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# Efficient Deterrence of Workplace Sexual Harassment

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## ABSTRACT

*Although sexual harassment imposes costs on both victims and organizations, it is also costly for organizations to reduce sexual harassment. Legislation, education, training, and litigation have all been unsuccessful in eradicating workplace sexual harassment. My proposal is to establish financial incentives of sufficient magnitude to incentivize organizations to eliminate sexual harassment. The key challenge is in monetizing the harm caused by sexual harassment. I propose a new approach that draws on my research, which calculated the risk of sexual harassment by gender, industry, and age based on charges filed with the Equal Employment Opportunity Commission. Using these risk measures, I established that workers receive a hazard pay premium for exposure to risk of sexual harassment. This premium reflects the higher pay workers need to work in a more hostile work environment and monetizes the aggregate societal evaluation of exposure to risk of an abhorred workplace behavior. Using my estimates of the pay premium, I calculate a value that I refer to as the “value of statistical harassment” (VSH). This amount is \$7.6 million, far greater than the current federal cap of \$300,000 for the largest firms. Raising the damages cap on awards to this level would provide organizations with the necessary financial incentive for efficient deterrence.*

## INTRODUCTION

The #MeToo movement has graphically revealed the widespread decades-long practices of unwelcome and often criminal sexual acts perpetrated by men at the top of their industries. The acts described in mainstream media go well beyond misaimed courting overtures. The treatment by these harassers has been career destroying for victims.

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Meanwhile, the harassers continued to victimize subordinates with impunity, often with tacit assent of numerous observers and colleagues who were in the position to stop their behavior.<sup>1</sup>

Although the #MeToo movement has raised awareness of sexual harassment<sup>2</sup> and has been costly to some individual harassers that have lost jobs and suffered reputational harm, the bulk of the cost continues to be borne by victims. The continued prevalence of sexual harassment does not merely reflect the harasser's or their organization's failure to consider the consequences that may result from such behavior but rather that the expected consequences have been largely inconsequential. Low reporting, an even lower probability of a successful lawsuit, and a low federal cap on damages awards combine to create a situation in which organizations rarely suffer substantial financial consequences from tolerating workplace sexual harassment. In contrast, there are countervailing costs associated with monitoring workplace behavior and sanctioning or removing from their positions some of the most valued or highly-placed employees.

Damages awards can be used to deter risky or illegal workplace behavior in an efficient manner. Currently, however, damages awards in employment discrimination cases are not structured to provide a deterrence function. A fundamental problem can be traced to the federal cap on damages awards in employment discrimination cases, which, based on my analysis reported in this Article, is currently set at a level far short of that required for efficient deterrence.<sup>3</sup>

To address this shortfall, I propose that there be statutory changes to increase the cap to a more effective level. To establish the efficient deterrence level for sexual harassment, I follow the same economic principles used to establish efficient deterrence values for workplace mortality risks. The deterrence values for mortality risks is based on the pay that workers require to face mortality risks; I correspondingly derive the deterrence value for sexual harassment based on the pay that workers require for such hostile work environments. This value is about \$7.6 million (in 2017 dollars) per sexual harassment claim filed with

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<sup>1</sup> Many examples have been described in the media. See, e.g., the highly detailed *New York Times* article reporting on Harvey Weinstein's "complicity machine." Megan Twohey et al., *Weinstein's Complicity Machine*, N.Y. TIMES, Dec. 5, 2017, <https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html> [<https://perma.cc/9AM8-9ZAH>].

<sup>2</sup> A note on terminology: Sex-based harassment is a term used to describe behavior that includes sexual harassment among other forms of gender-based harassment. The legal issue in my empirical analysis described in Part IV is recorded as "sexual harassment" in the EEOC charge data. I therefore use the term "sexual harassment" throughout this Article, but note that the term "sex-based harassment" is commonly used to characterize the broader workplace issues associated with workplace harassment. See Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641, 641–42 (2007).

<sup>3</sup> See 42 U.S.C. § 1981a(b)(3) (2012).

the EEOC, far above the current maximum damages award under Title VII of \$300,000 for the largest firms.<sup>4</sup>

This Article will proceed as follows: Part I summarizes the costs of sexually harassing behavior to victims and to organizations. These costs are disproportionately borne by the victims; indeed, sanctioning sexual harassers can be costly to the organization. Part II summarizes survey evidence that demonstrates that sexual harassment is still common in the workplace. Part III provides an overview of possible approaches to deterring sexual harassment. The continuing high prevalence of sexual harassment confirms that current approaches provide inadequate incentives for deterrence.

In light of the inadequacy of current approaches, Part IV describes how damages awards can serve a deterrence function by analogy to the approach government agencies use to set efficient deterrence amounts for mortality risks. The key challenge to using damages awards as a deterrent is monetizing the harm caused by sexual harassment. I describe my approach, which is based on recognizing sexual harassment as a job risk. I discuss the tradeoffs for individuals working in jobs with high levels of sexual harassment, provide measures of the risk of sexual harassment, and summarize my research that demonstrates that women receive a hazard pay premium for exposure to the risk of workplace sexual harassment. This hazard pay premium serves as the basic building block for establishing the amount that firms should be penalized for sexual harassment. In Part V, I argue that the compensation of victims of sexual harassment should be based on what I term the Value of Statistical Harassment (VSH) derived from the hazard pay premium and provide the calculations of this measure. The VSH is the sexual harassment risk counterpart to the commonly used value of a statistical life (VSL), which is generally used to establish optimal deterrence levels for morality risks. Part VI describes how the VSH can be used for efficient deterrence by setting damages awards to the level of the VSH. Doing so will raise both the costs to organizations of tolerating workplace sexual harassment and the benefits to victims of filing an EEOC claim. The greater potential benefits to victims will bolster the incentive to file suits, thereby raising the probability of detection for sexual harassers and remedying the failure of Title VII to appropriately address the systemic issue of sexual harassment.

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<sup>4</sup> See *id.*

## I. SEXUAL HARASSMENT IS COSTLY TO VICTIMS AND ORGANIZATIONS—BUT MOSTLY COSTLY TO VICTIMS

Organizational tolerance of sexual harassment has been identified as the most important influence on whether sexual harassment occurs in a workplace.<sup>5</sup> It is more prevalent in traditionally male occupations and in organizations with large power differences within a hierarchical structure,<sup>6</sup> such as the military.<sup>7</sup>

There is extensive evidence that victims of sexual harassment suffer a range of physical, psychological, and career consequences. These costs include lower job satisfaction, worse psychological and physical health, higher absenteeism, less commitment to their organizations, and higher quit rates.<sup>8</sup> Workers who report sexual harassment are more likely to face retaliation, which is associated with even greater loss of job satisfaction and worse health outcomes than those arising from the harassment alone.<sup>9</sup> The risk of retaliation is higher if the harasser is a supervisor.<sup>10</sup>

The costs to workplaces are the flip side of the costs to victims. Substantial empirical evidence shows that workplaces in which sexual harassment is tolerated are subject to inefficient turnover, increasing absenteeism, and generally wasted work time as workers attempt to avoid interaction with harassers.<sup>11</sup> Furthermore, the threat of litigation

<sup>5</sup> Louise F. Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCHOL. 578, 583–86 (1997); Chelsea R. Willness et al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127, 135–39 (2007). A list of additional risk factors is provided in CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EQUAL OPPORTUNITY EMPLOYMENT COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS 25–30 (2016) [hereinafter EEOC TASK FORCE REPORT].

<sup>6</sup> Remus Ilies et al., *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERSONNEL PSYCHOL. 607, 609 (2003).

<sup>7</sup> Heather Antecol & Deborah Cobb-Clark, *The Sexual Harassment of Female Active-Duty Personnel: Effects on Job Satisfaction and Intentions to Remain in the Military*, 61 J. ECON. BEHAV. & ORG. 55, 59 (2006).

