DISPARATE TREATMENT: HOW INCOME CAN AFFECT THE LEVEL OF EMPLOYER COMPLIANCE WITH EMPLOYMENT STATUTES

*Philip L. Bartlett II**

INTRODUCTION

The remedies available under Title VII to victims of sexual harassment are designed to encourage employers to take preventive action and develop grievance procedures to deal with sexual harassment when it occurs.[1] When employers fail to do so, they are subject to liability under the statute.[2] Aggrieved employees can sue their employers for monetary awards up to a statutory cap, which depends on the size of the employer.[3] Sexual harassment, however, continues to be prevalent in the American workplace today.[4] Numerous studies

* John M. Olin Fellow in Law, Economics, and Business. J.D., Harvard Law School; B.A., Tufts University. The author thanks Professor Christine Jolls for her guidance and support, and Ryan Johnson for his helpful comments. Financial support from the Olin Center for Law, Economics, and Business is gratefully acknowledged.

1. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998); Lynn Evans, Comment, *Confusion in the Court: Sexual Harassment Law, Employer Liability, and Statutory Purpose*, 21 LOY. L.A. INT'L & COMP. L.J. 521, 547 (1999); Christopher M. O'Connor, Note, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV. 501, 540 (1999); *The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 359, 366 (1999) [hereinafter *Leading Cases*].

2. 42 U.S.C. § 1981a(a)(1) (1994).

3. *Id*. § 1981a(b)(3).

4. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999) [hereinafter ENFORCEMENT GUIDANCE], http://www.eeoc.gov/docs/harassment.html ("Harassment remains a pervasive problem in American workplaces."); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FL. ST. U. L. REV. 959, 960 (1999) ("Empirical evidence indicates that discrimination in employment, while not as overt as in the past, is nevertheless quite prevalent."); Rosemary A. Macero & Lucy Halatyn, *Employer Beware: Do You Have Insurance Coverage for Employment Claims?*, *in* INSURANCE LAW 1999, at 399, 402 (PLI Litig. & Admin. Practice Course, Handbook Series No. 602, 1999) ("Employment discrimination and other wrongful employment practices occur everyday."); *cf.* Deborah Zalesne, *Sexual Harassment Law: Has It Gone Too Far, Or Has the Media?*, 8 TEMP. POL. & CIV. RTS. L. REV.

examining a wide array of occupations all lead to the conclusion that sexual harassment is common.[5]

This Article introduces economic analysis to consider why the deterrent purposes of employment statutes such as Title VII may not have been fulfilled. In particular, the Article examines how the expected cost of complying with statutes, and hence the amount of money a firm will be willing to spend to prevent violations, may vary. Interestingly, it is often assumed in the employment law context that the potential for liability should be sufficient to induce compliance[6] without a thorough analysis of the costs and benefits of compliance.

Parts I, II, and III of the Article focus on the sexual harassment context, through which I provide an economic framework for analyzing how employers make decisions regarding the appropriate level of preventive measures to take. My analysis suggests that the expected cost of sexual harassment may be substantially less for low-income employees than for high-income employees, leading rational employ-

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351, 352 (1999) ("[R]ecent events, both in the courts and outside, have brought the term 'sexual harassment' into our vernacular and people are more conscious than ever about their interactions with others in the workplace. . . . We have finally progressed to the point where sexual harassment is taken seriously.").

5. *See, e.g.*, Wayne T. McGaw, *Investigating Sexual Harassment: A Practical Primer for the Corporate Lawyer*, 40 LOY. L. REV. 97, 102 (1994) ("Studies have shown that sexual harassment is pervasive, particularly in male-dominated occupations recently entered by females, such as the construction, forestry, and automobile industries. Sexual harassment is not limited to one strata of society, however, studies and case law are replete with examples of sexual harassment from the assembly line to the executive board room and involving the educationally accomplished as well as the educationally deprived."); Claudia Withers, *Preventing Sexual Harassment in the Workplace*, *in* AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS 1998, at 109, 111 (PLI Litig. & Admin. Course, Handbook Series No. 587, 1998) ("[A s]urvey by U.S. Merit Systems Protection Board in 1994 of sexual harassment in federal government indicated that 44% of the women and 19% of the men questioned had experienced some form of harassment. These percentages [are] consistent with studies conducted in 1980 and 1988. (Definition of harassment used in 1994 survey was broader than legal definition.) [A s]tudy released in 1990 of sexual harassment in the military revealed that two of every three women, or about 64 percent, said that they had been sexually harassed either directly or in more subtle ways like catcalls, dirty looks and teasing. Seventeen percent of men surveyed said that they had been harassed by male or female colleagues."); Evans, *supra* note 1, at 525 n.20 ("According to a recent study, nearly 75% of medium and large firms reported sexual harassment claims in 1996—compared to a tally of just over 50% five years earlier." (quoting WILLIAM PETROCELLI & BARBARA KATE REPA, SEXUAL HARASSMENT ON THE JOB: WHAT IT IS & HOW TO STOP IT 3/35 (1998))).

6. *See* Kimberly J. Houghton, *The Equal Pay Act of 1963: Where Did We Go Wrong?*, 15 LAB. LAW. 155, 158 (1999) ("Since the costs of such gender bias in dealing with lawsuits, governmental reporting and complaints, and lost work production would ultimately would [sic] be larger than any 'savings' generated by paying women less than men, one would surmise that even the threat of litigation under these regulations would be ample encouragement to comply.").

ers to utilize fewer preventive tools to combat sexual harassment among low-income workers. The disparate levels of management effort in preventing harassment for low- and high-income employees result primarily from the fact that low-income employees are less likely to sue, although such trends may be exacerbated if remedies are larger for higher-income employees or if the probability of a plaintiff succeeding in a lawsuit is positively correlated with income. An additional implication of the analysis is that a firm may rationally employ different levels of prevention and redress for different divisions if they are comprised of workers of differing incomes. The analysis also raises the question of whether distortions result from the high marginal cost of certain workers—namely, those employees who push a firm from one statutory cap to a higher one. Part III discusses potential ways of increasing the expected cost of harassment for low-income employees.

Part IV of the Article looks at three other areas of employment law—the Fair Labor Standards Act, the Family and Medical Leave Act, and the Worker Adjustment and Retraining Notification Act—and discusses how the expected cost of violating those statutes is also likely to vary with income. In each of these statutes, the remedy is dependent in large part on the income of the worker. Moreover, each of these statutes raises the marginal cost of hiring workers that push the firm across their threshold of applicability, thereby potentially distorting firm behavior. For each statute, I briefly discuss some ways to remedy the problems identified.

I
FRAMEWORK

A. Overview of Harassment

Sexual harassment is generally broken down into two major categories: quid pro quo and hostile environment. Although the United States Supreme Court has said that these categories are malleable and that courts should not be constrained by them,[7] they are useful in delineating the liability imposed for different types of harassment. Quid pro quo sexual harassment occurs when the harassing conduct results in an adverse employment action.[8] An employer's liability for quid

7. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998).

8. To establish a prima facie case of quid pro quo sexual harassment, a plaintiff must show (1) she is a member of a protected group; (2) there was an unwelcome sexual advance; (3) an adverse employment action was taken; (4) a causal link between the rebuffed advance and the adverse employment action, which was a tangible term of employment; and (5) the employer's responsibility either through affirmative

pro quo sexual harassment is often considered strict,[9] as the plaintiff does not need to establish that her employer had notice,[10] and liability can be avoided only if the employer can establish that the adverse employment action was the result of a legitimate, nondiscriminatory motive.[11]

Hostile work environment sexual harassment refers to a sexually charged work environment, created by either supervisors or non-supervisors. A hostile environment may result from unwelcome sexual advances, gender-based animosity, or sexually charged workplace behavior.[12] An employer is liable for a hostile environment created by a supervisor, though an affirmative defense is available. The affirmative defense was defined by the United States Supreme Court as including two elements: an employer must show "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[13] This affirmative defense is not available for quid pro quo harassment. The rationale behind this distinction is that it encourages employers to identify harassment and take action to remedy it before adverse employment actions are taken.[14] Allowing an employer to avoid liability by exercising reasonable care also corresponds with Title VII's purpose of encouraging preventive measures and grievance procedures.[15]

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misconduct or ratification of an individual's illegal conduct. Richard S. Gruner, *The Impact of Compliance Programs on Employers' Sexual Harassment Liability*, *in* 1 CORPORATE COMPLIANCE 1999, at 173, 180 (PLI Corp. Law & Practice Course, Handbook Series No. 1120, 1999) (citing Henson v. City of Dundee, 682 F.2d 897, 903–05 (11th Cir., 1982)).

9. *See* Macero & Halatyn, *supra* note 4, at 407 ("When an employee is subjected to quid pro quo harassment by a supervisor, the employer will be held liable for such actions." (citing Amanda D. Smith, Note, *"Supervisor" Hostile Environment Sexual Harassment Claims, Liability Insurance and the Trend Towards Negligence*, 31 U. MICH. J.L. REFORM 263, 267 (1997))); Evans, *supra* note 1, at 533–34 ("Where the harassing conduct results in a tangible job detriment, that liability may be considered strict." (citing Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998))).

10. *See* Gruner, *supra* note 8, at 181 ("The adverse action itself is deemed affirmative misconduct"); Macero & Halatyn, *supra* note 4, at 407 ("The employer will be liable even in situations when the employer is unaware of the sexual demands."); Evans, *supra* note 1, at 547 ("Note, however, that lack of knowledge is no longer relevant [after *Faragher* and *Burlington Industries*].").

11. *See* Gruner, *supra* note 8, at 181.

12. *See id*. at 182.

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

14. *See* Gruner, *supra* note 8, at 177.

15. *See, e.g.*, O'Connor, *supra* note 1, at 506.

The affirmative defense is thought to provide a clear incentive to employers to develop a sexual harassment policy and procedures for dealing with harassment if it occurs.[16]

An employer may also be held liable for hostile environment sexual harassment caused by its employees. While the Supreme Court has not directly addressed this issue, the Court has indicated that agency principles should be applied to actions by employees.[17] More specifically, an employer may be held liable where an employee used apparent authority or was aided in accomplishing the harassment by the agency relationship.[18] To establish liability, a plaintiff must show that the employer knew or should have known of the sexual harassment and that the employer failed to take prompt and effective remedial action.[19] The requirement of knowledge will not shield an employer who remains willfully blind to harassment; if there is no reasonable way for an employee to complain of harassment, liability will be imposed without actual knowledge.[20] To constitute prompt and effective remedial action, an employer's action must have been reasonably calculated to end the harassment and, where appropriate, should include disciplinary action.[21]

B. Responding to Incentives

In determining whether the goals of Title VII have been achieved, it is imperative to analyze what incentives employers have and the extent to which they are responding to the liability structure developed by Congress and the judicial branch. One would expect

16. After *Faragher* and *Burlington Industries*, "the message is now clear: the employer who wishes to protect his interests will promulgate an anti-harassment policy with a well-defined set of complaint procedures and communicate both to his employees." Evans, *supra* note 1, at 547.

17. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (declining to issue definitive rule on employer liability for hostile environment sexual harassment, but indicating that courts should look to agency principles for guidance).

18. *See Burlington Indus.*, 524 U.S. at 759 (determining that "aided in the agency relation" standard was appropriate in that case).

19. *See* Macero & Halatyn, *supra* note 4, at 409–10; *see also* Gruner, *supra* note 8, at 86 (indicating that there are five elements to plaintiff's prima facie case: "1. The employee belongs to a protected group, 2. The employee was the subject of unwelcome sexual harassment; 3. The harassment was based on sex; 4. The sexual harassment affected a term, condition or privilege of employment; 5. The employer knew or should have known of the harassment and failed to take remedial action." (citing Jones v. Flagship Int'l, 793 F.2d 714, 719–20 (5th Cir. 1986))).

20. *See* Gruner, *supra* note 8, at 186 (citing Perry v. Ethan Allen, Inc., 115 F.3d 143 (2d Cir. 1997)).

21. *See id.* at 187 (citing Yamaguchi v. United States Dept. of the Air Force, 109 F.3d 1475 (9th Cir. 1997); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991)).

employers to take preventive measures so long as the cost of those measures is less than the expected cost of discrimination. From this perspective, what is important is not the total cost of prevention methods, but rather the marginal cost of each additional preventive tool. Given the wide array of options available to an employer seeking to avoid liability, an employer can be thought to move along a sliding scale until the point where utilizing an additional tool will not be cost effective.

In discussing this research topic with others, the opinion that employers are not so "cold and calculating," but rather motivated by a desire to see an end to sexual harassment, was repeatedly presented. While it is likely that the very existence of sexual harassment laws will change societal norms, leading employers to want to minimize or eliminate sexual harassment,[22] they may be put at a competitive disadvantage for doing so where the costs of discrimination are less than the costs of prevention.[23] For example, suppose there are two employers producing competing products with labor that is similar (similar number of employees, similar demographics, similar skills, etc.). If each company faces costs of $100 each year from sexual harassment, and preventive measures would cost each firm $150, the company that does not take preventive measures will make $50 a year more than the other or be able to sell its product for less money, thereby increasing its market share and potentially driving the other firm out of business.

A second response is that, for a large firm, the extent of a problem will be signaled by the liability the firm faces if that problem is not resolved. Consider a large corporation where the CEO and division managers are being pressured to maximize shareholder profits. The CEO, who is not directly involved in the day-to-day operations of each division, may not realize that sexual harassment is a significant

22. *See* Bisom-Rapp, *supra* note 4, at 987 ("Organizations are complex social actors that react not only to efficiency concerns, but also to society's cultural norms." (citing Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 L. & SOC. INQUIRY 903, 918 (1996))); Zalesne, *supra* note 4, at 352 ("Society's awareness about the prohibitions against sexual behavior in the workplace has led to widespread concern about avoiding liability. This has resulted in reforms of company policies and changes in employer and employee behavior in the workplace." (footnote omitted)).

