89, at 91.

97. Culbertson & Rosenfeld, *supra* note 64.

1995 Merit Systems Protection Board study, filing a formal grievance was perceived as the response strategy most likely to make a harassment situation worse.<sup>98</sup>

This perception that filing an internal harassment complaint is dangerous can only be reinforced by the United States Supreme Court's most recent pronouncement on sexual harassment and retaliation. In a bizarre post-*Faragher* twist worthy of a Franz Kafka novel, the Court held in *Clark County School District v. Breeden*<sup>99</sup> that a woman who had filed an internal complaint of sexual harassment with her employer was not protected from retaliation, because no reasonable person could believe that a single incident of harassment like the one she reported could constitute a violation of Title VII.<sup>100</sup> Evidently, it did not occur to the author of the *Breeden* Court's brief, per curiam opinion that, by reporting the objectionable conduct early, the plaintiff had behaved precisely as prescribed in *Faragher* and *Ellerth*. *Breeden* leaves workers in a vicious double bind: if they do not report early, they may well lose their claim under the *Faragher* affirmative defense, but if they *do* report early, before a hostile work environment claim has emerged, they will have no legal protection from retaliation. It really should come as no surprise, then, if women shy away from reporting unwanted sexualized conduct early in an escalating sequence of harassing events.

### III. APPLYING SOCIAL SCIENCE EVIDENCE TO SEXUAL HARASSMENT LAW: NORMATIVE, DESCRIPTIVE, AND DOCTRINAL INTERACTIONS

The sexual harassment response literature supplies no single metric by which to measure the reasonableness of plaintiffs' response behaviors. Instead, it supports the far less simplistic notion that how a woman will respond to sexual harassment will depend on how she experiences the harassment and what she believes will be the likely consequences flowing from different responsive strategies. This suggests that if we want to understand a particular woman's response to sexualized workplace conduct, we will have to carefully examine the full complexity of features characterizing her workplace as a social environment. Response strategies are shaped by these situational features, can be expected to change over time, and must be understood as serving many different functions, including management or ameliora-

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98. USMSPB, TRENDS, *supra* note 89.

99. 121 S. Ct. 1508 (2001) (per curiam), *reh'g. denied*, 121 S. Ct. 2264 (2001).

100. *Breeden*, 121 S. Ct. at 1510.



tion of the harassment situation itself, management of one's own emotional reaction to that situation, and avoidance of "collateral damage" stemming from the effects of unsuccessful responsive strategies. Unfortunately, as Professor Beiner's review of the post-*Faragher* case law demonstrates,<sup>101</sup> lower court applications of the *Faragher* defense lack anything even approaching such a nuanced view. Whether, as an institutional matter, courts are suited to conduct this sort of close, contextual evaluation is a matter of considerable uncertainty.

The descriptive account underlying *Faragher's* second prong depicts a world in which, absent some personality quirk or flaw, a woman who is truly subjected to unwelcome sexualized conduct in the workplace can be expected to complain about it to her employer. But as we have seen, this is not the world in which we actually live. The overwhelming majority of women subjected to sexualized workplace conduct do not complain to their employers about it, at least not early in an escalating sequence of harassing events.

Similarly, as Professor Bisom-Rapp has demonstrated,<sup>102</sup> the descriptive account underlying *Faragher's* first prong blithely assumes that employer policies, training programs, and complaint procedures hold the power significantly to reduce the occurrence of harassment or discrimination. As Professor Bisom-Rapp explains, the same assumption informs the Court's recent pronouncements on employer liability for punitive damages under Title VII.<sup>103</sup> And yet, as Professor Bisom-Rapp shows, we have virtually no evidence that this account is in any way accurate; the Court simply assumes it so.

As Professor Beiner and Bisom-Rapp's investigations suggest, social science provides us with useful tools for interrogating the implicit models of human and organizational behavior undergirding doctrinal structures. In other words, social science evidence permits us to determine whether, with respect to aspects of human or organizational behavior implicated by legal rules, the courts' normative, descriptive, and doctrinal accounts cohere. Sometimes, we find, they do not. In shaping legal doctrine, courts sometimes presume a behavioral world that does not actually exist. But here lurks a difficult question. Does

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101. Beiner, *Sex, Science, and Social Knowledge*, *supra* note 29 at 277-91 (reviewing trends in lower court applications of the *Faragher* affirmative defense); Beiner, *supra* note 25, at 120-31 (same).

102. Bisom-Rapp, *supra* note 24, at 29-43.

103. *Id.* at 10-12 (describing the logic underlying *Kolstad's* punitive damage liability "safe harbor" for employers promulgating anti-discrimination policies and conducting anti-discrimination training).

such disjunction, if it exists, really matter, either generally, or in this particular case? Does it matter, for example, whether the descriptive account of victim response underlying the second prong of the *Faragher* affirmative defense is wrong? With respect to the first prong, does it matter that there exists no sound empirical basis for believing that policies, grievance procedures, and training actually reduce the incidence or severity of harassment? The answer, I suggest, is, "it depends." Specifically, it depends on the precise nature of the normative claim on which the doctrinal structure rests.