<sup>8</sup> See EUROPEAN COMM'N. DIRECTORATE-GENERAL FOR EMPLOYMENT, INDUS. RELATIONS, & SOC. AFFAIRS, SEXUAL HARASSMENT IN THE WORKPLACE IN THE EUROPEAN UNION 5 (1998); U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, AND CONTINUING CHALLENGES 24 (1995), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=253661&version=253948&application=ACROBAT> [<https://perma.cc/EX8C-JATZ>] [hereinafter USMSPB REPORT]; Darius K-S. Chan et al., *Examining the Job-Related, Psychological and Physical Outcomes of Workplace Sexual Harassment: A Meta-Analytic Review*, 32 PSYCHOL. OF WOMEN Q. 362, 362–64 (2008); Fitzgerald et al., *supra* note 5, at 583–86; Willness et al., *supra* note 5, 135–39.

<sup>9</sup> Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCH. 230, 231 (2002).

<sup>10</sup> Blair Druhan Bullock, *Judicial and Agency Enforcement of Nondiscrimination Laws* (May 2015) (unpublished Ph.D. dissertation, Vanderbilt University) (on file at <https://law.vanderbilt.edu/phd/students/files/Bullock.pdf>) [<https://perma.cc/PKH9-XJUW>].

<sup>11</sup> See USMSPB REPORT, *supra* note 8, at 23–27; Fitzgerald et al., *supra* note 5, at 586; Willness

looms, which may involve costly legal defenses as well as any payment to victims.<sup>12</sup> Firms may suffer reputational harm, which may lead to difficulty in hiring or to lower firm profitability.<sup>13</sup>

However, comparing the costs of sexual harassment to the overall monetary scale of organizations suggests that the costs to organizations are relatively small. The costs of workplace sexual harassment in the U.S. federal government over the two-year period from 1992 to 1994 were estimated to be \$327.1 million.<sup>14</sup> This takes into account lost productivity due to job turnover, sick leave, individual productivity, and workgroup productivity, with the loss to workplace productivity accounting for 61 percent of the total.<sup>15</sup> However, compared to the federal budget, this cost represents rounding error, if that.<sup>16</sup>

A 1988 report estimated the costs to a typical Fortune 500 firm were \$6.7 million annually.<sup>17</sup> These costs came from absenteeism, lower productivity, increased health care costs, poor morale, and employee turnover (but excluding litigation costs and damages awards).<sup>18</sup> A different study reports an average sexual harassment liability loss estimate of \$600,000 in 1994 including legal fees.<sup>19</sup> However, compared to the value of a Fortune 500 firm in 1988 dollars, such costs are minor. Take Ford Motor with 2017 revenues of \$151.8 billion. In 1988 dollars, this is \$75.325 billion, making the average sexual harassment liability loss equal to about 0.09 percent of revenues.<sup>20</sup> Awards resulting from EEOC litigation similarly show that liability loss is small. For example,

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et al., *supra* note 5, at 136–37; Jana L. Raver & Michele J. Gelfand, *Beyond The Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance*, 48 ACAD. MGMT. J. 387, 392–94 (2005).

<sup>12</sup> See Alexis Christoforous, *The Cost of Sexual Harassment in the Workplace*, YAHOO FIN. (Dec. 5, 2017), <https://finance.yahoo.com/news/cost-sexual-harassment-workplace-190250229.html> [https://perma.cc/MGJ3-B7NK].

<sup>13</sup> Joni Hersch, *Equal Employment Opportunity Law and Firm Profitability*, 26 J. HUM. RESOURCES 139, 151–53 (1991) (showing that firms involved in employment discrimination litigation suffer substantial loss in the value of these firms). Studies showing costs due to reputation are summarized in EEOC TASK FORCE REPORT, *supra* note 5, at 22–23.

<sup>14</sup> USMSPB REPORT, *supra* note 8, at 26.

<sup>15</sup> *Id.*

<sup>16</sup> In 1993 and 1994 combined, federal outlays totaled \$2.87 trillion. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016 HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT 27 (2016).

<sup>17</sup> Ronni Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN 68–73 (Dec. 1988).

<sup>18</sup> *Id.* at 71.

<sup>19</sup> FRANCIS ACHAMPONG, WORKPLACE SEXUAL HARASSMENT LAW: PRINCIPLES, LANDMARK DEVELOPMENTS, AND FRAMEWORK FOR EFFECTIVE RISK MANAGEMENT 157 (1999).

<sup>20</sup> *The Top 10*, FORTUNE 500, <http://fortune.com/fortune500/2017/> [https://perma.cc/G8RV-UF T2] (last visited Jan. 15, 2019).

the EEOC recovered \$164.5 million in 2015 for workers alleging harassment.<sup>21</sup> But this too is a trivial share of the economy.<sup>22</sup>

In sum, although one might expect that profit-maximizing firms would have an incentive to eliminate unproductive behavior, because sexual harassment is costly for firms to monitor and eliminate, sexual harassment clearly occurs in some workplace environments. The point is not that sexual harassment isn't costly to organizations—it is, and it is clearly costly to victims—but that it is not costly enough for adequate deterrence.

## II. PREVALENCE OF SEXUAL HARASSMENT

Although recent media coverage may seem to suggest that sexual harassment is overwhelmingly common, reliable data on the prevalence of sexual harassment, and especially data on harassment that would meet the legal definition, is lacking. Because the bulk of sexual harassment events goes unreported, most of our knowledge of its prevalence is from surveys.<sup>23</sup> Surveys utilize different definitions of sexually harassing behavior and also differ widely on time periods covered (requesting reports of sexual harassment from as little as three months to any past experience with no time limit) and differ by population surveyed.<sup>24</sup> Most surveys do not sample from a nationally representative population but instead are based on specific groups (by occupation, industry, or within a single workplace).<sup>25</sup>

Researchers primarily use two methods to elicit experiences of sexual harassment.<sup>26</sup> In the direct query approach, respondents are asked to report whether they have been sexually harassed according to their own definition of harassment.<sup>27</sup> The second method is a behavioral experiences approach in which respondents are asked to indicate whether they have experienced any of the behaviors, such as sexual teasing, looks, or gestures, on a provided list. Incidence rates based on a behavioral experiences survey are higher than when based on direct query. A meta-analysis using fifty-five probability samples from the U.S. finds

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<sup>21</sup> EEOC TASK FORCE REPORT, *supra* note 5, at v. This value includes recovery for any type of workplace harassment, not only harassment on the basis of sex.

<sup>22</sup> See OFFICE OF MGMT. & BUDGET, *supra* note 16, at 26–28.

<sup>23</sup> Joni Hersch, *Sexual Harassment in the Workplace*, IZA WORLD OF LABOR 3–3 (Oct. 2015), <https://wol.iza.org/articles/sexual-harassment-in-workplace/long> [<https://perma.cc/4SK4-99XZ>].

<sup>24</sup> Hersch, *supra* note 23, at 2.

<sup>25</sup> See, e.g., EUROPEAN COMM'N, *supra* note 8.

<sup>26</sup> Hersch, *supra* note 23, at 2.