23. *See* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 535 (1992) ("To achieve any deterrence, the employer must lose, rather than gain, when it violates those rights. Many employers will, of course, obey the law out of a sense of social and moral obligation, but without a deterrent factor they will be placed at a competitive disadvantage by those who value profits over good citizenship.").

problem if the firm is not being subjected to substantial liability.[24] Moreover, managers concerned with conforming to legal standards may choose the least intrusive means in order to maintain flexibility and minimize costs.[25] This is not to say that firms or managers consciously subvert the rights of employees, but rather that the level of preventive measures is likely to be impacted by the perceived costs of harassment.[26] Indeed, if there are few complaints about sexual harassment or few losses in court, a firm might rationally believe that sexual harassment is being adequately addressed even when it is not.

The key is that it is rational for organizations to take preventive measures only to the extent that doing so saves more than it costs. To the extent that harassment in the workplace lowers morale or increases employee turnover, these negative effects will be taken into account as a cost of discrimination. When all costs of discrimination and all costs of prevention are considered, employers are expected to choose the combination of preventive tools that maximizes profits. Analyzing the effectiveness of Title VII, therefore, involves an investigation into whether the costs of discrimination outweigh the costs of preventing harassment and instituting effective grievance mechanisms.

C. Types of Prevention and Remedial Actions

Prevention and correction strategies can be broken into four main categories: (1) initiating and distributing a policy; (2) training; (3) monitoring; and (4) implementing response mechanisms. Commentators and practitioners recommend a thorough program in all categories

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24. *See* Chris Guthrie, *Better Settle than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 82 ("Institutional litigants, like insurance companies, governmental bodies, and Fortune 500 corporations, are generally repeat players with active caseloads who are likely to view litigation primarily as a financial matter, while individual litigants are often one-shot players who are more prone to view litigation as a financial *and* emotional matter." (citing Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974))).

25. For a more detailed analysis of the competing pressures facing middle managers and other executives that lead organizations to address sexual harassment in ways that are minimally intrusive to the status quo, see generally Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 1 (1999).

26. Here I echo the sentiments of Professor Bisom-Rapp: "This Article does not seek to portray employers . . . as villainous characters who are out to subvert civil rights mandates . . . . Discrimination is a subtle, complex, and often unconscious phenomenon. Moreover, employment decision making can be a complicated process subject to a broad range of influences, some legitimate, some illegitimate." Bisom-Rapp, *supra* note 4, at 964–65 (footnote omitted).

in order to avoid liability.[27] Employers may in fact engage in each of the four prevention and correction strategies in order to establish the basis for an affirmative defense to a harassment claim.[28] There are, however, different magnitudes within each category. One way to think about the problem, then, is to assume that employers will avail themselves of a preventive or remedial tool within each category, but have a range of options to choose from. Alternatively, the categories may be thought of as falling along a linear scale, with employers adding programs to increase preventive efforts. For the purpose of my analysis, it does not matter whether there is a linear scale of options or whether there is a scale within each category. The key is that employers have options with varying costs.

The most basic level of prevention is the creation and distribution of a policy prohibiting sexual harassment. The purpose of the policy is both to prevent harassment and to limit liability if harassment does occur.[29] A policy is relatively inexpensive to produce (it is a one-time fixed cost) and provides the employer with an opportunity to communicate to employees that sexual harassment is not acceptable. It seems logical, then, that if an employer is going to undertake any type of prevention, it will begin with creating a policy. Employers may, however, differ as to how much they are willing to spend to develop a policy, which in turn could affect the policy's thoroughness.

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27. *See, e.g.*, Gruner, *supra* note 8, at 177; McGaw, *supra* note 5, at 104. Based on *Meritor*, *Harris*, and the EEOC guidelines, the employer should attempt to prevent sexual harassment on the job by: (1) developing a corporate policy statement defining and prohibiting sexual harassment; (2) regularly training management on the law and the company's policy; (3) orienting new employees on the prohibition against sexual harassment; (4) establishing a sympathetic investigative procedure; (5) setting out progressive discipline for breach of the policy; and (6) monitoring the policy for effectiveness.

Id.; O'Connor, *supra* note 1, at 540–41.

28. There might be a minimum bundle of tools that will insulate an employer from liability, even though it is not composed of the most effective options. For example, the New Jersey Supreme Court held that there were five elements of an effective prevention and detection strategy: (1) policies; (2) structures for reporting; (3) training; (4) monitoring; and (5) commitment. Anthony J. Cincotta & David G. Uffelman, *The Fifth Element: Responding to a Sexual Harassment Allegation*, N.J. LAW., Apr. 1999, at 39, 39 (citing Lehman v. Toys 'R' Us, Inc., 626 A.2d 445, 463 (N.J. 1993)). If this is the case, employers facing costs of harassment exceeding the cost of this minimum bundle will utilize these tools, while employers with lower costs of harassment will not. What is more likely, I think, is that a minimum bundle might reduce the probability of facing liability as it is more likely an employer can establish the affirmative defense, but additional steps could reduce that risk further.

29. *See, e.g.*, Withers, *supra* note 5, at 115.

Once the policy is created, distributing the policy has a very low marginal cost. It could, for example, be provided to employees on their first day of work, at the beginning of a shift, or through interoffice mail. Despite this low marginal cost, however, it should not be assumed that any employer who creates a policy will in fact distribute it to everyone. The City of Boca Raton, for example, failed to distribute its sexual harassment policy to all of its lifeguards.[30] An employer may also choose to review the sexual harassment policy and make changes periodically or regularly remind employees of the policy.[31] These additional steps bear additional costs, becoming increasingly expensive with the frequency and thoroughness of communication and review efforts.

Training programs are recommended prevention tools, but they may vary significantly across firms with respect to scope, frequency, and sophistication. The New Jersey Supreme Court suggested that training should be "'mandatory for supervisors and offered to all other members of the organization.'"[32] Training might also be provided to the individuals responsible for investigating claims of sexual harassment[33] to ensure a speedy resolution and to ensure that all parties to a complaint feel they have been fairly treated. Some employers, fearful of liability for a hostile environment created by non-supervisors, might require training for all employees.[34] Training may take several forms, from simply reviewing the sexual harassment policy[35] to providing sensitivity training to supervisors to help them better deal with problems that arise and to help avoid inadvertent harassment. The more employees who are trained and the more frequently training is repeated, the more costly it will be since fewer hours will be devoted to creating a work product. The marginal benefit of training may also decline, particularly as the frequency of training increases.

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30. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 782 (1998).

31. Many commentators recommend that employers regularly communicate the policy to employees and continually evaluate and revise policies. *See, e.g.*, Withers, *supra* note 5, at 119; O'Connor, *supra* note 1, at 540–41.

32. Cincotta & Uffelman, *supra* note 28, at 39 (citing Lehman v. Toys 'R' Us, Inc., 626 A.2d 445, 463 (N.J. 1993)).

33. According to EEOC guidelines, "the investigator should be well trained in the skills required for interviewing witnesses and evaluating credibility." George L. Lenard & Christopher A. Ott, *Recent Developments in Sexual Harassment Law*, 56 J. MO. B. 84, 92 (2000).

34. "[A]n effective training program is key to any effort to eliminate sexual harassment from a particular workplace. Training should be continuing and directed to both management and non-management employees." Withers, *supra* note 5, at 115.

35. "In addition to explanation of the policy itself, such training should include clear guidance as to the specific types of conduct that are prohibited." Lenard & Ott, *supra* note 33, at 91.

Monitoring the effectiveness of a sexual harassment policy may take several forms. Employers might scrutinize any adverse employment actions to ensure that the company is complying with the sexual harassment policy.[36] Another possibility is periodic "audits," which involve "'systematic, documented, periodic and objective review . . . of facility operations and practices related to meeting [legal] requirements.'"[37] The New Jersey Supreme Court defined monitoring as having "mechanisms to provide feedback as to whether the policies and complaint-reporting structures are trusted by the workforce."[38] These different forms of monitoring will bear different costs, depending on the scope of their application and whether new employees or lawyers are necessary for their implementation. An employer must decide which monitoring procedures to use and whether monitoring is necessary in all departments of a firm or just for certain classes of workers. It is likely that different monitoring procedures will be appropriate in different work environments—if, for example, one division of a company has high turnover and another does not.

Finally, in order to avail itself of the affirmative defense to sexual harassment, an employer must establish and maintain grievance procedures.[39] These grievance procedures, for example, might allow an employee to bypass her direct supervisor to lodge a complaint.[40] Once a complaint is filed, an employer should respond promptly to prevent quid pro quo harassment and demonstrate its commitment to address sexual harassment. There may, however, be wide variation with respect to how employers choose to investigate claims of sexual harassment.

An employer must first decide who should conduct the investigation.[41] Employers may even choose to have two investigators,[42] per-

36. Gruner suggests such review for "impending adverse employment actions initiated by low level supervisors." Gruner, *supra* note 8, at 200.

37. *Id*. at 212 (alterations in original) (quoting Environmental Protection Agency, Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (July 9, 1986)).

38. Cincotta & Uffelman, *supra* note 28, at 39 (discussing Lehman v. Toys 'R' Us, Inc., 626 A.2d 445 (1993)).

39. *See* Gruner, *supra* note 8, at 193–94; Cincotta & Uffelman, *supra* note 28, at 39.

40. *See* Gruner, *supra* note 8, at 201 (asserting that this may be required under *Faragher*).

41. "The person who should investigate the allegation is the person who is best suited to investigate, identify and eliminate sexual harassment. The selected individual should be skilled in interviewing witnesses and gathering evidence, including relevant documents. The investigator should be impartial and thorough." Cincotta & Uffelman, *supra* note 28, at 40.

haps one male and one female.[43] In some circumstances, employers will not have internal employees who have the qualifications or objectivity necessary to conduct the investigation,[44] and may need to hire a lawyer or another person familiar with sexual harassment law. Once the investigators have been selected, the employer will have to decide how the investigation should be carried out. There are varying levels of thoroughness and documentation that could be chosen, with varying price tags. The remedial measures taken in the event that sexual harassment has occurred may also vary widely. An employer may face a choice of putting employees on different shifts at the same location (where their paths may still cross), transferring an employee across the country (a more costly proposition), or firing the harassing employee, risking a lawsuit for wrongful discharge.[45]

D. Expected Cost of Sexual Harassment

It is often pointed out that sexual harassment can be extremely costly to an organization because of the potential for a large verdict, and therefore must be avoided.[46] Organizations, however, only face the *risk* of a large verdict if sexual harassment occurs. Not every victim will sue, and not every victim who does sue will win. A firm analyzing the potential costs of harassment, therefore, will take into account a variety of factors, such as the size of the remedy, the probability of being sued, litigation costs, and the risk of losing a lawsuit. An employer will also consider other costs of harassment, such as lower productivity and increased turnover. Taking all of these factors into account, the expected cost of sexual harassment to a firm can be expressed in the following equation:

$$Exp.\ Cost = [Pr(suit)(\#empl.)][Pr(loss)(remedy)] + Pr(suit)(\#empl)(legal\ expenses) + a$$

42. *See id.* (asserting that use of two investigators is preferable where it would not impede prompt and thorough investigation).

43. *See* McGaw, *supra* note 5, at 106 (recommending this approach).

44. *See id.*; Cincotta & Uffelman, *supra* note 28, at 41.

45. McGaw, *supra* note 5, at 108 ("Unfortunately, an incomplete or inaccurate investigation may result in a suit by the alleged harasser for wrongful termination, defamation, invasion of privacy, intentional infliction of mental distress, or even violations of the accused's rights under Title VII."); O'Connor, *supra* note 1, at 542 ("An employer who summarily discharges an alleged discriminator or engages in a pattern of activity that is defamatory in nature may face a lawsuit by the alleged harasser.").

46. *See, e.g*, Gruner, *supra* note 8, at 176 n.2 ("Even a single sexual harassment suit may produce substantial liability expenses in a large organization."); William A. Blue & Jill Stricklin Cox, *New Approaches to Harassment Claims*, FED. LAW., Aug. 2000, at 34, 34 ("Claims of harassment have continued to proliferate, often resulting in large verdicts against employers and accused harassers.").

1. Probability of an Employee Suing

One of the most significant factors in determining an employer's potential liability for sexual harassment is the likelihood that an employee will seek damages. If an employer knows in advance that any victim of harassment will sue, then the expected cost of sexual harassment would be the sum of the expected litigation costs, the productivity losses, and the anticipated remedy (based on damages permitted under Title VII), discounted by the probability of each plaintiff being successful. Conversely, if an employer expects no one to sue if harassed, then the expected cost of harassment would fall to "*a*," which represents the productivity and other losses associated with harassment, as legal liability would be zero.

The direct relationship between the expected cost of harassment and the probability of suit suggests that the level of enforcement may not be the same as Congress intended.[47] If, for example, Congress anticipated that all victims of sexual harassment and other forms of discrimination would sue, then a probability of suit less than one would lead to less enforcement than Congress intended. Thus, if Congress overestimated or underestimated the number of employees that would file suit if harassed, there could be too much or too little enforcement.

In considering what the probability of suit for various types of employees might be, it is important to consider how this factor is determined. The probability of an individual employee suing is determined by the probability of success, the potential remedy, and the cost of suing. Consider an employee who has been harassed and is considering bringing suit. For a lawsuit to be worthwhile, the cost of litigation must be less than the expected recovery. The expected recovery, in turn, is determined by the probability of success times the potential remedy. If, for example, the costs of litigation total $100, the probability of success is 50%, and the damages if successful would be $100, then an employee would not sue because the expected value of

47. One commentator suggests this is the case, saying:

> The efficacy of Title VII depends in part on the willingness and ability of individuals to bring private suits challenging discriminatory employment practices. When private and social incentives to sue differ, the system may fail to produce the optimal amount and composition of litigation. If victims do not sue, employers have less economic incentive to comply with the statute.

Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 413 (1993) (footnote omitted).

suing equals minus $50.[48] This simplistic example does not consider factors such as feelings of vindication if successful, a better working environment resulting from an injunction, or the emotional difficulties of going through a trial.[49] An employee would be expected to weigh these considerations and include them in her decisionmaking. Plaintiffs' lawyers considering taking a case on a contingency-fee basis, however, will carefully weigh the three factors used in the example, placing much less emphasis on emotional costs and rewards than an individual employee would.[50]

2. Expected Number of Harassed Employees

In assessing its potential liability, a firm will need to consider the number of employees likely to be victims of harassment. Knowing that there is a 50% chance of an employee filing suit alone does not tell you how many suits, and therefore how much in damages, the employer will face. To determine the number of expected victims of harassment, an employer would need to know which employees are at risk and the likelihood of those at risk being harassed. For example, if an employer has ten employees all working under a single supervisor and it knows that on average 20% of employees will be harassed and that there is a 50% chance of each employee suing if harassed, then an employer would expect to be sued once.

For a more complex example, consider a firm with one hundred male and one hundred female employees. If all supervisors are men, an employer might consider the at-risk population to be the women. Suppose that women face a 10% chance of being subjected to quid pro quo sexual harassment and a 50% chance of being subjected to hostile environment sexual harassment. This employer would expect fifty-five women to be victims of harassment.[51]

A critic of this approach might argue that determining this figure could be quite difficult, particularly where there are both male and

48. Expected Outcome = 50% (probability of being successful) x $100 (damages recovered if successful) - $100 (cost of litigation).

49. Indeed, the top priority for many plaintiffs will be simply ending the harassment. *See* Jonathan A. Segal, *Do Ask & Do Tell*, FAM. ADVOC., Winter 2000, at 26, 29 ("Notwithstanding the large verdicts in sexual harassment cases, most employees want only for the objectionable behavior to stop.").

50. For a discussion of the difficulty of obtaining a lawyer, see *infra* Part II.A.3.a.

51. This number can be arrived at one of two ways. To simplify things, one might consider that the ten women subject to quid pro quo sexual harassment are taken out of the pool. This would yield a total of fifty-five expected victims of harassment (10 + (90 x 50%)). To take a different perspective, an employer might expect between fifty (if there is complete overlap) and sixty (if there is no overlap) women to be victims. The average would be fifty-five.

female supervisors and a different composition of workers in different divisions (i.e., the proportion of male to female workers may vary). It is likely, however, that an employer would get a sense of how many sexual harassment claims arise in a given year, either because formal complaints are filed or through word of mouth. An employer might thus arrive at this number through experience over time rather than through the aforementioned equation. Further, if there are changes in the composition of the workforce, or if a new plant is opened with a different gender ratio, an employer would likely extrapolate from its experience to increase or decrease the number of expected victims of harassment—in effect changing the size of the risk pool.

3. Probability That Plaintiff Will Prevail

The probability that those plaintiffs who sue will prevail plays an integral role in determining the extent of a firm's potential liability. The greater the likelihood of success, the greater the expected cost of discrimination. Here, an employer might look to lawyers to find out what percentage of sexual harassment claims result in successful outcomes for plaintiffs. It is important to note that when I speak of plaintiffs prevailing, I do not limit this to affirmative verdicts for plaintiffs. Instead, any settlement a plaintiff receives should be taken into account. This makes sense because an employer is ultimately concerned with how much money, on average, is paid out because of sexual harassment, and not whether the plaintiff receives an affirmative verdict.

When thinking about the probability that an employee will prevail, it is important to consider its relationship to other parts of the expected cost equation. As this term increases, the probability of an employee filing suit will rise because embedded in the employee's decision to file suit is an evaluation of the likelihood of success. It should be noted, however, that an employee's (or plaintiffs' lawyer's) estimation of the probability of success may not always comport with an employer's estimation.[52] What is important here is the employer's estimation of whether plaintiffs will sue (based on experience or general data across employers), and the extent to which the employer anticipates losing at trial or paying a large settlement.

52. *Cf*. Robert S. Adler & Ellen R. Pierce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job Preferences: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1424 (1996) (indicating that employers' fear of lawsuits may be exaggerated given relatively small number of cases actually brought against employers); Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)Rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123, 124 (1992) (suggesting that employers overestimate probability of being subject to workplace defamation liability as result of providing detailed references).

4. Average Remedy if Plaintiff Prevails

As mentioned previously, the average remedy includes not only verdicts for the plaintiff but also settlements that an employer pays out. A firm will be concerned with how much it can expect to pay as a result of claims being filed. If an employer is confident about its ability to settle for significantly less than the statutory caps under Title VII, this will reduce the size of its anticipated liability. The question arises as to the extent Congress considered settlements in establishing the damages permitted under Title VII. If Congress incorrectly estimated the size and number of settlements, the purposes of Title VII may not be adequately fulfilled.

5. Legal Expenses

The expected remedy does not capture the expenses involved every time a plaintiff brings a claim of harassment either to the Equal Employment Opportunity Commission (EEOC) or directly to a court. Employers will also consider these costs in evaluating how expensive sexual harassment is to the firm. To be more specific, such costs could be accounted for by multiplying the probability of suit times the expected number of victims times the average legal expenses.

6. Other Costs of Discrimination

Sexual harassment in the workplace may lead to low morale, reduced productivity, and increased turnover,[53] which are captured in the "*a*" term of the equation. Some studies indicate that for large employers these costs may be quite substantial.[54] The difficulty for an employer is determining whether sexual harassment is taking place, to what extent productivity is suffering, and how many workers are lost as a result. Even if it is discovered that productivity is not as high as it should be or that turnover is increasing, it may be difficult for an employer to isolate a particular cause. This task would be easiest for a firm in existence for a long time before sexual harassment becomes a

53. *See* McGaw, *supra* note 5, at 103.

54. "Studies of federal government workers by the U.S. Merit Systems Protection Board estimate that sexual harassment cost the government $267 million in a two year period in lost productivity and turnover." Withers, *supra* note 5, at 112. "A *Working Woman* study found that sexual harassment costs the typical Fortune 500 company $6.7 million a year in increased absenteeism, employee turnover, low morale, and low productivity." *Id.*

problem at the company, as the resultant costs would be clearly demarcated.[55]

A variety of other factors could also be included in this term. For example, some employers might prefer to have a sexually charged workplace rather than not, or those running the company could be harassers themselves. To the extent an employer places a positive value on sexual harassment occurring, this decreases the "*a*" term. On the other hand, where an employer would prefer the company to be free of any sexual harassment above and beyond the costs previously discussed, the "*a*" term would increase. An example of this scenario would be an employer that takes pride in providing equal employment opportunities to all.

There may be firms for which the "*a*" term is so large that they are already taking maximum preventive measures. For these firms, the first part of the equation is irrelevant as they already have significant incentives to minimize sexual harassment. In fact, we would expect these firms to be taking preventive measures even in the absence of Title VII. One caveat to this inference is that Title VII and the 1991 amendments may have given people a sense of greater entitlement to a work environment free of sexual harassment. When people feel they have an entitlement, they may feel more aggrieved when sexual harassment occurs, thereby increasing productivity and turnover costs. Similarly, employers who place a value on conforming to laws may find harassment more costly. In any event, these firms would not need a threat of damages to take steps to prevent sexual harassment.

E. Anticipated Differences in the Expected Cost of Discrimination

It is possible that there will be different expected costs of harassment for different types of employees. If, for example, blue-collar workers are less likely to sue than white-collar workers, the expected cost of discrimination would be higher for white-collar workers, *ceteris paribus*. This could lead to varying levels of preventive measures for different types of employees. Moreover, if the differences are based on easily detectable characteristics, an employer might calculate its expected cost for each individual class of employees rather than for its workforce as a whole.[56] Many commentators and practi-

55. For example, if a firm has had no significant problem with sexual harassment in the last ten years, but then hires a manager who creates a hostile environment, the corresponding losses in productivity would likely be apparent.

56. This could easily occur where employees in different income groups work in different departments.

tioners suggest preventive measures in a one-size-fits-all manner.[57] Yet, there are many preventive tools available to employers, which can be used to varying degrees depending on the perceived need or cost savings.[58] For example, the manufacturing workers in a firm could be given some level of protection that differs from the protection provided to employees at corporate headquarters.

1. Average Remedy if Plaintiff Prevails

Plaintiffs suing under Title VII can seek both compensatory and, in some cases, punitive damages. To the extent that compensatory damages are based on back pay, one would expect employees with higher incomes to obtain a larger remedy. Other forms of compensatory damages, such as medical bills or pain and suffering, would not be expected to vary with the income of an employee as systematically as the back pay award.[59] A caveat here is that low-income employees may place a smaller value on working in a pleasant environment than higher-income employees.[60] This might be the case if low-income employees are primarily concerned with having a job and feeding their families, and only worry about the job environment as a secondary concern. This could affect the employee's estimation of the value of injunctive relief, leading higher-income employees to view injunctive relief as providing a greater benefit, perhaps, than lower-income employees. Another possibility with respect to injunctive relief is that workers in different occupations, though earning the same wages and benefits packages, may place different values on injunctive relief. One group could, for example, be voluntarily taking a lower wage in exchange for a discrimination-free environment.[61] These employees

57. *See, e.g.*, McGaw, *supra* note 5; Withers, *supra* note 5.

58. *See supra* Part I.C.

59. Arguably, nonpecuniary losses such as loss of reputation may be greater for employees with higher incomes if reputation is more important for those employees (i.e., if employment options are dictated by one's reputation). I suspect, however, that nonpecuniary losses are more strongly tied to personality types and other factors for which income is not a good proxy. As a result, the distribution of individuals who would suffer large or small nonpecuniary losses may be randomly distributed among income levels.

60. *See* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS 250 (6th ed. 1997) (indicating that tradeoff exists between working conditions and wages and that employees must "buy" more pleasant working conditions by accepting lower wages).

61. In other words, the marginal revenue product of these workers is equal to the sum of wages, benefits packages, and the value of reduced harassment, whereas the marginal revenue product of workers in a different occupation may be just the wages plus the benefits packages.

may be willing to spend more to obtain injunctive relief because of the value placed on a discrimination-free environment.

Punitive damages might also vary with the income of employees if they are calculated based on the compensatory damages awarded. If, for example, punitive damage awards were routinely double or triple the size of the compensatory damages, any variance in compensatory damages would be magnified in punitive damage awards. On the other hand, if punitive damages are calculated independently of compensatory damages, they should not be affected by income.[62]

Another important point with respect to punitive damages is that their impact on decisions to sue depends upon their predictability. If plaintiffs expect that in certain kinds of cases damages are routinely awarded (i.e., those of quid pro quo sexual harassment), they can accurately gauge their likelihood of obtaining a punitive award. Similarly, if punitive damages are calculated in a systematic way (i.e., they are typically twice the size of the compensatory damages award), potential plaintiffs can make a reasonable estimate of the size of the remedy if successful. On the other hand, if punitive damages are not systematically awarded in certain cases or in certain amounts, it will be difficult for plaintiffs to make reliable predictions as to the size of their particular award, and, instead, they will have to rely on an average total award. This could drastically overstate or understate the value of their claims.

The fact that Title VII places caps on the size of a successful plaintiff's compensatory damages[63] may lead to increased predictability of the size of the remedy. Moreover, if lower-income employees systematically receive those caps or an approximately equal value (either through successful suits or settlements), then the distinction in remedy between employees at different income levels would largely disappear.

Similarly, if insurance coverage is available to employers[64] to shield them from high damage awards, and there is no deductible, em-

62. I have been unable to find evidence of a strong correlation in the sexual harassment context. Consider, anecdotally, Cush-Crawford v. Adchem Corp., 94 F. Supp. 2d 294 (E.D.N.Y. 2000) (upholding jury's award of $100,000 in punitive damages despite fact that no compensatory damages were awarded); Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986) (awarding $95,000 in compensatory damages and $15,000 in punitive damages).

63. 42 U.S.C. § 1981a(b)(3) (1994).

64. Companies can, in fact, obtain liability insurance: "EPLI [Employment Practices Liability Insurance] policies are new coverage for wrongful employment acts which arise out of the employer or its supervisor's role on behalf of the employer. . . . These policies are designed to protect the insured from claims of discrimination, sexual harassment and wrongful termination." Macero & Halatyn, *supra* note 4, at 421.

ployers will face a constant cost of insurance premiums. If there is a deductible, an employer could face variable remedies, depending on the size of the deductible, but the variation will be less than if there was no insurance—above the deductible amount, an employer is indifferent to how much the employee receives.[65] Insurance coverage, then, can greatly undermine the incentive effects of Title VII by sharply reducing the liability faced by an employer. However, although insurance coverage is available for intentional discrimination by supervisors, co-workers, and independent contractors,[66] coverage generally cannot reimburse employers for punitive damages.[67]

2. Probability That Plaintiff Will Prevail

To the extent that the probability a plaintiff will prevail depends on the strength of the employee's case, there could be considerable disparities based on income. To build a winning case requires investigation and finding witnesses to corroborate allegations. The amount a plaintiff or her lawyer is willing to spend on investigation depends on the anticipated remedy. A lawyer taking a case on a contingency-fee basis will not spend more to investigate and prepare a case than she expects to earn from the case.[68] As a result, employees with higher expected remedies will be able to spend more to build a case, thereby increasing their chances of winning. If employees with higher incomes can obtain a greater remedy, then they will have a greater likelihood of success. It may also be the case that employees with higher incomes can spend more money independent of a contingency fee on preparing a case. They may, for example, be able to hire an attorney at an hourly rate. This could enable higher-income employees to bring cases that no attorney would take on a contingent basis. Since

65. An employer would, however, still be concerned with increasing premiums if high awards occur frequently.

66. *See* Macero & Halatyn, *supra* note 4, at 421.

67. *See id*. at 422 ("[A]s with any policy, the term 'Loss' eliminates coverage for punitive or exemplary damages, criminal or civil fines or penalties, taxes and other matters deemed uninsurable by law."). *But see* Jeffrey P. Klenk, *Emerging Coverage Issues in Employment Practices Liability Insurance: The Industry Perspective on Recent Developments*, 21 W. NEW ENG. L. REV. 323, 331 (1999) (indicating that "insurance companies have attempted to provide punitive damages protection in creative ways").