Let us assume for a moment that the moral intuition underlying the second prong is that it is simply unfair to allow employers to be legally "blindsided" by unexpected sexual harassment claims. A proponent of this view might ask, "why should a person who is subjected to unwanted sexualized workplace conduct be permitted to stay quiet about it, then spring a sexual harassment lawsuit on her employer?" One would reasonably argue that an employer should not be held responsible for a harm of which it was unaware and which it was denied the opportunity to prevent or mitigate. Such an outcome, the argument might go, would be unjust, especially in cases involving sexualized workplace conduct, which, after all, is often ambiguous, hidden, or consensual.

So, the second prong might reasonably be based on the notion that it is just not "fair" for a woman to remain silent about behavior she does not appreciate, then turn around and sue her employer for compensatory and punitive damages with no advance warning. Such an outcome would be especially unfair in those situations in which the first prong was satisfied—that is, where the employer had taken steps to prevent harassment from occurring.

If this normative account undergirds the second prong, it really does not matter what social science tells us about how women commonly respond to sexualized conduct in the workplace. Common behavior is not necessarily normative behavior—or, for that matter, lawful behavior. Indeed, when Title VII was first enacted, most—or at least many employers *did* discriminate based on race, sex, and national origin. In interpreting and enforcing Title VII in those early days, it mattered not one bit that the doctrinal and normative accounts underlying the emerging Title VII anti-discrimination jurisprudence diverged from empirically verifiable patterns of prevailing individual and organizational behavior.

My point is this: while it is true, as both Professor Beiner's and my own research suggests, that the Supreme Court's normative account of

how sexual harassment victims should respond diverges significantly from the empirically accurate account of how most victims *do* respond, that is not enough to make the second prong “bad law.” Normative and descriptive accounts of human behavior made relevant by legal rules do not and need not always correspond to render those rules sound as a matter of social policy or just as a matter of moral philosophy. Perhaps courts should *not* listen to the stories of sexual harassment victims in deciding whether unreported harassment should be actionable any more than courts should listen to the stories of weary doctors or impatient drivers in determining whether botched surgeries or reckless driving should be legally actionable. Prevalent conduct is often not desirable conduct.

Let me extend this point, suggesting a second normative theory under which disjunction between the normative and descriptive accounts embedded in *Faragher*’s second prong would hold little legal policy significance. Not all sexualized workplace conduct is unwelcome. In light of this, how closely do we want employers to monitor employees’ behavior in matters bearing on sexuality? Do we actually *want* employers to monitor employees’ behavior so closely that they will be able to detect any and all sexualized workplace conduct? Once such conduct is detected, how far do we really want employers to go to determine whether such conduct is welcomed? In the interests of Title VII compliance, do we want to encourage employers to prohibit all sexualized workplace conduct on the grounds that such conduct might be or in the future become unwelcome?

Some people might answer “yes, employers should do these things.” But most of us, I suggest, would not want to work in such an environment.<sup>104</sup> It would entail too great an intrusion on our personal liberty; it would require too substantial an invasion of our personal privacy. Viewed in this light, the second prong, interpreted so as to require a harassment victim to complain, could be seen as providing a way to mediate between two sets of competing employee interests—interests in being protected from unwelcome sexual conduct on the one hand, and interests in sexual privacy and liberty on the other.

Under this “competing interests” justification, a disparity between the normative and descriptive accounts of women’s responses to sexualized workplace conduct would be utterly insignificant. Under this

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104. See generally Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (cautioning against a sexual harassment jurisprudence that too quickly equates sexualized workplace conduct with harassment impinging on anti-discrimination principles).

framework, a complaint requirement is interposed between a harassment victim and a legal remedy in order to provide a mechanism for balancing two important sets of competing interests, and thus avoid establishing a system of legal incentives that would encourage employers to institute overly intrusive, even oppressive, anti-fraternization rules and workplace surveillance systems.

We could, of course, approach the problem from an entirely different angle. Actual patterns of victim response to sexualized workplace conduct will be of little consequence if employer liability rules are premised not on the goal of harassment prevention, but rather on the notion that organizations should be held responsible, even if not really to blame, for foreseeable harms resulting from organizational activities.

In many contexts, agency principles hold employers responsible for their employees' misconduct, even if that conduct specifically violated vigorously enforced employer policies, about which extensive employee training had been conducted. For example, a trucking company may have explicit policies prohibiting speeding or other forms of reckless driving, and may conduct extensive training in driving safety. It may even place a large, bold message on the back of each of its trucks, saying, "How am I driving? Call 1-800-451-9987," so that it might be alerted to problematic employee conduct. But, under established agency principles applied in virtually every state, if despite all these precautions, a company driver speeds through an intersection and runs over a little old lady, the company will be held liable. Operating in the shadow of modern agency principles, enterprises establish policies and complaint procedures, and conduct employee training, to minimize the likelihood that bad things will happen, not because these prophylactic measures, in and of themselves, are legally sufficient to absolve the business of liability for accidents that do occur. Under the normative framework reflected in modern agency law, if a company reaps the economic benefits derived from its activities, we expect it to assume the reasonably foreseeable costs of those activities as well.