<sup>27</sup> *Id.* at 2; see also, e.g., Joni Hersch, Valuing the Risk of Workplace Sexual Harassment, 57 J. RISK & UNCERTAINTY 111, 116 n.11 (2018). For an example of a direct query question, the General Social Survey asks respondents: “In the last 12 months, were you sexually harassed by anyone while you were on the job?”

that the incidence rate is about double when based on the behavioral survey than on direct query, with an incidence rate of 24 percent based on direct query and 58 percent based on behavioral experiences.<sup>28</sup>

The Sexual Experiences Questionnaire (SEQ) developed by Louise Fitzgerald and co-authors is the survey most commonly used to record individual perceptions of whether they have been sexually harassed at work.<sup>29</sup> The authors intended the survey to measure psychological sexual harassment, although they claim that the survey parallels the definition of illegal sexual harassment.<sup>30</sup> The survey has been revised by Fitzgerald and colleagues over time, and various modifications have been used in sexual harassment surveys, but the essential form is a series of questions that are grouped into three categories: gender harassment, unwanted sexual attention, and sexual coercion.<sup>31</sup>

An insight into the potential disconnect between survey-based evidence on sexual harassment and the legal definition is provided in *Equal Employment Opportunity Commission v. Dial Corporation*.<sup>32</sup> Challenging expert evidence, Dial claimed that the SEQ did not measure sexual harassment within the meaning of Title VII.<sup>33</sup> The EEOC's expert, Louise Fitzgerald, argued that what it measures is "sexual harassment under the social science definition" in the "commonly understood sense of sex-related behavior that is unwanted and unreciprocated by the recipient."<sup>34</sup> The trial judge did not consider this point alone to invalidate the SEQ for legal purposes.<sup>35</sup> However, he did find that the SEQ did not truly measure what it purports to measure; that is, truly offensive sex-related experiences at work during the time frame alleged by the plaintiffs.<sup>36</sup> The judge expressed further concerns over

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<sup>28</sup> Ilies et al., *supra* note 6, at 619–23.

<sup>29</sup> See Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 157–59 (1988); Maria Rotundo et al., *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, J. APPLIED PSYCHOL. 914, 915 (2001).

<sup>30</sup> See Fitzgerald, *supra* note 29, at 155. The relevance of the SEQ to the legal definition of sexual harassment has been questioned in the academic literature. See Barbara A. Gutek et al., *A Review and Critique of the Sexual Experiences Questionnaire (SEQ)*, 28 L. & HUM. BEHAV. 457, 459 (2004).

<sup>31</sup> See Gutek, *supra* note 30, at 461.

<sup>32</sup> No. 99 C 3356, 2002 U.S. Dist. LEXIS 17543 (N.D. Ill. Sept. 17, 2002).

<sup>33</sup> *Id.* at \*9.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*9–10.

<sup>36</sup> The survey requested reports of experiences during the time the respondent was employed by Dial and not restricted to the time period at question in litigation. The survey requested frequency of experiences without any indication of whether respondents found the experiences offensive or unwelcome. *Id.* at \*12–13.



bias introduced by self-selection of respondents.<sup>37</sup> Fitzgerald's report was excluded from evidence.<sup>38</sup>

Although survey evidence may not reach legal standards, most of our evidence on the prevalence of sexual harassment continues to be derived from surveys. Perhaps the most reliable trend evidence on sexual harassment is derived from the U.S. Merit Systems Protection Board (USMSPB) survey, "Sexual Harassment in the Federal Workplace." This is a behavioral experiences survey of federal employees conducted in 1980, 1987, 1994, and 2016.<sup>39</sup> Among other questions, these surveys asked respondents to report whether they had experienced any of a series of the following unwanted or uninvited behaviors in the past two years: sexual teasing, jokes, remarks, questions; sexual looks or gestures; invasion of personal space by deliberate touching, leaning, cornering; pressure for dates; communication of a sexual nature by letters, calls, or sexual materials; stalking; pressure for sexual favors; and actual or attempted rape or assault.<sup>40</sup>

Table 1 provides the summary of sexually harassing behaviors reported in the USMSPB surveys in 1980, 1987, 1994, and 2016.<sup>41</sup> As Table 1 shows, a large share of workers, both male and female, report that they have been sexually harassed, with women far more likely than men to report that they have been sexually harassed. In 1994, the survey shows that 44 percent of women and 19 percent of men had experienced unwanted sexual attention on the job in the preceding two years. The values are fairly similar to the percent reporting unwanted sexual attention in the 1980 and 1987 waves of the survey. Encouragingly, by 2016, the share of workers reporting that they had been sexually harassed in the past two years dropped considerably, to 6 percent for men and 18 percent for women.

The trends provide some comfort and some concern. That actual or attempted rape or sexual assault reported by 1 percent of both men and women in 2016 is clearly concerning, and the rate has not consistently diminished over the time period. But it is more comforting that most of the harassment is not assault or rape and has diminished over time. Note also that in the 1980 survey, 26 percent of women reported that

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<sup>37</sup> *Id.* at \*31.

<sup>38</sup> *Id.* at \*33–34.

<sup>39</sup> See USMSPB REPORT, *supra* note 8; U.S. MERIT SYS. PROTECTION BD., ISSUES OF MERIT 1–5 (2017), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1442317&version=1447804&application=ACROBAT> [<https://perma.cc/5WAC-4BAF>] [hereinafter USMSPB ISSUES OF MERIT] (providing highlights “[i]n advance of an upcoming report that provides a full analysis of our research findings . . .”).

<sup>40</sup> USMSPB REPORT, *supra* note 8, at 7; USMSPB ISSUES OF MERIT, *supra* note 39, at 2.

<sup>41</sup> USMSPB REPORT, *supra* note 8, at 58–62 apps. 2, 3, 4, 5 & 6; see also USMSPB ISSUES OF MERIT, *supra* note 39, at 1–2 (providing highlights in “advance of an upcoming report that provides a full analysis of our research findings . . .”).

they had been pressured for dates, and that the proportion dropped to 13 percent by 1994, and dropped further to 3 percent in 2016. There is also a large share of women who reported that they had been pressured for sexual favors—9 percent in 1980 and 1987 and 7 percent in 1994, but that too dropped to 3 percent in 2016. What is not ascertainable from the survey is whether these requests for dates or pressure for sexual favors were quid pro quo in nature.

TABLE 1. U.S. MERIT SYSTEMS PROTECTION BOARD SEXUAL HARASSMENT SURVEY

|   | Men  |      |      |      | Women |      |      |      |
|---|------|------|------|------|-------|------|------|------|
|   | 1980 | 1987 | 1994 | 2016 | 1980  | 1987 | 1994 | 2016 |
| Unwelcome sexual teasing, jokes, remarks, questions | 10   | 12   | 14   | 3    | 33    | 35   | 37   | 9    |
| Unwelcome sexually suggestive looks or gestures     | 8    | 9    | 9    | 1    | 28    | 28   | 29   | 9    |
| Unwelcome invasion of personal space                | 3    | 8    | 8    | 3    | 15    | 26   | 24   | 12   |
| Pressure for dates                                  | 7    | 4    | 4    | 1    | 26    | 15   | 13   | 3    |
| Unwelcome communication of a sexual nature          | 3    | 4    | 4    | 1    | 9     | 12   | 10   | 6    |
| Stalking  | NA   | NA   | 2    | 1    | NA    | NA   | 7    | 2    |
| Pressure for sexual favors                          | 2    | 3    | 2    | 1    | 9     | 9    | 7    | 1    |
| Actual or attempted rape or sexual assault          | 0.3  | 0.3  | 2    | 1    | 1     | 0.8  | 4    | 1    |
| Any behavior reported                               | 15   | 14   | 19   | 6    | 42    | 42   | 44   | 18   |

Note: Percent experiencing unwanted behaviors in previous 2 years. For statistics for 1980, 1987, and 1994 see USMSPB REPORT, *supra* note 8. For statistics for 2016, see USMSPB ISSUES OF MERIT, *supra* note 37. “NA” indicates not available. Table rows report category labels used in Fall 2017 report. These differ slightly from the category labels used in the 1995 report as follows (numbered in order of rows in table):

1. 1995 report did not include the word “Unwelcome”
2. 1995 report used the phrase “Sexual looks, gestures”
3. 1995 report used the phrase “Deliberate touching, leaning, cornering”
4. No difference
5. 1995 report used the phrase “Letters, calls, sexual materials”
6. No difference
7. No difference
8. 1995 report used the phrase “Actual/attempted rape, assault”

Like almost all surveys that elicit information on sexual harassment, the focus in the USMSPB survey is on sexual behavior and does not request respondents to indicate whether they have been subjected to other behaviors that are based on gender hostility. Furthermore, and typical of such surveys, there is no indication recorded in the USMSPB survey of the severity of the harassment.