68. *Cf*. William J. Smith, *Focusing on Damages to Win the Case*, ALI-ABA Course of Study, Hot Issues in Employment Law and Litigation, Mar. 28, 2000, at 149, *available at* WL, VLR9913 ALI-ABA 149 (advising sexual harassment lawyers to pursue litigation when "the case appears to be worthy of your time and the expenditure of your scarce resources.").

the likelihood of succeeding without legal counsel is nil,[69] being able to retain a lawyer greatly increases the chance of prevailing.

Another factor in determining the probability of success is locating witnesses to corroborate a victim's testimony, to establish a pattern of discrimination, or to raise questions about the credibility of defense witnesses. It is possible that lower-income employees have a harder time finding witnesses because their fellow employees fear losing their jobs, particularly at times where the low-skilled job market is not favorable to employees (i.e., when there is an excess supply of labor). Higher-income employees, who likely have greater skills and greater job opportunities, may not be as deterred by the risk of losing their jobs. Even when there is excess supply in the job market, high-skilled employees tend to be more mobile, and thus more able to find work.[70]

3. Probability of an Employee Suing

To some extent, all employees are similarly situated with respect to their employers. Most employees are not repeat players in litigation as their employers are, they lack the resources their employers have, and they lack the bargaining power their employers possess.[71] Employees as a group, therefore, may be less likely to sue than groups whose rights have been violated in some other context. This does not mean, however, that all employees are equally unlikely to sue.

The probability of an employee suing depends on the likelihood of success, the potential remedy, and the cost of litigation. If it is the case that employees with higher incomes have both a greater probability of success and a higher potential remedy, then by definition they are more likely to sue. The probability of an employee suing may also be based on the egregiousness of the conduct. It may be that those subjected to quid pro quo sexual harassment are more likely to sue than victims of hostile environment sexual harassment. This is likely the case for all groups of employees, regardless of occupation or income. It may be, however, that the difference in probabilities is greater for higher-income employees or lower-income employees. One possible scenario is that low-income employees generally tolerate hostile environment sexual harassment (the probability of suing is, say, 10%), but almost always sue when there is quid pro quo sexual

69. *See* Karen A. Lash et al., *Equal Access to Civil Justice: Pursuing Solutions Beyond the Legal Profession*, 17 YALE L. & POL'Y REV. 489, 494 (1998).

70. *Cf.* EHRENBERG & SMITH, *supra* note 60, at 343 (indicating that there is positive relationship between education and likelihood of moving).

71. *See* Summers, *supra* note 23, at 461.

harassment (the probability increases to 90%). At the same time, higher-income employees could be more likely to sue for a hostile environment (say, 70%) and equally as likely to sue for quid pro quo sexual harassment. This could lead to variations in the way employers address the different types of sexual harassment for each group of employees. An employer may, for example, take the same measures to prevent quid pro quo sexual harassment across the board, while extending preventive measures for hostile environment sexual harassment only to higher-income employees. In any event, one would expect the probability of suit to be greater for higher-income employees, although it may be closer to equal for quid pro quo sexual harassment.

Finally, there may be disparate access to the judicial system for employees of different incomes or backgrounds. There may be some employees that, regardless of the validity of their claims, cannot take advantage of their right to enforce Title VII because they cannot get into court. For these individuals, it does not matter what the expected remedy is or what the likelihood of success would be if they sued. If an employer knows that a certain class of employees will not sue (their probability of suing is zero), the only costs of harassment to the employer will be those captured in the "*a*" term that are not associated with litigation. Those most likely to be denied access to the legal system are the poor (in this context, the working poor), immigrants, and employees in rural areas (where the Legal Services Corporation is less active).[72] Because of the dramatic effect on the expected cost of harassment, and thus on an employer's incentive to prevent harassment, a lack of access to the legal system would be an enormous barrier to particular groups enforcing their rights. Due to its potential significance, special attention will be devoted to the problem of unequal access in Part II.

4. Expected Number of Harassed Employees

The expected number of harassed employees will vary from employer to employer depending on the composition of the workforce and structure of the work environment. The biggest way this variable will change is through preventive measures. An employer considering what preventive measures could be instituted will look to their impact on the occurrence of harassment. Instituting a policy prohibiting har-

72. *See* Christopher D. Atwell, Comment, *Constitutional Challenges to Court Appointment: Increasing Recognition of an Unfair Burden*, 44 Sw. L.J. 1229, 1244 (1990).

assment, for example, might be expected to reduce harassment by 20%. Training employees on what constitutes harassment might reduce harassment by another 20%. Employers might look to other employers to estimate the effects of various preventive measures or consult aggregate data compiled by attorneys.

5. Other Costs of Discrimination

Losses resulting from reduced worker productivity will be greater for higher-income employees. This is because employees are paid in relation to their marginal revenue product.[73] Since higher-income employees have a greater marginal revenue product, reduced productivity of these workers will be more costly to the employer. One criticism here is that eventually a worker's pay will adjust to its new marginal revenue product.[74] Though this may occur, wages are generally thought of as sticky, meaning that it is difficult for wages to move downward, particularly in the short run.[75]

Another reason why productivity losses may be greater for higher-income employees is that they may feel more entitled to a discrimination-free work environment, particularly if they feel it is part of their compensation. Though low-income workers dislike harassment and other forms of discrimination, their productivity may not be as adversely affected; eliminating discrimination would still leave poor working conditions and thus marginal productivity gains would be small.

Costs resulting from increased turnover may also be greater for higher-income employees, who tend to possess more specialized skills. Filling a position requiring specialized skills will generally involve greater search costs than a position involving few or no skills. Further, for low-skilled jobs, there is greater interchangeability of workers. Moving people around an assembly line, for example, is likely to be easier than moving a public relations specialist into a computer programming position.

The actual turnover costs will vary depending on the job market. One could envision a situation where there are a lot of college graduates in an area but few low-skilled workers.[76] In this scenario, it might be more costly for the employer of low-skilled labor to find

73. *See* EHRENBERG & SMITH, *supra* note 60, at 66. The marginal revenue product (MRP) is equal to the marginal product times price.

74. *See id.* at 72–74.

75. *See id*. at 49.

76. In other words, there may be an excess supply of skilled workers and a shortage of low-skilled workers.

replacements.[77] In most cases, however, it is likely that the greater the skills required for the job, the higher the turnover costs will be. This is, in part, because some of the turnover costs are associated with training; the more skills a job requires, the more costly it is to train a new employee.[78] Thus, even if it is easy to find a new skilled employee, there may be substantial costs incurred by the employer before the new employee is able to perform the job as the previous employee had.[79]

II
ANALYSIS

This portion of the Article analyzes why the expected cost of harassment differs for different types of employees. It begins with a discussion of the role of differential access to the legal system in changing the expected costs of discrimination faced by an employer. Not surprisingly, individuals and households with lower incomes will be less likely to sue. This is, in part, due to a lower likelihood of success and a lower potential remedy. Next, the Article examines how the remedies available under Title VII suppress the expected cost of discrimination for all groups. Finally, this Part concludes with a discussion of the implications of the disparate costs of discriminating against different income groups.

A. Differential Access to the Legal System

Before considering other factors such as the likelihood of success or the size of the remedies, it is imperative to consider who will and will not file a lawsuit. If there are barriers preventing some groups from gaining access to the legal system, then the expected cost of discriminating against those groups will fall dramatically. In fact, the only cost of discriminating against individuals who will not seek redress is the "*a*" term in the equation, which captures productivity and turnover costs resulting from the discrimination. For firms where these other costs are not large, taking expensive preventive measures will not be profit-maximizing.

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77. If, for example, it took six months to find a low-skilled worker and only two weeks to find a high-skilled worker.

78. This is in part because of the cost of the firm-specific training that is required, and in part because of the higher opportunity cost of each hour spent in training. *See* EHRENBERG & SMITH, *supra* note 60, at 141–42.

79. *Cf. id.* at 165 (discussing reluctance of firms to layoff workers in whom they have invested specific training).

1. Unmet Legal Needs

Not surprisingly, the legal needs least often met are those of the poor. Indeed, a national study conducted by the American Bar Association (ABA) found that approximately three-quarters of the legal needs of low-income households are never taken to the civil justice system.[80] The households defined as low-income in the ABA study comprise 20% of American households.[81] One might expect that as income increases, more complaints would find their way into the legal system. Indeed, for moderate-income households, which comprise 60% of the population,[82] more complaints are taken to the civil justice system. Nonetheless, nearly two-thirds of the legal needs of those households never enter the legal system.[83]

Though aggrieved individuals may not be bringing their complaints to the civil justice system, they may nonetheless be using alternative mechanisms to address the situation. Only 38% of low-income and 26% of moderate-income households took no action at all to deal with their legal needs.[84] They may have handled their concerns themselves or consulted someone outside the legal system.[85] This begs the question of whether households that did not seek legal help were able to satisfactorily resolve the issue in question. As it turns out, low-income households that consult non-legal help are no more satisfied with their outcomes than those that took no action at all.[86]

Studies conducted in various states have yielded similar results. In California, for example, nearly three-quarters of the legal needs of the poor are not met.[87] Moderate-income households fare better, but

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80. CONSORTIUM ON LEGAL SERVS. & THE PUB., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 12 (1994) [hereinafter SURVEY OF AMERICANS]. "'Low' income households are those that have a combined annual income of not more than 125 percent of the poverty level as designated by the federal government. They are considered eligible for the publicly supported legal services." *Id*. at 1.

81. *Id*.

82. *See id*. "Based on 1988 data from the U.S. Census Bureau, the moderate-income sample included households with a combined annual income above 125 percent of the poverty threshold but below $60,000." *Id*.

83. *See id*. at 12.

84. *See id*. at 11.

85. *See id*.

86. *See* CONSORTIUM ON LEGAL SERVS. & THE PUB., AM. BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE: FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 5 (1996) [hereinafter FINAL REPORT].

87. Lash et al., *supra* note 69, at 489 (citing ACCESS TO JUSTICE WORKING GROUP, STATE BAR OF CAL. OFFICE OF LEGAL SERVS., AND JUSTICE FOR ALL: FULFILLING THE PROMISE OF ACCESS TO CIVIL JUSTICE IN CALIFORNIA 78 n.2 (1996)). Of the remain-

60% of their needs remain unmet.[88] In a Hawaii study, only 9.6% of the legal needs of low-income families received legal attention.[89] Households with incomes between 125% and 250% of the federal poverty level obtained legal assistance for 23.6% of the problems they faced.[90] These numbers suggest that low-income households are highly unlikely to bring claims to the legal system. Moderate-income households, though more likely to get legal assistance, still do not receive legal assistance for most problems.

The fact that differences exist between these income groups lends credence to the possibility that employers could differentiate between groups and calculate the expected cost of discrimination for each group. Looking just at these two groups, for example, an employer could determine that there is only a 29% chance that low-income employees will file suit while there is a 39% chance that moderate-income employees will do so.[91] If all other terms in our equation remained constant, this would lead to a substantial difference in the cost of discrimination between these two groups. If, for example, an employer had 100 employees in each group, thought its probability of losing was 20%, and expected the remedy to be $100,000 if it lost, the expected cost of discriminating would be $780,000 for moderate-income employees but only $580,000 for low-income employees. This means the employer would be willing to pay up to $200,000 more to eliminate harassment for its moderate-income employees.

To this point I have reported findings which incorporate all legal problems a household may face. It is important now to address whether these numbers are accurate for employment-related problems. As it turns out, households are less likely to take action for employment-related problems.[92] For low-income households, no action was taken for 52% of employment-related problems,[93] and no legal help

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ing twenty-five percent of households, legal needs "are sometimes met only partially." *Id.* at 491.

88. *See id*. at 492.

89. *See* ROBERT L. SPANGENBERG ET AL., HAW. COMM'N ON ACCESS TO JUSTICE, ASSESSMENT OF CIVIL LEGAL NEEDS OF LOW- AND MODERATE-INCOME PEOPLE IN HAWAII 41 (1993) (on file with the *New York University Journal of Legislation and Public Policy*).

90. *See id*. at ii, 41 (defining and noting statistics for "gap group").

91. These numbers are based on the ABA study. *See* SURVEY OF AMERICANS, *supra* note 80, at 11.

92. In the ABA study, employment-related problems included "discrimination in hiring or on the job and problems with compensation or working conditions for low-income respondents; working conditions and problems with compensation or benefits among moderate-income respondents." *Id.* at 6.

93. *Id*. at 13.

was obtained for 78% of those problems.[94] No action was taken for nearly one-third of the employment-related problems faced by moderate-income households,[95] and legal help was not obtained for 71% of the problems.[96] Employment-related problems, therefore, are among the least likely to be brought to the legal system by both low- and moderate-income individuals.[97] Nonetheless, there continues to be a differentiation between low- and moderate-income employees in terms of both the likelihood of taking action and the likelihood of bringing their problems to the legal system. One would also expect a distinction between higher-income employees and moderate-income employees.[98]

2. Using the Access Data

Now that we have found a distinction between groups regarding the number of legal problems brought to the legal system and the number of problems where no action was taken at all, the question arises as to which numbers employers might use in assessing the likelihood that different groups of employees will take action if harassed. This is important because the numbers vary substantially for the different categories. Looking at the number of employees who took no action, there is more than a 19% difference between low- and moderate-income households. On the other hand, the difference is only 7% when we look at whether households sought legal help. Although the results would not change qualitatively, the magnitude of the difference in the expected cost of harassment would be much larger if employers use the no-action numbers.