If we apply this principle of enterprise responsibility for foreseeable enterprise-caused harm to the problem of supervisor sexual harassment, we see that it matters little whether the harassment victim utilized an available grievance procedure. Even if ninety percent of women responded to unwanted sexualized workplace conduct by complaining to their employers, such complaints would not constitute a prerequisite to a legal remedy. If our goal is to internalize to the

employer the costs of sexual harassment by its managerial agents, patterns of victim response are not particularly relevant.

Similarly, if employer liability rules are premised on principle of enterprise-based responsibility for foreseeable enterprise-caused harms, whether a harm-causing enterprise has taken prophylactic measures to reduce the likelihood of a particular harm's occurrence should be irrelevant as well—at least with respect to the imposition of liability. Like trucking accidents, sexual harassment happens; it is a reasonably foreseeable harm flowing from the operation of a business. Its costs, along with others the enterprise might impose on others should be internalized, or so the argument would go.<sup>105</sup>

When courts devise new legal rules, one often finds embedded in their analysis three accounts—a doctrinal account, a normative account, and a descriptive account—of the patterns of human and organizational behavior implicated by those rules. Increasingly, and quite noticeably in the area of anti-discrimination law, the descriptive accounts embedded in and underpinning legal doctrine are inaccurate, or incomplete. Social science research, from which judicial social engineering projects often seem oddly isolated, has in many respects discredited the implicit theories of individual and organizational behavior on which much of anti-discrimination doctrine is premised.<sup>106</sup> Sometimes this disjunction matters, and sometimes it does not. In the area of sexual harassment law, I would argue however, it matters quite a lot.

As Professor Bisom-Rapp convincingly demonstrates, the Supreme Court, in *Faragher/ Ellerth* and in *Kolstad*, has embarked on a bold new jurisprudential project. That project, as the Court in both instances explicitly acknowledges, involves fashioning Title VII doctrine in such a way as will provide incentives for employers and employees to “avoid harm.” Through this bold foray into what we might call a “prophylactic

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105. This, in fact, is how California state law approaches the problem of employer liability for supervisor sexual harassment. Employers are held automatically liable for such harassment, on the theory that, like traffic accidents in the bussing industry, harassment is a reasonably foreseeable harm flowing from the operation of a business. The California Fair Employment and Housing Act imposes on covered employers automatic liability for sexual harassment by supervisors. CAL. GOV'T CODE § 12940(j)(1) (West 1992); *Murillo v. Rite Stuff Foods, Inc.*, 77 Cal. Rptr. 2d 12, 17 (Cal. Ct. App. 1998); *Doe v. Capital Cities*, 58 Cal. Rptr. 2d 122, 127 (Cal. Ct. App. 1996); *Kelly Zurian v. Wohl Shoe Co. Inc.*, 27 Cal. Rptr 2d 457, 466 (Cal. Ct. App. 1994).

106. For a thorough explication of this claim with regard to Title VII disparate treatment doctrine, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

jurisprudence of non-discrimination," the Court approaches statutory interpretation as an exercise in the practical application of game theory, structuring legal rules in an explicit attempt to elicit desirable behaviors from relevant legal actors.

This is certainly nothing new in modern law. One finds all across the landscape of commercial, environmental, and securities law the deliberate shaping of statutes, regulations, and judicial interpretation in ways explicitly designed to encourage desirable behaviors and discourage undesirable ones.<sup>107</sup> But this is most definitely a new project in civil rights law, particularly in relation to judicial efforts to shape victim responses to discriminatory conduct. The Supreme Court justifies the *Faragher* doctrine not on the grounds that it is somehow fair or just, but on the grounds that its application will prevent discriminatory harms from occurring.

There is certainly nothing inherently wrong with such a judicial undertaking. But if the Court's effort to shape individual and organizational behavior is premised on a faulty descriptive account of how people and organizations actually behave, its project cannot be expected to succeed. If, in fact, policies, grievance procedures, and training do not reduce the incidence of harassment or discrimination, the Court's new prophylactic jurisprudence will operate primarily to increase the rates of unremedied discriminatory harms, as courts mistake symbolic indicia of compliance with actual fealty to the norms underlying Title VII and similar equal employment opportunity laws.

In short, legal doctrine is often premised on implicit models of human and organizational behavior. Frequently, these models derive from what social psychologist Lee Ross refers to as "intuitive" psychology.<sup>108</sup> Unfortunately, these intuitive models are often wrong. Sometimes their inaccuracy is of little consequence. But as Ross reminds us, "at other times, the results may be harmful to the individual or the society, as unjust and maladaptive methods of resource allocation and social control are justified and perpetuated."<sup>109</sup> So it is, I fear, with the post-*Faragher* law of hostile work environment harassment.

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107. See, e.g., John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984) (examining a variety of regulatory schemes designed to provide incentives and disincentives for behavior of various sorts).

108. Lee Ross, *The Intuitive Psychologist and His Shortcomings*, 10 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 173 (1977).

109. *Id.* at 214.