## III. WHAT DOESN'T WORK: CURRENT APPROACHES TO DETERRENCE

Currently, three mechanisms show potential to deter or prevent sexual harassment to varying degrees of success. Training attempts to change the preferences of harassers *ex ante*. In contrast, both legal consequences under Title VII and market incentives act to impose an *ex post* cost on sexual harassers. I next discuss the shortcomings of each of these schemes in their ability to alter the behavior of sexual harassers.

## A. Policies and Training

It is routine for large companies to have policies, workplace training, and reporting procedures to prevent sexual harassment.<sup>42</sup> Workplace training has been shown to raise awareness of what constitutes sexual harassment,<sup>43</sup> although there is little evidence that such training is effective in reducing sexual harassment in the workplace. However, the consensus in the literature is that best practices for organizations are to have in place strong policies and a reporting procedure.<sup>44</sup> This would also be the guidance of lawyers responsible for protecting employers, as these policies and procedures may serve as a legal defense against liability.<sup>45</sup> Availability of confidential counselors is another procedural tool utilized to encourage reporting. But studies confirm that this too fails to be effective.<sup>46</sup>

Furthermore, as the litany of harassers shows, it is quite clear that these organizational efforts have been insufficient to prevent workplace sexual harassment or costly settlements to victims who were not protected by the organization's structure. Before the #MeToo movement gained momentum, in 2016, Fox News CEO and chairman Roger Ailes was ousted in light of a barrage of evidence of longstanding sexual har-

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<sup>42</sup> *Id.*

<sup>43</sup> See Heather Antecol & Deborah Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View from the Federal Level*, 84 SOC. SCI. Q. 826, 838–40 (2003).

<sup>44</sup> See, e.g., Peter Aronson, *Justices' Sex Harassment Decisions Spark Fears: Companies Review Policies to Avoid 'Ellerth' Liability*, 21 NAT'L L.J. (Nov. 9, 1998), at A1; David Rubenstein, *Harassment Prevention is Now a Must for U.S. Companies*, 93 CORP. LEGAL TIMES 31 (Aug. 1999).

<sup>45</sup> See *Sexual Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, [https://www.eeo.gov/laws/types/sexual\\_harassment.cfm](https://www.eeo.gov/laws/types/sexual_harassment.cfm) [<https://perma.cc/4H6N-GTP5>] (last visited Jan. 16, 2019).

<sup>46</sup> See EUROPEAN COMM'N, *supra* note 8, at 17 (“The functioning of the *confidential counsellor* is unsatisfactory. Few of the harassed employees contacted a confidential counsellor. From the studies reviewed it appears that confidential counsellors often lack the necessary facilities to do their work, are too close to management, and are relatively unknown or not trusted. It is also difficult for confidential counsellors to work in organisations that lack an awareness of the problem.”).

assessment against many female Fox News employees, despite formal policies, workplace training, and reporting procedures.<sup>47</sup> Ultimately this behavior proved costly to the organization: A lawsuit filed by former Fox News host Gretchen Carlson resulted in a \$20 million settlement.<sup>48</sup>

The failure of established procedures to deter harassment is not limited to the top of the corporate structure: Despite a successful lawsuit for sexual and racial harassment by blue-collar workers at Ford plants in Chicago in the 1990s, and established procedures to deter harassment as well as union representation, workers continued to be sexually harassed.<sup>49</sup>

## B. Legal Ramifications under Title VII

The EEOC characterizes sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.”<sup>50</sup> Employers have a possible defense against liability if (1) the employer takes reasonable care to prevent harassment (such as disseminating a policy against harassment and establishing reporting procedures), (2) the employer promptly corrects any sexually harassing behavior, and (3) the employee unreasonably fails to take advantage of the employer’s preventive or corrective opportunities.<sup>51</sup> In such cases, the employee is only entitled to relief if she takes advantage of the employer’s procedures and remedies, which generally means that the employee must report sexual harassing behavior to their employer.<sup>52</sup>

Title VII allows for the award of both compensatory and punitive damages. However, the total damage award is capped and determined

<sup>47</sup> John Koblin et al., *Roger Ailes Leaves Fox News, and Rupert Murdoch Steps In*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/business/media/roger-ailes-fox-news.html> [https://perma.cc/U4BQ-2E7V].

<sup>48</sup> Sarah Ellison, *Fox Settles with Gretchen Carlson for \$20 Million—and Offers an Unprecedented Apology*, VANITY FAIR (Sep. 6, 2016), <https://www.vanityfair.com/news/2016/09/fox-news-settles-with-gretchen-carlson-for-20-million> [https://perma.cc/639J-JJVE].

<sup>49</sup> See Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES, Dec. 19, 2017, <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html?module=inline> [https://perma.cc/X4FF-TCTG]; Susan Chira & Catrin Einhorn, *Ford Apologizes for Sexual Harassment at Chicago Factories*, N.Y. TIMES, Dec. 21, 2017, <https://www.nytimes.com/2017/12/21/us/ford-apology-sexual-harassment.html> [https://perma.cc/QK6Y-RBP6].

<sup>50</sup> *Sexual Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 45.

<sup>51</sup> *Id.*

<sup>52</sup> An exception to the requirement to report sexual harassment to the employer would arise if the employee is being harassed by a supervisor, and there is no one else to whom to report the harassment. See *Monteagudo v. Asociación de Empleados del Estado Libre Asociado de P.R.*, 554 F.3d 164, 171–72 (1st Cir. 2009). In addition, a jury may find that “a failure to file a complaint [was not] unreasonable . . . .” *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27, 35 (1st Cir. 2003).

by the number of employees of the defendant firm, with the total award capped at a maximum of \$300,000 (excluding back pay) if the employer has 500 or more employees.<sup>53</sup>

These compensatory damages can be fairly low, especially with respect to back pay, which is directly connected to the victim's pay. The Supreme Court decision *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>54</sup> usually limits punitive damages to less than a ten to one ratio to compensatory damages.<sup>55</sup> Subject to this punitive to compensatory damages ratio constraint, the current limit on the sum of compensatory and punitive damages in employment discrimination cases of \$300,000 for the largest firms implies that any individual with compensatory damages of more than \$27,273 is eligible for less than the maximum punitive damages award that would be available without the Title VII caps. Raising the current cap on damages awards to my proposed \$7.6 million would mean that compensatory damages of up to \$690,972 would be eligible for the maximum punitive damages award.

It should be clear that there are steep barriers to launching a successful lawsuit against an employer for sexual harassment. Most employers have policies prohibiting sexual harassment and typically provide training of some kind.<sup>56</sup> Because claimants usually need to report the harassing behavior to their employer before filing a charge with the EEOC, they risk retaliation within their current employment.<sup>57</sup> Furthermore, even when plaintiffs jump through the hurdles that Title VII provides to both bring suit against their harassers and prove that the sexual harassment occurs, their ultimate reward is not significant enough to deter sexual harassment in the future.

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<sup>53</sup> 42 U.S.C. § 1981a(b) (2012). The maximum total damages award for employers with 15 to 100 employees is \$50,000; for those with 101 to 200 employees, \$100,000; for 201 to 500 employees, \$200,000. These limits have not been raised since 1991. Damages awards may differ by state; for example, \$500,000 in punitive damages was awarded in *Gyulakian v. Lexus of Watertown Inc.*, 56 N.E.3d 785, 799 (Mass. 2016).

<sup>54</sup> 538 U.S. 408 (2003).