What matters to employers is the number of employee claims that lead to a court battle and/or a remedy; it is irrelevant whether an attor-

94. *Id*. at 15 fig.6.
95. *Id*. at 14 fig.5.
96. *Id*. at 15 fig.6.
97. *See id*. at 24. Harassment claims, a subset of employment-related claims, would thus seem rarely to be brought into the legal system. In a brief, one plaintiff said, "'This is an unusual case of sexual harassment—not in that it happened, but in that [the plaintiff] sued.'" O'Connor, *supra* note 1, at 501 (alteration in original) (citing Brief of Respondent at 44, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979)).
98. In fact, the distinction might be sharper as incomes exceed $60,000. This is expected because the moderate-income group in the ABA study had a wide range of incomes, starting at just 125% of the poverty level. Particularly for those close to that mark, we would not expect them to have enough additional resources to acquire representation. They may, in fact, have less ability to get assistance because they do not qualify for free legal services. *See* FINAL REPORT, *supra* note 86, at 28–29; Lash et al., *supra* note 87, at 492. Unfortunately, most studies exclude the top fifth of the population. *See, e.g.*, SURVEY OF AMERICANS, *supra* note 80, at 1.

ney or some other agent (i.e., a union) is used. I have defined remedy to include any case where an employer is required to pay, either by a court order or through a private settlement.[99] Since the risk of facing a remedy will be greatest when the employee approaches the legal system, one could argue that the number of employees who turn to the civil justice system is the most significant. On the other hand, employers are likely to base their calculations of expected liability on experience.[100] In doing so, an employer will consider how many employees seek redress and their likelihood of success in making a rough estimate of the probability of facing liability for sexual harassment and other forms of discrimination. This rough estimate will incorporate all cases in which a remedy was sought and achieved, regardless of whether the legal system or some other forum was utilized. The most accurate estimate of the difference, therefore, probably lies somewhere between seven and nineteen percent.

3. Reasons People Do Not Bring Problems to the Legal System

Because limited access to the legal system affects the expected cost of discrimination, policymakers may attempt to increase access to the legal system as a way of raising the expected cost of harassment in order to encourage further preventive measures. A discussion of the reasons why people do not sue when they face a legal problem is integral to any attempt to increase access to the legal system. For this reason, I delineate some of the most frequently cited reasons for why people do not take their problems to the legal system.

a. High Cost of Litigation

Filing a lawsuit against an employer can be prohibitively expensive. In large part, this is due to the high cost of hiring a lawyer. One estimate puts the total cost of getting a claim to summary judgment at $20,000.[101] If there is a trial, legal costs may exceed $40,000.[102] In addition to the legal costs, a victim would be forced to take time off work to avail herself of the courts.[103] Such high costs make it difficult, if not impossible, for low-income employees to hire a lawyer and

99. *See supra* Parts I.D.3–4.

100. They may not have access to, or the time to track down, the latest national survey results. Even if they did, national numbers may not be particularly useful as there may be geographical or industry-specific differences.

101. Summers, *supra* note 23, at 486.

102. *Id*.

103. *See* James W. Meeker & John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2228 (1993) (noting that time taken off from work for this purpose is usually not compensated).

bring a claim.[104] One might counter that an employee need not pay these costs up front because attorneys will take cases on a contingency-fee basis. The problem for low-income employees, however, is that their potential recovery may not be large enough for a plaintiffs' lawyer to find it worthwhile to bring a claim.[105] Title VII does provide for an award of attorney fees if a plaintiff wins at trial.[106] There is, however, no award of fees in unsuccessful cases or settlements, and the amount of attorney fees awarded is not adjusted to reflect the risk of loss assumed by the lawyer.[107] Title VII's provision for awarding attorney fees, moreover, does nothing to help an attorney finance the cost of litigation ex ante.[108] If a plaintiff does not have the money to fund the effort herself, she may thus be unable to secure a lawyer to pursue even a strong claim of sexual harassment against her employer.[109]

Recent studies support the notion that low-income employees do not bring claims to the legal systems because of the high costs associated with doing so. In Hawaii, for example, "[t]he number one reason

104. *See* Summers, *supra* note 23, at 486 ("Few individual victims can afford to pay such costs."); Howard A. Matalon, Note, *The Civil Indigent's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate* Pro Bono Publico, 71 B.U. L. REV. 545, 545 (1991) ("To receive equal justice, one must have legal assistance, which has inevitably become too expensive for all but a select few because society has permitted the practice of law to become a 'legal market.'").

105. *See* Summers, *supra* note 23, at 533 ("A contingent fee will not compensate the lawyer for her time unless the claim is potentially large . . . ." (citing JAMES N. DERTOUZOS ET AL., INSTITUTE FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 48 (1988))); Yelnosky, *supra* note 47, at 412 ("Relying on a contingent fee agreement also may be problematic because the lower wages used to generate a back-pay award may not compensate a lawyer adequately.").

106. 42 U.S.C. § 2000e-5(k) (1994).

107. Summers, *supra* note 23, at 487. The greater the risk of loss, the greater the potential recovery will be discounted by plaintiffs' attorneys. *Id*.

108. *See id*. at 488.

109. *See id*. at 487 ("[T]he provision for attorneys' fees fails to assure an employee whose Title VII rights are violated of finding a lawyer to vindicate those rights. One commentator has noted that plaintiffs' lawyers in equal employment cases 'have become an endangered species, in many places already extinct.'" (quoting Ray Terry, *Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy*, 5 LAB. LAW. 63, 63 (1989))); Kirstin Downey Grimsley, *Worker Bias Cases Are Rising Steadily: New Laws Boost Hopes for Monetary Awards*, WASH. POST, May 12, 1997, at A1 ("[M]any strong claims never make it into the courts because workers cannot afford to hire attorneys to represent them. Few attorneys have the money to fund long litigation efforts on behalf of individual plaintiffs, and many potential litigants report that attorneys simply turn them away."). *But see* Wayne Moore, *Access to Legal Services: Intake, Diagnosis and Referral Procedures*, *in* CIVIL JUSTICE: AN AGENDA FOR THE 1990s, at 19, 20 (Esther F. Lardent ed., 1989) (pointing to studies suggesting that "clients have been relatively successful in gaining access to an attorney, but lack an understanding of when they need a lawyer").

cited by low-income families for not getting legal help with their most serious problem, was that they thought a lawyer would be too expensive."[110] The ABA study similarly found that the high cost of seeking legal assistance was a predominant reason for low-income households not doing so.[111]

b. Low Probability of Success

Bearing the costs—both monetary and emotional—of pursuing a claim against an employer will not be worthwhile if success is highly unlikely.[112] The ABA found that one of the predominant reasons why low-income households did not seek legal help was that they did not think it would make a difference.[113] In the employment context, this view may result from the overwhelming size and organization of the employer. If, for example, the employee knows that her employer keeps thorough documentation with respect to its personnel, the employee may feel that suing would be futile because the case would come down to her word against an enormous pile of documents.[114] Perversely, complaint procedures themselves may be used by employers to convince complainants that taking legal action would be futile.[115]

Substantial documentation not only discourages employees from approaching the legal system, but it also discourages attorneys from taking cases.[116] If an employee cannot get an attorney, the chances of success in court are almost nil.[117] One commentator suggests that at-

110. SPANGENBERG ET AL., *supra* note 89, at 40. "Interestingly, approximately a third of respondents with this expectation predicted that a lawyer would charge $500 or less." *Id*.

111. SURVEY OF AMERICANS, *supra* note 80, at 15.

112. *Cf*. Zalesne, *supra* note 4, at 367 ("Frivolous harassment claims are minimal because of the economic and emotional cost of bringing a lawsuit and because of the effects such drastic action has on an employee's life.").

113. FINAL REPORT, *supra* note 86, at 10.

114. "[I]f the employee knows you've got good documentation, there's less incentive to launch a suit." Bisom-Rapp, *supra* note 4, at 1010 (alteration in original) (quoting John J. Myers, *Reduce the Risk of Frivolous Lawsuits*, GETTING RESULTS FOR THE HANDS-ON MANAGER, Oct. 1997, at 7).

115. *See id.* at 973 (citing Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 528 (1993)).

116. "[E]ven if the employee decides to seek legal counsel, '[a] fully documented personnel file may discourage a former employee's attorney from filing prospective litigation.'" *Id.* at 1010 (quoting Patrick H. Hicks & Neil M. Alexander, *The Five Biggest Mistakes Employers Make*, NEV. LAW., June 1996, at 12, 15) (second alteration in original).

117. *See* Lash et al., *supra* note 69, at 494 ("[A]s a practical matter in most cases there can be no access to justice without access to meaningful legal assistance.").

torneys are gatekeepers, assisting those they accept as clients to maneuver through the legal system and terminating the claims of those they do not.[118] The ABA study lends credence to the importance of lawyers in resolving people's legal needs. Households were far more satisfied with the resolution of their legal issues when they obtained legal help than when they did not.[119] With respect to employment-related matters, low-income households rarely sought legal help and their satisfaction was very low.[120]

The probability of success likely varies with income. The ABA study indicates that when moderate-income households approached the legal system, nearly two-thirds were satisfied with the outcome, compared with less than half of low-income households that approached the legal system.[121] This suggests that higher-income households are more likely to be successful in pursuing their claims than lower-income households.

c. Lack of Knowledge of Rights

Many employees are not fully aware of the protections afforded them under Title VII, or how they can effectively use the legal system to seek redress.[122] This is particularly true of low- and moderate-income employees.[123] To the extent that employees underestimate the protection against sexual harassment provided by Title VII, they will not seek remedies in cases where they may be entitled to bring suit.[124]

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118. Bisom-Rapp, *supra* note 4, at 1018.

119. *See* SURVEY OF AMERICANS, *supra* note 80, at 17–18 ("[W]hen households turned to a lawyer or some other part of the justice system, 48 percent of low-income households and 64 percent of moderate-income households were satisfied. At the other end of the continuum, when people took no action at all about a problem, only 29 percent of low-income and 39 percent of moderate-income households were satisfied.").

120. *Id.* at 19.

121. FINAL REPORT, *supra* note 86, at 5.

122. *See* Summers, *supra* note 23, at 529 ("Employees are often unaware of their substantive rights, and therefore do not seek remedies. . . . They may, however, be unaware that the sexual or racial harassment endemic in their workplace is illegal . . . ."). *See generally* Douglas J. Besharov, *Legal Services for the Poor: Time for Reform*, *in* CIVIL JUSTICE: AN AGENDA FOR THE 1990s, *supra* note 109, at 475, 478 (discussing problem clients have identifying legal issues and coming to solutions); Moore, *supra* note 109, at 20 (discussing AARP study suggesting that "clients have been relatively successful in gaining access to an attorney, but lack an understanding of when they need a lawyer").

123. *See* Meeker & Dombrink, *supra* note 103, at 2228.

124. *See* Summers, *supra* note 23, at 529. One study actually suggests that workers overestimate the extent to which employment law protects them. *See* Bisom-Rapp, *supra* note 25, at 50 (citing Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997)). Bisom-Rapp asserts, however, that employees "lack a basic under-

Moreover, if employees are unaware of their rights, "employers may ignore or deny them."[125]

Even when employees know their rights, they may not realize what avenues are available to seek redress. Low-income employees, for example, are often unaware that they qualify for free legal services.[126] This ignorance may be rational. Since it is rare that people need lawyers, it may not make sense for them to seek information about legal services unless they have a particular concern.[127] The problem stemming from this choice is that when people need lawyers, they often need them very quickly.[128] By the time they realize they are eligible for free legal services, if ever, it may be too late to do any good.

d. Fear of Losing Job

Employees may not want to bring claims against their employers for fear of losing their jobs.[129] This is particularly true if an employee does not think the probability of success is very high. If fear is a significant factor, one would expect to see a lot more claims brought by employees who were fired than those facing a hostile environment at work.[130] In a booming economy, the fear of losing one's job is less

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standing of how employment law functions," putting them at a disadvantage when confronting employers. *Id.*

125. Summers, *supra* note 23, at 529.

126. *See* SPANGENBERG ET AL., *supra* note 89, at vi ("Only 19% of the low-income families in the statewide phone survey sample were aware of the availability of free civil legal services."); SURVEY OF AMERICANS, *supra* note 80, at 22 ("[O]nly 36 percent of low-income respondents believe their household is eligible for subsidized legal help (when in fact *all* are by virtue of the way the 'low-income' sample was defined). Twenty-six percent of these respondents think they are *not* eligible; 38 percent are not sure.").

127. *Cf.* Stephen Z. Meyers, *Informing Clients of Legal Services*, *in* CIVIL JUSTICE: AN AGENDA FOR THE 1990S, *supra* note 109, at 9, 13 ("[R]egular people are *not* interested in information about legal services until they are *about* to hire lawyers. Since they hire lawyers so infrequently, this means that they *rarely* pay any attention to information about availability of legal services.").

128. *See* FINAL REPORT, *supra* note 86, at 15 ("Most people are not frequent consumers of legal services. . . . But, when people need information about legal services, it is usually needed quickly and for specific circumstances.").

129. *Cf.* Wayne N. Outten & Adam T. Klein, *The Fair Labor Standards Act: Hot Topics*, ALI-ABA Course of Study, Hot Issues in Employment Law and Litigation, Mar. 28, 2000, *available at* WL, VLR9913 ALI-ABA 123 (discussing Fair Labor Standards Act (FLSA) and fear of retaliation among low-income employees); Louise Sadowsky Brock, Note, *Overcoming Collective Action Problems: Enforcement of Worker Rights*, 30 U. MICH. J.L. REFORM 781, 789 (1997) (discussing employment intimidation and fear of losing one's job with respect to the Occupational Safety and Health Act).

130. "'People will swallow a lot at work, but once they are canned, they have nothing left to lose if they sue.'" Grimsley, *supra* note 109 (quoting Richard Seymour,

likely to be a prevalent concern than during times of high unemployment. If the fear of job loss is significant, then there may be a noticeable change in the number of sexual harassment and other discrimination claims filed during different points in the economic cycle. Notably, fear of job loss is likely more salient for low-income workers, as they have fewer skills and fewer job opportunities.[131]

e. Cultural Reasons

Some groups may not bring claims to the legal system because of cultural barriers that interfere with their knowledge of the system or their ability to access it. If an employee does not speak English, or is unfamiliar with the United States legal system, she may find it impossible to navigate the justice system effectively.[132] Such employees may not even be aware of the legal services available or fully understand their rights.[133] If they are aware of their rights, certain populations may be unable to get to an attorney's office, or to court.[134] Furthermore, in some cultures, seeking outside help to solve problems is discouraged.[135] Individuals may thus be shutting themselves out of the legal system.

To the extent that employers are aware of these cultural barriers, the expected cost of discrimination will be reduced. If, for example, an employer knows that its workforce, consisting of recent immigrants with little knowledge of American law or the justice system, is unlikely to sue,[136] the employer will not anticipate facing substantial liability. This can be contrasted with an employer who knows that its workforce is both familiar with the legal system and has access to attorneys.

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director of employment discrimination project at the Lawyers Committee for Civil Rights).

131. *Cf.* EHRENBERG & SMITH, *supra* note 60, at 343 (discussing how education makes job mobility easier).

132. *See* SPANGENBERG ET AL., *supra* note 89, at 14–15; Meeker & Dombrink, *supra* note 103, at 2219.

133. *See* FINAL REPORT, *supra* note 86, at 18 n.35 (citing 1–5 LEGAL SERVS. CORP., SPECIAL LEGAL PROBLEMS AND PROBLEMS OF ACCESS TO LEGAL SERVICES (1981)). *But see* SURVEY OF AMERICANS, *supra* note 80, at 23 ("With respect to race and ethnicity, African Americans and Latinos are more likely than others to think they are eligible [for legal services programs].").

134. *See* FINAL REPORT, *supra* note 86, at 18; Meeker & Dombrink, *supra* note 103, at 2219.

135. *See* FINAL REPORT, *supra* note 86, at 18.

136. Employees in a vocation with English-only rules sue less often. *See* Rey M. Rodriguez, *The Misplaced Application of English-Only Rules in the Workplace*, 14 CHICANO-LATINO L. REV. 67, 79–80 (1994).

f. Lack of Faith in the Legal System

Some individuals have given up faith in a justice system that has let them, their families, or their communities down. Indeed, commentators repeatedly point to a cynicism the public feels toward the justice system.[137] Those that do not trust the system are unlikely to seek out its help when faced with a legal problem. Again, if employers know that their employees do not trust the legal system to solve their problems, they will not be concerned with facing lawsuits and, consequently, the expected cost of discrimination will decline.

B. Remedies

A major cost of discrimination is, of course, the remedy that a successful plaintiff might obtain. The larger the remedy, the greater the expected cost to an employer of discriminating, *ceteris paribus*. This section of the Article discusses the remedies available to a victim of sexual harassment under Title VII and highlights some of the potential problems with the statutory scheme created under the Civil Rights Act of 1991.

1. Available Remedies Under Title VII

Prior to 1991, victims of sexual harassment could only obtain equitable relief from the courts.[138] In terms of monetary damages, the primary form of equitable relief was back pay.[139] One of the major problems with providing only back pay awards was that employers were not subject to paying anything so long as a harassed employee was not terminated or subject to discriminatory pay differentials.[140]

137. *See, e.g.*, Lash et al., *supra* note 69, at 490 ("The California public has lost faith and trust in our justice system. Many people do not believe they have equal access to civil justice." (citing COMM'N ON THE FUTURE OF THE CAL. COURTS, JUSTICE IN THE BALANCE: 2020, at 82–83 (1993))); Vernetta L. Walker, *Legal Needs of the Public in the Future*, FLA. B.J., May 1997, at 42, 42 ("More and more Floridians are becoming disillusioned with the legal system and often feel the system is not there to help them or is not accessible."); *cf*. Meeker & Dombrink, *supra* note 103, at 2218 ("Access reaffirms the fairness of the legal system—indeed, the entire social order—especially for those of limited economic means, who may believe that the legal system favors those of wealth over members of minority groups.").

138. *See* Grimsley, *supra* note 109.

139. Anne-Marie C. Carstens, Note, *The Front Pay Niche: Reinstatement's Alter Ego is Equitable Relief for Sex Discrimination Victims*, 88 GEO. L.J. 299, 299–300 (2000); Grimsley, *supra* note 109.

140. "Although back pay provides a measure of deterrence for employers, the lack of either emotional distress damages or punitive damages allows racial, religious, and sexual harassment to continue uncompensated and undeterred as long as the employee is not actually terminated." Summers, *supra* note 23, at 483 (footnote omitted); *see also* Carstens, *supra* note 139, at 299–300.

Another problem with limiting recovery to equitable relief is that the level of deterrence will depend, to a large extent, on the income of the employee. Higher-income workers could obtain much larger monetary awards than lower-income workers because higher wages would be used in calculating back pay.

In 1991, Congress enacted the Civil Rights Act of 1991, which provided that sexual harassment victims could recover both compensatory and punitive damages.[141] Compensatory damages available under the new statute include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[142] Punitive damages are available "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices *with malice or with reckless indifference* to the federally protected rights of an aggrieved individual."[143]

The compensatory and punitive damages allowed under the Civil Rights Act of 1991 are capped, depending on the size of the employer. If an employer has between 15 and 100 employees, the maximum award is $50,000. The maximum award increases to $100,000 for employers with 101 to 200 employees, to $200,000 for employers with 201 to 500 employees, and to $300,000 for employers with more than 500 employees.[144] It is important to note that because back pay is classified as equitable relief, it is not included in the statutory caps.[145] Similarly, the United States Supreme Court recently held that front pay is equitable relief and thus is not restricted by the statutory caps.[146] The purpose of the statutory caps "is to limit liability for compensatory damages based on the relative size of the employer, as a proxy for its ability to pay."[147]

In addition to compensatory and punitive damages, Title VII provides for an award of attorney fees to successful plaintiffs.[148] Attorney fees include not only fees for representation before a court, but also "fees incurred representing the plaintiff before state fair employ-

141. 42 U.S.C. § 1981a(a)(1) (1994).
142. *Id*. § 1981a(b)(3).
143. *Id*. § 1981a(b)(1) (emphasis added).
144. *Id*. § 1981a(b)(3).
145. The statute specifically excludes back pay from the calculation of compensatory damages. *Id.* § 1981a(b)(2).
146. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 848 (2001). Front pay is "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." *Id.* at 846.
147. Hamlin v. Charter Township of Flint, 965 F. Supp. 984, 988 (E.D. Mich. 1997).
148. 42 U.S.C. § 2000e-5(k).

ment agencies and the EEOC."[149] The fee is calculated by multiplying the number of hours an attorney reasonably spends on the case by "a reasonable hourly rate for a lawyer of equal competence and experience in the community."[150] Attorney fees in Title VII cases are significant in that they often exceed the plaintiff's total recovery.[151]

2. Calculating the Expected Remedy

Determining the expected remedy if a plaintiff is successful in bringing a sexual harassment claim to the courts, then, requires the consideration of potential back pay and front pay awards, compensatory and punitive damages, and attorney fees. Calculating a potential back pay award would be straightforward if an individual is terminated. The calculation is a bit more complex if discriminatory pay differentials exist, but it can still be done fairly easily by comparing the going wages of workers with similar skills. Attorney fees can be estimated based on average awards in other cases (either based on personal experience or case law).

Because of the statutory caps, employers know their maximum liability for compensatory and punitive damages. This can be used as a starting point in considering the expected cost of harassment, and can be adjusted downward if experience indicates that plaintiffs rarely achieve the statutory maximum award. Because there is a maximum, there is no risk of a wayward jury award that could bankrupt the company. This reduces the expected cost of sexual harassment to the firm below what it would be if judges and juries were free to determine the appropriate award as in other areas of law.[152] The cap also means that some individuals may be undercompensated for the injuries they sustain.[153] If, for example, compensatory damages totaled a million dollars, the plaintiff would be woefully undercompensated under federal law even if fortunate enough to work for a large company. The smaller the company, the greater the loss.

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149. Summers, *supra* note 23, at 485.

150. *Id.* at 485–86. This figure "may be adjusted up or down, based on a number of factors." *Id.* at 486.

151. *Id*.

152. *See, e.g.*, Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL. PUB. POL'Y & L. 743, 744–45 (2000) (discussing process of awarding damages in negligence cases).

153. Another way of articulating this is to say that employers will not bear the full cost of discrimination in those cases where a plaintiff's loss exceeds the statutory cap.

Plaintiffs may be able to avoid Title VII's statutory caps by filing pendent state law claims.[154] A few courts have allocated awards in excess of Title VII's statutory caps to state law claims.[155] One district court, however, has held that such allocation is inappropriate where the plaintiff is sufficiently compensated by the capped damage award.[156] If courts routinely allocate damage awards so as to avoid the statutory caps, the caps may not prove to substantially limit the expected remedy.

3. Difficulty of Obtaining Punitive Damages

Punitive damages are available where employers intentionally discriminate "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[157] This differs from the standard for compensatory damages, which simply requires that the employer intentionally discriminated,[158] indicating that Congress intended to raise the bar for punitive damage awards.[159] One court held that constructive knowledge of a hostile environment was not sufficient to award punitive damages unless, perhaps, it results from willful blindness.[160] A 1999 Supreme Court case, *Kolstad v. American Dental Association*, held that an employer could not be vicariously liable for discrimination by its managers where it has engaged in good faith efforts to comply with Title VII.[161] The Court relied on the Restatement of Torts,[162] reasoning that "[w]here an employer has undertaken

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154. *See* CYNTHIA L. REMMERS, AMERICAN BAR ASSOCIATION CENTER FOR CONTINUING LEGAL EDUCATION NATIONAL INSTITUTE, MANAGING SEXUAL HARASSMENT ISSUES IN THE WORKPLACE: THE ELEMENTS OF AN EFFECTIVE PREVENTION POLICY AND COMPLAINT PROCEDURE, TRAINING AND SPECIAL ISSUES, *available at* WL, N98SHCB ABA-LGLED C-21 (1998).

155. *E.g.*, Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 509–10 (9th Cir. 2000); Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1349–50 (D.C. Cir. 1999).

156. Oliver v. Cole Gift Ctrs., Inc., 85 F. Supp. 2d 109, 113 (D. Conn. 2000).

157. 42 U.S.C. § 1981a(b)(1) (1994).

158. *Id*. § 1981a(a)(1).

159. "Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award." Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534 (1999).

160. Splunge v. Shoney's, Inc., 97 F.3d 488, 491 (11th Cir. 1996).

161. 527 U.S. at 544–45; *see also* Lenard & Ott, *supra* note 33, at 90 (analyzing *Kolstad*'s holding in this area).

162. *Kolstad*, 527 U.S. at 544 ("[I]t is 'improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.'" (quoting RESTATEMENT (SECOND) OF TORTS § 909 cmt. b (1965))).

such good faith efforts at Title VII compliance, it 'demonstrat[es] that it never acted in reckless disregard of federally protected rights.'"[163]

Critics of *Kolstad* argue that vicarious liability is an integral part of providing employers with the necessary incentives to compensate victims of sexual harassment and to prevent the harassment from occurring in the first place.[164] If employees cannot recover damages from the perpetrators of sexual discrimination,[165] they may be left undercompensated for the injuries they suffer. Moreover, employers may not have sufficient incentive to take the preventive measures required to end sexual harassment in the workplace. This is because the expected cost of harassment goes down for the employer, provided it invests just enough in preventive measures to entitle it to the defense of good faith.[166] Of course, since *Kolstad* applies only to punitive damages, the expected cost of sexual harassment will only be less if compensatory damages are less than the statutory cap.[167] An empirical question, then, is how close compensatory damages are to the statutory caps. If they consistently approach the caps, then *Kolstad* does not have a significant impact on the expected cost of discrimination

163. *Id.* (second alteration in original) (quoting Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)).

164. *See* Ann M. Anderson, Note, *Whose Malice Counts?:* Kolstad *and the Limits of Vicarious Liability for Title VII Punitive Damages*, 78 N.C. L. REV. 799, 801 (2000); *Leading Cases*, *supra* note 1, at 366.

165. *See* Anderson, *supra* note 164, at 801–02 ("Because recovery from the offenders themselves is at best impractical and at worst impossible, employers must be held responsible for *all* damages arising from unlawful discrimination." (footnote omitted)).

166. *Id.* at 829 ("At the very least, the vague safe harbor provision of *Kolstad* could shift employers' focus toward compliance tools that do more to prevent *liability* for discrimination than to prevent discrimination itself."); *cf*. Bisom-Rapp, *supra* note 25, at 5 ("[T]here are incentives for organizations adopting such structures to do so in ways minimally disruptive of the status quo. Thus, employers may demonstrate compliance with EEO law through actions more concerned with form rather than substance."); *Leading Cases*, *supra* note 1, at 367 ("Law firms advising employers about the *Kolstad* ruling have stated: 'As an employer, you can breathe a bit easier—you don't have to worry quite as much about large punitive damage awards *if* you've adopted and implemented antidiscrimination policies.'" (quoting *High Court Ends Term with Important Rulings on ADA, Punitive Damages*, PA. EMPLOYMENT L. LETTER (Buchanan Ingersoll), July 1999, at 4)). *But see* Lenard & Ott, *supra* note 33, at 90 ("[I]n the sexual harassment context, if the employer can demonstrate a strong, vigorously enforced policy against sexual harassment, it may be able to avoid punitive damages for harassment committed by its supervisors based on *Kolstad*, even if it is unable to avoid all liability based on the affirmative defense. This further emphasizes the importance of a sexual harassment policy and training.").

167. If compensatory damages meet or exceed the statutory cap, the failure to get punitive damages is irrelevant since a plaintiff will already be getting the maximum recovery.

unless courts routinely allocate damage awards in excess of the statutory caps to state law claims.[168]

C. Probability of Loss

Another important factor affecting the expected cost of discrimination is the probability of an employer losing in court. At first glance, it seems that this should be fairly constant across all employees. After all, the elements of the offense are the same regardless of who is suing. The level of satisfaction reported by different income groups in the ABA study, however, suggests that there may be differences in the success rates across income groups. Although the resolution of claims brought to the courts were generally seen as more satisfactory than those that were not, there were sharp differences between satisfaction levels of low- and moderate-income households. For claims taken to the justice system, 64% of moderate-income households were satisfied with the outcome, while only 48% of low-income households were satisfied.[169]

One reason the satisfaction numbers may vary is that higher-income households are more likely to be successful. This may result because they can afford better counsel with more substantial resources.[170] There could also be systemic bias resulting in higher-income households getting punitive damages more often. Study in this area would be useful to better enable policymakers to assess the relationship between income and quality of access to the judicial system. At this point, it is important simply to recognize the difference in satisfaction rates and consider that the probability of an employer losing may correlate with the plaintiff's income.