<sup>55</sup> *Id.* at 425–26; see also Alison F. Del Rossi and W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 AM. L. & ECON. REV. 116, 120 (2010) (the authors found “after the *State Farm* decision there has been a statistically significant drop in the number of blockbuster punitive damages awards, their amount, and the ratio of punitive damages to compensatory damages”); Benjamin J. McMichael and W. Kip Viscusi, *Shifting the Fat-Tailed Distribution of Blockbuster Punitive Damages Awards*, 11 J. EMPIRICAL LEGAL STUD. 350, 350 (June 2014) (the authors found “*State Farm* shifts the fat tail of the distribution of blockbuster awards down (or ‘thins’ the tail), which is consistent with a constraining effect on award size,” and that “*State Farm* also has a negative influence on the probability of exceeding a single-digit ratio between punitive and compensatory damages”).

<sup>56</sup> Megan Cole, *71 Percent of Organizations Offer Sexual Harassment Prevention Training*, ASS'N TALENT DEV. (Nov. 13, 2017), <https://www.td.org/insights/71-percent-of-organizations-offer-sexual-harassment-prevention-training> [<https://perma.cc/CL6K-D46V>].

<sup>57</sup> See Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 50 (2018).

### C. Corporate Oversight

There are a staggering number of examples of sexual misconduct that appeared to be known by industry insiders but largely concealed until publicly revealed by the #MeToo movement.<sup>58</sup> But in situations in which sexual harassers are considered essential to an organization's success, organizations have often been slow to respond to complaints. Below are some prominent examples that highlight the tension between protection of victims and corporate priorities.

The situation facing the Wynn Resorts board of directors is one such example of this tension. On Friday, January 26, 2018, the *Wall Street Journal* reported on decades-long practices of sexual harassment by Steve Wynn, founder and billionaire owner of landmark Las Vegas hotels and casinos.<sup>59</sup> Wynn Resorts stock fell 10 percent on that Friday and an additional 9 percent the following Monday.<sup>60</sup>

As a publicly traded company, the board of directors has a duty to shareholders to protect their interests.<sup>61</sup> The stock market hit clearly reflected shareholder angst over the future of the company. But the board debated whether to oust Wynn. Few companies are as closely identified with their founder and chief executive as is Wynn Resorts.<sup>62</sup> Although a number of the largest and most successful companies are closely identified with their founder—think of Microsoft, Apple, Amazon, and Facebook—few companies actually bear the founder's name. The Wynn brand is integrally entwined with Steve Wynn, his flagship

<sup>58</sup> Perhaps the starkest example is provided by Harvey Weinstein, whose exposure as a serial sexual predator is credited with invigorating the #MeToo movement. See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [https://perma.cc/JAL6-HU3W]. Weinstein's reputation within the film industry was so widely known that *Family Guy* creator Seth MacFarlane could joke about Weinstein's sexual conduct at the 2013 Oscar ceremony, announcing the five nominees for best actress by saying, "'Congratulations, you five ladies no longer have to pretend to be attracted to Harvey Weinstein,' which elicited a sustained laugh from the audience." Maya Oppenheim, *Seth MacFarlane Made Joke about Harvey Weinstein and Women at 2013 Oscars*, INDEPENDENT (Oct. 11, 2017), <http://www.independent.co.uk/arts-entertainment/films/news/seth-macfarlane-harvey-weinstein-joke-oscars-2013-women-sexual-harassment-allegations-a7994506.html> [https://perma.cc/RDW8-G2QY].

<sup>59</sup> Alexandra Berzon et al., *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, WALL STREET J., Jan. 27, 2018, <https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953> [https://perma.cc/BEH3-9C7P].

<sup>60</sup> Bill Peters, *Could Wynn Resorts Be Sold in Wake of CEO's Sexual-Misconduct Allegations?*, INV. BUS. DAILY NEWS (Jan. 29, 2018), <https://www.investors.com/news/wynn-keeps-diving-as-fall-out-grows-over-ceo-steve-wynn-sexual-misconduct-allegations/> [https://perma.cc/V738-2TTL].

<sup>61</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179–80 (Del. 1986) (citing *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)); *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

<sup>62</sup> Elizabeth Winkler, *Wynn Resorts Is the Biggest Test for Investors' Tolerance*, WALL STREET J. (Jan. 29, 2018), <https://www.wsj.com/articles/wynn-resorts-is-the-biggest-test-for-investors-1517248977> [https://perma.cc/H447-R2XB].

properties bear his name, and as founder, chief executive, and largest stockholder of Wynn Resorts, he was considered essential to the brand identity and success of the firm.<sup>63</sup>

Therein lay the board's dilemma as to whether to oust Wynn from his position. Removing Wynn may have salved short run stock price concerns, but such removal may have longer run negative consequences if Wynn was indeed essential to the firm's success, which would make retaining Wynn the preferred option. Wynn resigned as CEO of Wynn Resorts following the media coverage.<sup>64</sup>

Not only may corporate boards fail to take action to oust leaders when they have information about allegations of sexual misconduct and settlement payouts, but information about sexual misconduct and payouts can also be cleverly concealed. Again, Steve Wynn provides a model. As public records from Wynn's prior divorce litigation revealed, he created a limited-liability company in 2005 for the sole purpose of paying \$7.5 million to the manicurist employed by Wynn Resorts who had accused Wynn of forcing her to have sex with him.<sup>65</sup>

Moreover, prior allegations of sexual harassment do not seem to provide sufficient deterrence to future employers. For example, Ross Levinsohn, who has now been ousted as CEO and publisher of the *Los Angeles Times*, had been a defendant in two sexual harassment lawsuits while in positions he held prior to the *Los Angeles Times*.<sup>66</sup> And harassers often ride out even highly publicized sexual harassment charges and apparently suffer little long-term consequences. For example, in 2007, a jury awarded \$11.6 million to a woman in a sexual harassment suit against Isiah Thomas, President of the New York Knicks, for behavior that began in 2004.<sup>67</sup> During and after the suit, he was not fired from his post at the Knicks.<sup>68</sup> He served as head coach for the Florida International University men's basketball program from 2009–2012

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<sup>63</sup> *Id.*

<sup>64</sup> See Everett Rosenfeld, *Steve Wynn is Out as CEO of Wynn Resorts*, CNBC (Feb. 6, 2018), <https://www.cnbc.com/2018/02/06/steve-wynn-is-out-as-ceo-of-wynn-resorts.html> [<https://perma.cc/8KCW-MTDY>].

<sup>65</sup> Kate O'Keeffe, *Steve Wynn Set Up LLC to Pay His Accuser*, WALL STREET J. (Feb. 5, 2018), <https://www.wsj.com/articles/steve-wynn-set-up-llc-to-pay-his-accuser-1517858826> [<https://perma.cc/PM34-834Q>].

<sup>66</sup> Lydia O'Connor, *L.A. Times Publisher Accused of Sexual Misconduct, 'Frat House' Behavior*, HUFFPOST (Jan. 18, 2018), [https://www.huffingtonpost.com/entry/ross-levinsohn-la-times-sexual-misconduct\\_us\\_5a60ecc3e4b01767e3d18eac](https://www.huffingtonpost.com/entry/ross-levinsohn-la-times-sexual-misconduct_us_5a60ecc3e4b01767e3d18eac) [<https://perma.cc/UAZA-767J>].

<sup>67</sup> See Jonathan Abrams & Lynn Zinser, *Thomas Returns to Knicks as Part-Time Consultant*, N.Y. TIMES (Aug. 6, 2010), [http://www.nytimes.com/2010/08/07/sports/basketball/07knick.html?mt\\_rref=www.google.com&gwh=459376E6E8BBC677AD2CBDA7CEC54DA0&gwt=pay](http://www.nytimes.com/2010/08/07/sports/basketball/07knick.html?mt_rref=www.google.com&gwh=459376E6E8BBC677AD2CBDA7CEC54DA0&gwt=pay) [<https://perma.cc/3Q5N-EHGT>]; Michael S. Schmidt & Maria Newman, *Jury Awards \$11.6 Million to Former Knicks Executive*, N.Y. TIMES (Oct. 2, 2007), <https://www.nytimes.com/2007/10/02/sports/basketball/03garden-cnd.html> [<https://perma.cc/D922-EU5Q>].