D. Implications

1. Higher Cost of Discrimination for Higher-Income Employees

The major implication of the preceding analysis is that the expected cost of sexual harassment is likely to be greater for higher-

168. Some courts have done so. *See* Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 509 (9th Cir. 2000); Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1349 (D.C. Cir. 1999). In addition, when multiple plaintiffs are involved in the suit, the cap may be exceeded. Remmers, *supra* note 154.

169. SURVEY OF AMERICANS, *supra* note 80, at 17–18.

170. *See* Summers, *supra* note 23, at 533 ("[I]f the injured employee must pay the costs of court litigation, only those in the upper income brackets with large claims and substantial likelihood of success will obtain a lawyer to press their claims." (citing JAMES N. DERTOUZOS ET AL., INSTITUTE FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 44 (1998))).

income employees. The reason this difference is important is that employers will only be willing to spend money on preventive measures to the extent they save money by doing so. Thus, if a firm's expected liability is $20,000, it will only be willing to spend up to $20,000 on preventive measures. If there is a systemic deviation in the costs of harassing different groups, the level of preventive measures taken by firms is likely to vary as well. In other words, since the expected cost of harassing low-income employees is less than the expected cost of harassing high-income employees, firms employing low-income workers will find fewer preventive measures on the spectrum of options worth taking.

2. Cost Per Worker

If the statutory caps are binding,[171] the cost of discrimination per worker will vary, even within an income group. This is because of how the statutory caps are structured. If you have 100 workers, for example, the statutory cap is $50,000. If you hire one more worker, the statutory cap jumps to $100,000. Thus, holding all else equal, the cost of harassment per worker will rise significantly when the 101st worker is hired. In other words, the marginal cost of that worker is enormous. Liability insurance premiums, for example, would likely rise dramatically when the additional worker is hired. An interesting empirical question is to what extent firms take this into account when determining how many workers to hire. If very few firms had, say, 100 to 120 workers, but many had either 90 to 100 or 150 to 200, such trends would lend credence to the argument that firms are mindful of the statutory caps and calculate increases in liability as part of their marginal cost. Where this issue might be the most prevalent is an employer's decision whether to go over the fifteen-employee threshold and subject itself to Title VII liability of up to $50,000. Doing so might require obtaining liability insurance, developing a sexual harassment policy and a set of grievance procedures, and having termination decisions reviewed by counsel.[172]

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171. I have been unable to ascertain the extent to which the statutory caps are binding in the sexual harassment context. The one "systematic study of sexual harassment cases in the federal courts," Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 549 (2001), unfortunately does not include a breakdown of damage awards.

172. It is important to note that small businesses are generally not expected to institute the type of formal procedures that are expected at large firms, provided the procedures chosen are effective. *See* ENFORCEMENT GUIDANCE, *supra* note 4, at pt. (V)(C)(1)(f)(3).

Another important point is that the marginal cost of hiring men and women will differ. Since women are significantly more likely to be sexually harassed in the workplace than men,[173] the marginal cost of hiring women (particularly when supervised by men) will also be higher.[174] Of course, the marginal cost of hiring a male manager to oversee a predominantly female workforce should also be higher than hiring a woman for that position, all else being equal.

Finally, there are some preventive measures for which the cost will vary depending on the wages of the workforce. The cost of training programs, for example, includes not only the design of the program and the cost of the trainer, but also the wages of employees while they attend the training. If, for example, a group of moderate-income workers earn twice as much as a group of low-income workers, the hourly cost of providing the training will be twice as high for the moderate-income group. This might suggest that where the differences in preventive measures between groups will show up most is in those preventive measures with high fixed costs. Consider a training program for fifteen workers that costs $3000 to design and to implement. An employer with an expected cost from harassment of $2800 will provide no training, whereas an employer facing an expected cost of $5600 might choose to provide some training.

3. Differentiation Within Firms

In large firms with many divisions, separate divisions may implement different levels of prevention based on the income of employees within the division. Imagine a large firm with numerous divisions, each headed by a different manager who is responsible for reaching profitability targets. It would be rational for the manager of each division to implement preventive measures only to the extent that doing so reduces liability costs. Indeed, some commentators argue that middle managers responsible for maximizing profits should not be given responsibility for monitoring complaint procedures.[175]

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173. *See* Withers, *supra* note 5, at 111.

174. *See* Evans, *supra* note 1, at 521.

175. *See, e.g.*, Bisom-Rapp, *supra* note 4, at 972–73 ("While administrators may be sincerely committed to equal employment opportunity, their position as middle managers, concerned for their own careers, may hamper their abilities to bring about significant change." (citing Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC'Y REV. 497, 501 (1993))); Gruner, *supra* note 8, at 206 ("The substantial costs of many compliance efforts suggest that monitoring of compliance results should be performed by persons other than managers responsible for the profitability of the operations they oversee. . . . Costly law compliance measures will tend to receive secondary attention as they detract from the profitability of the manager's unit." (citing JAY A. SIGLER &

One argument against such differentiation might be that a company needs to have similar preventive measures for all employees if they interact with each other. For morale reasons, as well as concern that the higher-income employees could be harassed by managers of lower-income employees, a firm may take more extensive measures if employees of different incomes interact regularly. In firms where high- and low-income employees never meet, however, preventive measures could easily be tailored to the specific workforce.[176]

One advantage of working at a large firm, however, is that the number of employees is higher, which raises the statutory cap. If, for example, each division had 200 employees, the cap would be only $100,000 if each division were a separate firm; but since they are part of a single firm, the statutory cap is significantly higher, at $300,000.[177] This raises the expected cost of harassment for all employees. Nonetheless, differentiation between the lowest- and highest-income workers would likely remain as long as there is a correlation between income and total recovery.

Another potential advantage of large firms may be that there are economies of scale in the provision of preventive measures. Once a policy is developed or a training program designed, the marginal cost of extending the policy or program to more divisions may be very small. If so, as long as the expected cost of sexual harassment for the highest-income employees is large enough to make preventive measures worthwhile, extending those measures to lower-income employees in other divisions may be of small enough cost to be profitable. An interesting empirical question, then, is whether large firms have uniform preventive measures (both in type and quality)[178] for all divisions, or whether there are deviations.

JOSEPH E. MURPHY, INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPULSION 107 (1998))).

176. In general, having different preventive measures for different work environments is not a bad thing, as the same preventive structure may not be effective in all work environments. Ideally, then, preventive measures should be tailored to the needs of each division. The problem arises when tailoring means reducing the level of prevention in some divisions.

177. To some extent, this outcome provides an incentive to outsource to different firms. It may be, however, that other costs of outsourcing exceed the reduction in liability that would result.

178. It is possible that a firm could generally provide the same preventive measures, but offer a substantially higher quality of measures to higher-income employees. For example, basic training could be provided to all, but more intensive training would be provided for higher-income workers.

III
CHANGING THE EXPECTED COST TO FULFILL THE PURPOSES OF TITLE VII

Since sexual harassment continues to be prevalent in the American workplace,[179] it is fair to question whether Title VII has been successful in deterring sexual harassment. Moreover, it is unlikely that Congress wanted differing preventive measures to be taken depending on the income of a firm's or a division's employees. The question remaining is how this disparity can be remedied to further Title VII's deterrent purpose. The foregoing analysis suggests that the key is to raise the expected cost of discrimination for low-income workers enough to make it worthwhile for employers to strengthen their preventive measures. This can be accomplished by increasing access to the legal system, thereby raising the probability of a lawsuit should sexual harassment occur. Another option is to increase the allowable remedies under Title VII, compensating for the low probability of an employer being sued and losing. A third possibility is to increase the likelihood of a plaintiff succeeding by limiting the affirmative defenses available to employers. Finally, the definition of harassment could be expanded to increase the number of employees with standing to sue.

A. Increasing Access to the Legal System

One way to increase the expected cost of sexual harassment is to find a way to get more claims into the legal system. Very few employment-related claims are brought to the legal system for both low- and moderate-income households.[180] If more claims were brought to the legal system, and the probability of success did not decline,[181] the expected cost of discrimination could be increased, leading firms to take additional preventive measures. Furthermore, if punitive damages are high enough, it is even possible that firms would face the full

179. *See* sources cited *supra* notes 4–5.

180. Seventy-eight percent of low-income households and seventy-one percent of moderate-income households did not seek legal help for employment-related legal problems. SURVEY OF AMERICANS, *supra* note 80, at 15 fig.6.

181. If the cases not brought have a very low probability of success, then the gains in access to the legal system may be offset by a reduction in the probability of success. Given the reasons cited by households for not bringing claims to the legal system, *see supra* Part II.A.3, there is no reason to believe that claims are not being brought based on an expert evaluation of the low probability of success.

cost of sexual harassment for all victims, even though not every victim sues or is successful.[182]

How might access to the legal system be increased? One possibility is to expand the role of the EEOC. Legal services could also be expanded to allow more low-income employees to obtain counsel and/or to include employees with higher incomes. The lack of information and the misinformation reported by respondents to the ABA survey also suggest that providing information to employees about their eligibility for aid and the extent of their legal rights could increase the number of households that seek legal help.[183] To the extent employees may be fearful of losing their jobs if they file a lawsuit, whistleblower statutes could be strengthened to increase employees' resolve to seek redress.[184] Finally, procedures could be simplified to make it easier to file and less costly to resolve a claim.

1. Equal Employment Opportunity Commission

Currently, victims of sexual harassment must file a Title VII claim with the EEOC[185] and, if reasonable cause is found, may benefit from an EEOC-brokered settlement or a lawsuit filed by the EEOC.[186] Under the EEOC's procedures, victims do not lose control of their claims during the process: "If the Commission finds reasonable cause and proceeds to conciliation, no settlements are binding without the consent of the aggrieved employees. If the Commission brings suit, the employees can intervene."[187] Moreover, should the EEOC not find reasonable cause in a particular case, the victim is not barred from filing a lawsuit independently.[188]

The EEOC, then, has the potential to provide valuable services to those it helps. The problem is that the EEOC plays a relatively minor role in bringing cases to court.[189] While the number of sexual harass-

182. Suppose, for example, that there are ten victims of harassment at a particular firm, causing total damages of $100,000. If only three sued, and of those only one was successful, a firm could still be forced to internalize the full cost of harassment if the total recovery for that one plaintiff was $100,000.

183. *See infra* Part III.A.3.

184. *See infra* Part III.A.4.

185. *See* Beverly Bryan Swallows, *Reducing Legal Risk and Avoiding Employment Discrimination Claims*, 19 FRANCHISE L.J. 9, 9; O'Connor, *supra* note 1, at 527 n.133 (citing 42 U.S.C. § 2000e-5(b)–(c) (1994)).

186. *See* Summers, *supra* note 23, at 479.

187. *Id*. at 480 (footnote omitted).

188. *Id*.

189. "In 1989, only 563 suits for employment discrimination were brought in the federal district courts by the federal government, while 7470 were brought by private plaintiffs." *Id*.

ment complaints filed with the EEOC has increased from 10,532 in 1992 to 15,475 in 2001,[190] the number of Title VII court cases initiated by the EEOC rose only from 242 to 271.[191] This is largely the result of the EEOC lacking the funds necessary to cover its burgeoning caseload.[192] This problem could therefore be remedied with increased funding.

a. Benefits of EEOC Involvement

One advantage of EEOC review is that it allows for a screening of cases where an objective body can assess the evidence and determine whether there is reasonable cause to believe sexual harassment occurred.[193] This helps deter frivolous lawsuits by signaling to alleged victims that the probability of success on their claim is low. At the same time, since the EEOC's reasonable cause determination does not prevent an individual from filing suit, it does not prevent those legitimately aggrieved from pursuing remedies.[194]

More importantly from a victim's perspective, the EEOC's investigation and conciliation efforts may aid in the settlement of claims.[195] The EEOC's investigative efforts may also reduce litigation costs. If a settlement is obtained or if the EEOC takes the case to trial, the victim does not need to obtain a lawyer independently.[196] If no settlement is reached and the EEOC does not try the case, investigative costs for the victim can still be reduced because she will have access to the reports prepared by the EEOC.[197] By increasing EEOC funding, a greater number of cases can be investigated more thoroughly, thereby lowering the cost and hence increasing the probability of a plaintiff suing.

b. Limitations of EEOC Involvement

EEOC involvement is not without its limitations. It may take 180 days for the EEOC to issue a "right-to-sue" letter, enabling an individ-

190. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, SEXUAL HARASSMENT CHARGES: EEOC & FEPAS COMBINED: FY 1992–FY 2001, *at* http://www.eeoc.gov/stats/harass.html (last modified Feb. 22, 2002).

191. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC LITIGATION STATISTICS, FY 1992 THROUGH FY 2001, *at* http://www.eeoc.gov/stats/litigation.html (last modified Feb. 22, 2001). This figure includes all Title VII claims, not just sexual harassment claims.

192. Bisom-Rapp, *supra* note 25, at 37; Summers, *supra* note 23, at 481.

193. *See* Summers, *supra* note 23, at 480.

194. However, when the EEOC does not find reasonable cause, individuals who are unable to get a private lawyer will be unable to pursue their cases.

195. Summers, *supra* note 23, at 480.

196. *See id.*

197. *See id*. at 482.

ual to file suit independent of the EEOC.[198] Victims who rely on the EEOC to handle their cases face further delays: "[T]he average case spans more than 600 days from the filing of a charge until the case is referred to the General Counsel to prepare to bring suit."[199] Even after a lengthy wait, there is no guarantee that a given case will be brought. Due to a lack of funding, the probability of having the EEOC file suit in any given case is small, even among those cases in which reasonable cause is found.[200]

Increased funding would allow the EEOC to conduct more thorough investigations and take more cases to trial. It is unrealistic, however, to ever expect the EEOC to be able to try every case in which there is reasonable cause to believe sexual harassment has occurred. At best then, increasing the resources of the EEOC is only a partial solution to raising employers' expected cost of discrimination to the point where they bear the full cost of harassment.