<sup>68</sup> See Abrams & Zinser, *supra* 67.

and became president and part-owner of the Knick's WNBA sister team, the New York Liberty.<sup>69</sup>

Furthermore, it is not necessarily to a firm's benefit to take a hard line on sexual harassment. One visible example is that of Mark Hurd, former CEO of Hewlett-Packard (HP), who was accused of sexual harassment by Jodie Fisher, a former contractor to HP. Although HP did not find that Hurd had violated the company sexual harassment policy, HP board members considered his behavior to demonstrate a lack of judgment that undermined his effectiveness, and he was forced to resign. It is notable that the stock market and market for executives displayed a more favorable response to Hurd's leadership of HP: HP's stock price dropped by 8.3 percent on the first day of trading following Hurd's forced resignation, and Hurd was quickly hired by Oracle as co-president.<sup>70</sup>

And even when an organization successfully ousts an executive for sexual misconduct, the organization may be responsible for paying legal fees for any ensuing arbitration over the termination. These legal fees can be substantial, as indicated in the termination of Leslie Moonves as CEO of CBS, with a reported estimate of \$50 million in legal costs to be paid by CBS to represent CBS, its board, and Moonves.<sup>71</sup>

Settlements such as the \$20 million awarded to Gretchen Carlson would also seemingly provide a market incentive to corporations to deter sexual harassment. However, what is perhaps most notable is that the existence of and amount of this settlement was publicly reported rather than concealed through a nondisclosure agreement. Any deterrence effects of even large settlements is reduced if information about the prevalence and size of settlements is concealed. Furthermore, even the higher pay workers receive as a compensating differential will be insufficient to deter sexual harassment if the true risk is unrecognized by workers because of low reporting, high turnover, and confidential settlements.

As these examples indicate, despite market pressures to eliminate unprofitable corporate activities, under the current legal regime, there

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<sup>69</sup> Ben Golliver, *Former Knicks Executive Isiah Thomas Fired by FIU*, CBS SPORTS (Apr. 6, 2012), <https://www.cbssports.com/nba/news/former-knicks-executive-isiah-thomas-fired-by-fiu/> [https://perma.cc/D36U-ZTNJ?type=image]; Ben Mathis-Lilley, *Knicks Hire Executive Who Lost \$11 Million Sexual Harassment Suit to Run WNBA Team*, SLATE (May 25, 2015), [http://www.slate.com/blogs/the\\_slatest/2015/05/05/certified\\_sexual\\_harasser\\_isiah\\_thomas\\_hired\\_to\\_run\\_women\\_s\\_basketball\\_team.html](http://www.slate.com/blogs/the_slatest/2015/05/05/certified_sexual_harasser_isiah_thomas_hired_to_run_women_s_basketball_team.html) [https://perma.cc/A6UK-MY34].

<sup>70</sup> See Ben Worthen & Pui-Wing Tam, *H-P Chief Quits in Scandal*, WALL STREET J. (Aug. 7, 2010), <https://www.wsj.com/articles/SB10001424052748703309704575413663370670900> [https://perma.cc/XXT2-9KCL].

<sup>71</sup> James B. Stewart, *CBS Is Footing Moonves's Legal Bills, Giving Him an Incentive to Fight*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/business/cbs-les-moonves-legal-fight.html> [https://perma.cc/K765-UPZN?type=image].



are clear limits to the ability of the market to deter sexual harassment. Markets cannot work to eliminate illegal and violent sexually predatory behavior in the presence of misinformation and deceit and in the absence of meaningful sanctions or consequences.

#### IV. DAMAGE AWARDS AS A DETERRENT TO SEXUAL HARASSMENT

##### A. Compensating Differentials for Job Risks

Title VII provides for compensatory as well as punitive damages awards for workplace discrimination. Such damages awards serve the dual purposes of compensating victims and providing an incentive to firms to not discriminate. Damages caused by discrimination in pay, promotion, and hiring are fairly easily monetized, for example, by comparing pay between those in a protected class to similar workers not in a protected class. Although the exact estimate of damages may differ, forensic economists routinely calculate compensatory damages in employment discrimination cases, and there is considerable agreement over accepted methodology.<sup>72</sup>

The harm caused by sexual harassment is not so easily monetized. In part, a large share of the harm caused by sexual harassment is psychological, which would be difficult to quantify, and victims are unlikely to be made whole with money. Another, more subtle problem with quantifying the harm caused by sexual harassment is that an individual victim's pay may actually be enhanced, possibly as a means to obtain complicity or silence. Despite inherent measurement problems, sexual harassment harm clearly is monetized in the form of financial settlements paid to victims, with the few values that have been publicly reported showing a substantial range.<sup>73</sup>

My approach to monetizing the harm caused by sexual harassment starts by recognizing that sexual harassment is a job risk. It is by no means a risk that is a necessary part of the workplace, but, as survey

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<sup>72</sup> See Michael R. Luthy et al., *A 2015 Survey of Forensic Economists: Their Methods, Estimates, and Perspectives*, 26 J. FORENSIC ECON. 53–83 (2015).

<sup>73</sup> For example, former Fox News host Gretchen Carlson received a \$20 million settlement; five sexually harassed Guess employees received a total \$500,000 settlement; and two women who alleged they were sexually harassed by former presidential candidate Herman Cain when he was CEO of the National Restaurant Association received settlements of \$45,000 and \$35,000 (which Cain described as severance payments). See Michael M. Grynbaum & John Koblin, *Fox Settles with Gretchen Carlson over Roger Ailes Sex Harassment Claims*, N.Y. TIMES (Sept. 6, 2016), <https://www.nytimes.com/2016/09/07/business/media/fox-news-roger-ailes-gretchen-carlson-sexual-harassment-lawsuit-settlement.html> [https://perma.cc/P7DS-AWAV]; Valeriya Safronova, *Paul Marciano Will Leave Guess after Sexual Harassment Settlements*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/style/guess-harassment-resignation.html> [https://perma.cc/4WVP-73XT]; Michael D. Shear et al., *Cain Accuser Tells of Pattern of Behavior, Lawyer Attests*, N.Y. TIMES (Nov. 4, 2011), <https://www.nytimes.com/2011/11/05/us/politics/cain-accuser-tells-of-harassment-pattern-lawyer-attests.html> [https://perma.cc/G2S9-WRKG].

evidence reviewed in Part II documents, it nonetheless is common. Most activities involve tradeoffs, and often the tradeoff is between money or time and safety. It is costly for firms to eliminate job risks such as risks of fatality and injury—and of sexual harassment. It is also costly to firms to not strive to eliminate these risks. Employers need to pay a wage premium—referred to as a “compensating differential”—to attract workers to risky jobs.<sup>74</sup> A massive literature documents that workers in jobs at greater risk of fatality are paid a premium for bearing greater risk, and indeed, this premium pay forms the basis for calculating the value of statistical life.<sup>75</sup> Furthermore, in setting regulatory safety standards, most federal agencies require comparison of the costs of implementing safety improvements to the value of lives saved from improved safety.<sup>76</sup>

It is not mere speculation that firms might pay a premium for exposure to risk of sexual harassment. As coverage of Steve Wynn’s pattern of sexually harassing employees made clear, the high pay at Wynn casinos relative to alternative jobs in Las Vegas served to reduce turnover and attract employees despite widespread risk of sexual harassment. Ex-employees reported to the *Wall Street Journal* that they tolerated workplace harassment because jobs at Wynn were among the highest paying in Las Vegas.<sup>77</sup>

Despite a large literature investigating whether workers are paid compensating differentials for a variety of working conditions, the economics literature had only consistently established compensating differentials for workplace risk of fatality or injury.<sup>78</sup> My research, described below, is the first to consider the possibility of compensating differentials for risk of sexual harassment. To briefly summarize my methodology and primary result, I created the first measures in the literature of risk of sexual harassment, estimated wage equations controlling for this risk, and identified that workers in industries at greater

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<sup>74</sup> The “theory of compensating differentials” originated with Adam Smith and is a standard topic in economics textbooks. A review of the literature and discussion of the underlying theory is W. Kip Viscusi, *The Value of Risks to Life and Health*, 31 J. ECON. LIT. 1912 (1993). See also Robert S. Smith, *Compensating Wage Differentials and Public Policy: A Review*, 32 INDUS. AND LAB. RELATIONS REV. 339, 339–40 (1979).

<sup>75</sup> See Joseph E. Aldy & W. Kip Viscusi, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World*, 27 J. RISK & UNCERTAINTY 5, 5 (2003).

<sup>76</sup> See *id.* at 40–42; W. Kip Viscusi, *Mortality Effects of Regulatory Costs and Policy Evaluation Criteria*, 25 RAND J. ECON. 94, 94–95 (1994); W. Kip Viscusi, *The Devaluation of Life*, 3 REG. & GOVERNANCE 103, 105 (2009); U.S. OFFICE OF MANAGEMENT & BUDGET, OFFICE OF INFO. & REG. AFFAIRS, *INFORMING REGULATORY DECISIONS: 2003 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES* 94 (2003).

<sup>77</sup> Berzon et al., *supra* note 59.

<sup>78</sup> Joni Hersch, *Compensating Differentials for Sexual Harassment*, 101 AM. ECON. REV.: PAPERS & PROC. 630, 630 (2011).

risk of sexual harassment received a pay premium for exposure to a working condition that workers found so heinous.<sup>79</sup> It is worth noting that my approach, which takes into account the risk of sexual harassment, obviates concerns of reverse causality in which workers who are at lower pay are more likely to be targets of harassment.<sup>80</sup>

## B. Sexual Harassment Risks

The first step in examining the labor market implications of sexual harassment claims requires calculation of sexual harassment risk.<sup>81</sup> To do so, I used data I obtained from the EEOC through a FOIA request. I calculated gender-specific estimates of the risk of sexual harassment by industry and age group,<sup>82</sup> by dividing the number of individual charges that include sexual harassment within each industry and age group by the corresponding levels of employment in the same industry and age group from the Current Population Survey (CPS).<sup>83</sup> In contrast to survey evidence of sexual harassment prevalence, my methodology provides a well-defined measure of the risk of sexual harassment that allows comparison across sectors of the economy.

Table 2 reports sexual harassment claim rates per 100,000 workers by gender and major industry as well as the percent female in the industry based on the construction of sexual harassment risk described above. Clearly women are far more likely to file a claim of sexual harassment than are men. The pattern across industries indicates that women are at a greater risk of sexual harassment in male-dominated

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<sup>79</sup> *Id.* at 633–35.

<sup>80</sup> If we observe that harassed workers have lower pay, we cannot be sure whether the harassment caused the individual worker to have lower pay, or if the worker is harassed specifically because they are lower paid and potentially more vulnerable. Because any individual's experience of sexual harassment will have only a small effect on the risk measure for that industry and age group, we can largely rule out the possibility that the individual's pay level influenced the risk measure for that industry and age group.

<sup>81</sup> For more information, see Joni Hersch, *Valuing the Risk of Workplace Sexual Harassment*, 57 J. RISK & UNCERTAINTY 111, 117–19 (2018). See also *Sexual Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 45.

<sup>82</sup> Specifically, the numerators in this risk measure are the number of sexual harassment charges by 2-digit industry (52 industries), six age groups (15–24, 25–34, 35–44, 45–54, 55–64, and ages 65 and older), and gender. The denominators are the corresponding levels of industry employment by age group and gender from the Current Population Survey (excluding self-employed workers who would generally not be able to claim sexual harassment against an employer). This follows the methodology to construct fatality rates by industry, age, and gender in W. Kip Viscusi and Joni Hersch, *The Mortality Cost to Smokers*, 27 J. HEALTH ECON. 943, 944–48 (2008). See Joni Hersch, *supra* note 811 (providing information on the construction of the risk measures and a table that lists the risk values for women by detailed industry and age group).

<sup>83</sup> The CPS is a monthly survey of households conducted by the Bureau of Census for the Bureau of Labor Statistics. It provides comprehensive data on the labor force, employment, and other demographic and labor force characteristics. See Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, <https://www.bls.gov/cps/> [<https://perma.cc/H3L4-G8V9>] (last visited Jan. 16, 2019).

industries, with the pairwise correlation between the female rate and percent female equal to  $-0.68$  ( $p=0.01$ ). The male sexual harassment claim rate is not correlated with the female rate nor is the male rate correlated with percent female.

TABLE 2: SEXUAL HARASSMENT RATES BY MAJOR INDUSTRY<sup>84</sup>

|   | Female | Male | Percent Female |
|---|--------|------|----------------|
| Agriculture, forestry, fishing, and hunting | 18.10  | 0.72 | 25.21          |
| Mining                                      | 72.02  | 2.31 | 9.71           |
| Construction                                | 20.28  | 0.48 | 9.58           |
| Manufacturing                               | 15.88  | 1.28 | 30.86          |
| Wholesale and retail trade                  | 10.21  | 1.33 | 45.46          |
| Transportation and utilities                | 17.50  | 1.22 | 24.48          |
| Information                                 | 19.35  | 2.73 | 43.40          |
| Financial activities                        | 6.98   | 1.49 | 57.58          |
| Professional and business services          | 14.35  | 1.89 | 43.16          |
| Educational and health services             | 3.71   | 1.66 | 75.13          |
| Leisure and hospitality                     | 14.53  | 2.15 | 51.55          |
| Other services                              | 6.64   | 1.29 | 52.70          |
| Public administration                       | 16.67  | 2.20 | 45.94          |
| Labor market overall                        | 8.61   | 1.35 |                |

Notes: Per 100,000 workers. Rates are calculated by the author from EEOC Charge Data FY2000–FY2004 based on claims by individuals in which at least one issue was sexual harassment and in which industry is reported. Employment data calculated using 2004 Current Population Survey.

For the labor market sample that I analyze, the overall sexual harassment rate is 8.61 per 100,000 workers for females, and 1.35 per 100,000 workers for males. Female employees are consequently 6.4 times more likely to file a sexual harassment claim. Because of the small number of sexual harassment claims brought by men, the ensuing analysis focuses on sexual harassment rates based on claims brought by women, as these rates are more reliable. The overall rates of sexual harassment claims are in the same general range as the frequency of workplace fatality rates, of about 4 in 100,000,<sup>85</sup> which is about half the sexual harassment claim rate for female employees.

<sup>84</sup> This table appears in Hersch, *supra* note 78, at 632.

<sup>85</sup> See *Census of Fatal Occupational Injuries Summary, 2017*, U.S. DEP'T OF LAB. (Dec. 18, 2018, 10:00AM), <https://www.bls.gov/news.release/cfoi.nr0.htm> [<https://perma.cc/T7B8-DLMA>].

### C. Wage Equations

The next step is to merge the sexual harassment risk measures with data that includes wage information and detailed information on other characteristics associated with wage in order to isolate the influence of sexual harassment risk on wage.<sup>86</sup> In particular, I take into account detailed information on education, race, ethnicity, type of employer, union status, marital status, location, and potential work experience. Importantly, I also take into account the percent female in detailed industry and occupation; doing so accounts for the higher risk of fatality and injury in male-dominated industries and occupation.

Using these data, I then estimate conventional log wage regressions. These wage equation estimates are reported in my earlier work.<sup>87</sup> The incremental effect on wage of a 1-in-100,000 increase in risk is 0.18 percent.<sup>88</sup> For women, the log wage difference between a job with zero sexual harassment risk and a job with the gender-specific mean sexual harassment risk is 0.0155, or about 25 cents per hour for women. With annual work hours of 2,000, this rate of compensation would be \$500 annually for women. This value represents the average hazard pay premium for being in a job with average risk of sexual harassment relative to a risk-free job.<sup>89</sup> Importantly, because this estimated risk premium is derived from labor market information on individual workers, this pay premium reflects the value that the workers themselves place on the risk of sexual harassment at their workplace that is severe enough to result in an EEOC claim.

## V. THE VALUE OF STATISTICAL HARASSMENT (VSH)

To date, the only mechanism employed by organizations in efforts to deter workplace sexual harassment is education and reporting and mediating systems. When these approaches fail, the remaining recourse for victims is to file a charge with the EEOC. Although the EEOC can, and does, litigate some claims, this is quite rare, and most claims will be filed and litigated privately.

There is no apparent connection between damages awards at their current level and efficient deterrence, and in fact, to my knowledge, no

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<sup>86</sup> The standard wage equation specification used in the hedonic wage literature is of the following form:

$$\ln(\text{wage}) = \alpha + \beta \text{Risk} + X\gamma + \varepsilon$$

where *wage* is the hourly wage rate; *Risk* is a measure of job risk (in this case the risk of sexual harassment); *X* is a vector of explanatory variables such as years of education;  $\alpha$ ,  $\beta$ , and  $\gamma$  are parameters to be estimated; and  $\varepsilon$  is a random error term.

<sup>87</sup> Hersch, *supra* note 78; Hersch, *supra* note 81.

<sup>88</sup> Hersch, *supra* note 81, at 124–25.

<sup>89</sup> Hersch, *supra* note 78, at 633.

one has suggested using damages awards for the purpose of efficient deterrence of sexual harassment.<sup>90</sup> But thwarting the current approaches to curb sexual harassment is the lack of any monetary basis for setting awards for efficient deterrence.

My proposal is to use the hazard pay premium described in Section IV for sexual harassment risks to establish the efficient deterrence value of awards. Specifically, following the same rationale by which the value of a statistical life can serve as the appropriate deterrence measure for fatality risks, I propose using a measure that I term “the value of statistical harassment,” (VSH) to set the total damages amount in sexual harassment cases in order to provide optimal deterrence.

This hazard pay premium has an important implication in terms of the rate at which workers are compensated for the risk. To provide a numerical illustration, suppose that a group of 100,000 workers each receive an extra \$50 to incur a sexual harassment risk of 1/100,000. Then together this group will experience one expected case of sexual harassment (i.e., 100,000 workers  $\times$  1/100,000 risk) and will receive \$5 million in compensation (i.e., 100,000 workers  $\times$  \$50 per worker). In this example, \$5 million is the amount of money that workers receive for facing risks that lead to one expected case of sexual harassment to the group. By analogy to the approach in the economics literature for the value of a statistical life, this amount represents the value of statistical harassment (VSH).<sup>91</sup>

The procedure for calculating the VSH directly from the empirical estimates requires information on the effect of the sexual harassment risk on the log of wages (0.0018), the average hourly wage rate (\$16.33 for women), the number of hours in a full-time work year (based on the assumption of 50 weeks per year at 40 hours per week), and any adjustment for units (in this case the risk is per 100,000 workers).

If we denote the effect of fatality rates on the log of wages by  $b$ , then parallel to the calculation of the VSL,<sup>92</sup> the VSH is calculated as

$$VSH = b \times \text{average wage} \times 2000 \times 100000.$$

Following this procedure yields VSH estimates of \$5.88 million in 2005 dollars. Converted to 2017 dollars, the VSH is equal to \$7.6 mil-

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<sup>90</sup> See, e.g., Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249 (2014) (making it clear that the cap was not intended for deterrence and citing in her footnote 342 some articles critiquing the cap because of inadequate deterrence).

<sup>91</sup> See Elissa Philip Gentry & W. Kip Viscusi, *The Fatality and Morbidity Components of the Value of Statistical Life*, 46 J. HEALTH ECON. 90, 93 (2016) (Equation 10).

<sup>92</sup> See *id.*

lion. This value reflects the additional amount that is generated by sexual harassment claims filed with the EEOC. It will consequently capture both the effect of the harassment claim itself but will also embody the influence of all harassment incidents in that industry that are correlated with the claim.

#### VI. USING THE VALUE OF STATISTICAL HARASSMENT FOR EFFICIENT DETERRENCE

To understand how the VSH can be used to set damages for efficient deterrence of sexual harassment, it is useful to review the role of the VSL in promoting deterrence of workplace fatalities. As noted above, government agencies use the VSL to establish the value of preventing one expected death, which corresponds to the value of deterring behavior that leads to one expected death. By providing a measure of the extra compensation workers receive for fatality risk, the VSL derived from the labor market establishes both the value of safety to the worker and the price of safety for the injurer. Specifically, it represents the amount of money a firm should be willing to spend to reduce the risk of fatality. This tradeoff between safety and money is common to many other market contexts. Consumers choose between cars with more or less safety equipment, with prices reflecting the higher costs to manufacturers of greater safety equipment as well as how much consumers value the safety improvement. Manufacturers respond to workers' tradeoffs by producing cars with less safety equipment that sell at lower prices and with more safety equipment that sell at higher prices. If car manufacturers find no market for their cars at a particular safety-price combination, they will alter the mix to meet consumer demand.

Continuing the analogy of the value of a statistical life to the sexual harassment situation, the VSH establishes the value of avoiding harassment to female workers and the price of reducing harassment to employers. Setting damages in EEOC claim cases equal to the VSH will send the appropriate price signal to firms of the economic value of harassment risks to workers; such damages would represent the amount of money employers should be willing to spend to reduce the risk of sexual harassment at their organization. As noted above, the VSH corresponds to the value of all sexual harassment incidents that women experience or are aware of at their workplace so that it will have a broad deterrent effect and is not limited to the single case in which the claim has been brought. My proposal is that for efficient deterrence, the sum of compensatory and punitive damages should equal the VSH. Unfortunately, damages are capped at a level that bears no relation to the value of VSH so that the statutory cap would need to be removed or at least increased to \$7.6 million.

This proposal also implicitly embodies the key concepts of the economic theory of deterrence. It not only recognizes the fact that sexual harassment involves irreplaceable nonmonetary harms, but it also embodies the broader incidence of sexual harassment at the workplace.

The advantage of the VSH approach is that it implicitly incorporates aspects of the probability of detection in that an entire toxic work environment will affect the VSH to the extent that the employees are aware of this environment. While the risk measure pertains to the risk of EEOC charges, this measure will likely be correlated with cases of sexual harassment that do not lead to charges. The VSH measure consequently captures both the value attached to the risk of an EEOC charge and will also capture the valuation of other harassment incidents that are known to workers but which do not lead to an EEOC claim.

#### CONCLUSION

Workplace sexual harassment is a widespread problem that has proven immune to legislation and workplace policies designed to prevent such behavior. It is costly to victims. And, although it is also costly to organizations, I demonstrate in this Article that it is not costly enough to deter workplace sexual harassment: The substantial market pressures that organizations currently face have proven inadequate as a deterrence. My policy proposal is to raise damages awards to a level that will properly incentivize organizations to eliminate sexual harassment. To establish the necessary award amount, I draw on labor market data documenting the premium workers receive for bearing the risk of sexual harassment. Using this pay premium, I calculate the value of statistical harassment, which establishes the award level that will correctly provide incentives to organizations to deter workplace sexual harassment. To implement this proposal, the statutory cap on damages must be removed so that the penalties can reach a level sufficient to deter sexual harassment and to reflect the value of a reduction in harassment to the women who are being protected. The recent #MeToo movement has raised visibility about the prevalence and severity of sexual harassment and may lead to further deterrence by raising the probability that sexually harassing behavior will be reported and lead to pertinent legal sanctions.