2. Expand Legal Services

The probability of low-income employees suing could also be raised by expanding other forms of legal services to include more low- and moderate-income workers. "The current federal standard of 125% of the poverty level excludes the working poor as well as those with moderate incomes [from civil legal assistance]."[201] Like the EEOC,

198. *See* 42 U.S.C. § 2000e-5(f) (1994).

199. *Id*. at 481(citing *EEOC Delays in Processing Age Discrimination Charges: Hearing Before a Subcomm. on Employment & Hous. of the House Comm. on Gov't Operations*, 100th Cong. 40 (1988) (statement of Clarence Thomas, Chairman, EEOC)).

200. *See* Bisom-Rapp, *supra* note 25, at 37 (asserting that EEOC's lack of funding discourages thorough review, and that attorneys selecting cases have incentive to choose cases that will "advance their careers and the goals of the agency itself. This translates into an imperative to pursue relatively uncontroversial cases with a high probability of success." (footnote omitted)); Summers, *supra* note 23, at 481 (indicating that the EEOC "brought suit in less than 30% of the cases in which reasonable cause was found and conciliation failed"); OFFICE OF COMMUNICATIONS AND LEGISLATIVE AFFAIRS, EQUAL EMPLOYMENT OPPORTUNITY COMM'N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: AN OVERVIEW, *at* http://www.eeoc.gov/facts/overview.html (last modified Dec. 10, 1998) (indicating that only ten percent of EEOC's budget "is available for such critically important functions as litigation support, technology, and staff training"). *But see* David Borgen, *Major Recent Developments in Employment Law from the Perspective of a Plaintiffs' Attorney*, *in* 1 28TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 151, 174 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-614, 1999) (advising employers to be aware of "the more aggressive enforcement policy of the EEOC. From October 1, 1998 to March 30, 1999, the EEOC reaped $7.4 million for victims of discrimination and filed 41 new class actions").

201. Meeker & Dombrink, *supra* note 103, at 2227.

legal services are subject to funding that changes with the political tide.[202] Limited resources impact the way cases are managed and limit the number of cases that can be advanced through the civil justice system.[203] Moreover, many low-income Americans are at a disadvantage in the courtroom because, unlike their adversaries, they lack competent and zealous advocates.[204]

By making a long-term commitment to increased funding for the provision of legal services to low-income individuals, Congress could not only increase the probability of an aggrieved employee taking legal action, but perhaps also increase the probability of success by allowing individuals to obtain better representation. The latter could be accomplished if legal services centers have enough funding not only to take on the legitimate cases they see, but also to reduce attorney caseloads to permit more thorough trial preparation.[205] Making the financial commitment long-term could also increase the quality of legal services attorneys by inducing more individuals to choose this line of work without fear of their position being terminated.[206]

The problem with relying exclusively on this approach is that it may be prohibitively expensive to achieve an increase in the probability of suit sufficient to force employers to fully internalize the cost of harassment. For example, it may be difficult to ensure that any employee, regardless of geographic location, is able to access the available legal services. It might also prove difficult to target the funding towards a particular type of case. A subsidy available to any lawyer performing requisite services may be more generally available and easier to target, but it may be difficult to predict and control the expense. This is not to say that efforts should not be made to increase

202. In California, for example, "the number of legal services attorneys who provide free services to the poor decreased by twenty percent" between 1980 and 1990. Lash et al., *supra* note 69, at 492 (citing PUBLIC INTEREST CLEARINGHOUSE, UNEQUAL JUSTICE: A REPORT ON THE DECLINING AVAILABILITY OF LEGAL SERVICES FOR CALIFORNIA'S POOR 1980–1990, at 1 (1991)).

203. *See* FINAL REPORT, *supra* note 86, at 11.

204. *See* Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 12 (1984).

205. *See* Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 155–56 (2000) (discussing how high caseloads make it difficult to spend time on individual cases).

206. *Cf*. Michael A. Mogill, *Professing* Pro Bono*: To Walk the Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 13 (2001) (indicating that budget cutbacks during 1990s "have had a 'demoralizing' impact on staff itself, with offices being subject to hiring freezes and a 'brain drain' by losing senior staff").

the availability of legal services,[207] but with respect to sexual harassment it is likely only part of the solution.

3. Provide Information

Many workers do not realize the full extent of the protections the law provides.[208] Moreover, they often do not know where to turn for help when they experience discrimination within the workplace.[209] Another way to increase the probability of an aggrieved employee suing, then, is to provide employees information about both their substantive rights and how they can seek redress.[210] This could be achieved through interactive Web sites or other technology-based tools.[211] A problem with relying exclusively on the Internet, however, is that many low-income households do not have access to it.[212] Such services should therefore be buttressed by efforts to make regularly updated materials available at public places, such as libraries and courthouses.[213]

Information alone, however, is of limited utility. In order to be successful at increasing the probability of an employee filing suit, the

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207. Additional goals may also be achieved by increasing funding for legal representation for the poor.

> Private attorneys and legal service lawyers who represent the poor perform an essential function when they act as "private attorneys general," ensuring that the laws are fairly interpreted and enforced. Legal assistance to the poor also provides legislators and administrators with information about the operation and effects of proposed and current laws and regulations helping to shape better public policies for everyone.

MASS. COMM'N ON EQUAL JUSTICE, EQUAL ACCESS TO JUSTICE: RENEWING THE COMMITMENT 4 (1996); *see also* Lash et al., *supra* note 69, at 489 ("Respect for justice and laws is diminished when large segments of our society do not have equal access to civil justice because they cannot obtain legal assistance to resolve disputes that touch on the very basics of life . . . or to seek legal redress of their grievances.").

208. *See supra* notes 122–25 and accompanying text.

209. *See supra* notes 126–28 and accompanying text.

210. The ABA's findings indicate the importance of such information.

> In most cases people want and are able to make sensible decisions regarding their own best interests—if pertinent and timely information is available. But information is also essential to those for whom the stress of the moment can inhibit the willingness or capacity to seize the initiative. For these individuals it is all the more important to remove obstacles that keep them from getting the help they may need.

FINAL REPORT, *supra* note 86, at 15.

211. *See id.* at 16–17.

212. *See* Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 55–56 (2000) ("Only 20% of low-income households report a regular access to a computer or the internet, compared with 75% of households earning $75,000 or more.").

213. *See* FINAL REPORT, *supra* note 86, at 17.

provision of information must be coupled with sufficient resources to meet legal needs. Informing a low-income individual of her rights, for example, may be of little value if the EEOC is unable, and private or legal services attorneys are unwilling, to pursue her case.[214]

4. Whistleblower Statutes

The probability of an employee suing might also be increased by strengthening statutes that purport to protect employees from retaliation if they bring claims against an employer. As Professor Summers observes, "'Whistleblower' statutes, on both the federal and state level, are perforated with loopholes and have proven notoriously ineffective."[215] Without a guarantee of protection, an employee fearing the loss of her job may be unwilling to pursue a valid claim. Particularly when unemployment is high, employees may be very reticent to risk losing their jobs.[216]

5. Simplify Procedures

More employees could potentially obtain recovery for their losses if traditional legal procedures were simplified. This would enable more individuals to address grievances on their own, eliminating the cost and difficulty of hiring an attorney.[217] Mediation and arbitration could be used more frequently to promote swift, inexpensive resolution of employee complaints.[218] The EEOC has developed a voluntary mediation program, the expansion of which might prove a useful way to resolve more claims without costly investigations.[219]

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214. *See id*. at 19 ("The potential of these initiatives dissipates quickly, of course, if there are not adequate legal resources to which people can be referred.").

215. Summers, *supra* note 23, at 535.

216. One might argue that when there is low unemployment there should be less sexual harassment in the workforce because if workers are harassed they will leave; the high turnover, and difficulty of replacing workers, may induce employers to take further precautions. However, at the same time, would-be harassers also know that other job opportunities are readily available to them, so they may be more willing to risk job loss by harassing workers.

217. *See* FINAL REPORT, *supra* note 86, at 13 ("A hurdle for many individuals attempting to handle matters on their own is the complexity of forms and procedures.").

218. *See id*. at 13 ("Mediation and arbitration are established as effective means of resolving some disputes more quickly with less strife and at less cost than usually accompanies litigation."). *But see* Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 401 (2000) (suggesting that arbitration may be more costly for employer than litigation).

219. *See* Bisom-Rapp, *supra* note 25, at 36–37 n.201 (indicating that by end of 2000, EEOC's estimate was that fifteen percent of its annual caseload would be referred to mediation).

Simplified and less formal procedures are not without their costs. Mediation and arbitration may result in more mistakes, for example.[220] It is also possible that the enforcement of legal rights may not be a priority for mediators seeking reconciliation.[221] Yet, if the parties are happy with the outcome of arbitration or mediation, this result would be preferable to the status quo, in which many grievances are never resolved at all. Put another way, it may be beneficial to provide a low-cost alternative with imperfect results rather than leave only a few to obtain recovery through the court system.[222]

B. Increasing Remedies

Another way to raise the expected cost of discrimination so that employers will take more preventive measures is to increase the remedies available to victims. This could be accomplished by increasing the availability of punitive damages and/or by raising the statutory caps.

1. Punitive Damages

Punitive damages are only available in cases where an employer acts "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[223] This has been interpreted by the Supreme Court to mean that, in the punitive damages context, employers are not vicariously liable for discriminatory acts of their managerial agents, provided they make a good-faith effort to adhere to Title VII.[224] Insofar as this allows employers to avoid liability by taking some minimal level of prevention,[225] the probability of an employer facing punitive damages can be reduced to nearly zero. If compensatory damages do not make up a substantial portion of the statutory cap, the absence of punitive damages will substantially reduce a firm's expected liability.[226]

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220. *See* Summers, *supra* note 23, at 534 ("Informal and simple procedures may provide less refined justice.").

221. *See* Bisom-Rapp, *supra* note 25, at 36–37 n.201 (citing Lauren B. Edelman & Mia Cahill, *How Law Matters in Disputing and Dispute Processing*, *in* HOW DOES LAW MATTER? 15–44 (Bryan G. Garth & Austin Sarat eds., 1998)).

222. *See* Summers, *supra* note 23, at 533–34.

223. 42 U.S.C. § 1981a(b)(1) (1994).

224. Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999).

225. *See supra* note 166 and accompanying text.

226. An important empirical question, then, is to what extent the statutory caps are binding. If they are, this suggests that the absence of vicarious liability will not prove particularly important, since cases are already reaching their statutory limits.

Moreover, one of the goals of punitive damages is to force firms to bear more than the costs of making the individual plaintiff whole in a given case in order to adjust for the fact that many plaintiffs never come forward.[227] If punitive damages are not available—or the likelihood of facing them is very small—then employers will only bear the costs of those plaintiffs who are successful in court, not all those that are harassed. This reduces the incentive of firms to fully control the actions of their employees and take other preventive measures.

To combat this problem, Congress could express its intention in an amendment to Title VII that employers face vicarious liability for punitive damages even when managerial agents are responsible for the harassment. This would enable more plaintiffs to receive punitive damages, thereby increasing the expected cost of sexual harassment.

One potential drawback of using punitive damages to provide greater deterrence is that it may be perceived as unfair. If punitive damages are too frequently imposed or set too high, for example, an employer may be forced to pay far more than the actual losses suffered by employees.[228] Another concern is that relying on punitive damages as the primary deterrent tool may prove ineffective if those imposing the remedy—judges and juries—believe they are excessive and refuse to impose them.[229] Like many of the tools for increasing access, then, punitive damages represent one part of a comprehensive solution. They are, however, particularly attractive from a policy standpoint because they do not require large government outlays to implement. Firms themselves bear the cost of the increased deterrence.

2. Modify the Statutory Caps

Congress could also raise, or eliminate, the statutory caps on the size of compensatory and punitive damage awards that a successful plaintiff can receive. The problem with statutory caps is that they reduce the average remedy by imposing a ceiling on an award, regardless of the actual damages a plaintiff sustained.[230] In the case of Title VII, the caps are not based on the type of damages sustained, but

227. Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 443 (1998).

228. *See id*. (asserting that penalties should be designed to force firms to internalize social loss).

229. *See* Summers, *supra* note 23, at 536 (arguing that "[d]eterrence is better achieved by increasing the percentage of violators held liable than by increasing the penalty on a few unlucky ones brought to book").

230. *See* Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185, 2209 (1999) ("Placing a cap on the largest

rather on the number of employees at the firm. Even a very profitable firm will face only up to $50,000 in penalties if it has fewer than 101 employees. By raising or eliminating the caps, the expected cost of discrimination will rise because of the risk that an employee might obtain an award above the old cap.

To address the high marginal cost associated with crossing each threshold to a higher cap, the caps could be replaced with a sliding scale, which would vary with the number of employees at the firm. Potential liability, for example, could be equal to five hundred dollars times the number of employees. This would avoid any labor market distortions caused by the current statutory caps.

3. Increasing the Likelihood of Suit

By increasing the remedy available to a successful plaintiff, the likelihood of an aggrieved employee suing will rise.[231] This is in part because it becomes more worthwhile for the employee to file a complaint: the potential gain from a lawsuit increases, leading more employees to determine that the benefits of suing outweigh the costs.[232] Moreover, as the potential remedy increases, it becomes easier for an employee to find a lawyer willing to take the case.

C. Increasing the Likelihood of Success

The expected cost of harassment could also be increased by making it more likely that plaintiffs will succeed if they take action against an employer. One way to do this is by removing the affirmative defense currently available to employers. Under *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*, an employer can assert an affirmative defense to avoid liability for sexual harassment when no tangible employment action is taken.[233] Concerns have been raised that the affirmative defense as applied by the courts allows employers to escape liability even if their efforts to address sexual harassment

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possible award is similar in many respects to subtracting something from the *expected value* of the damage award.").

231. Indeed, the passage of the Civil Rights Act of 1991, expanding the damages available to plaintiffs, increased the number of cases taken to court. Evans, *supra* note 1, at 525 (citing WILLIAM PETROCELLI & BARBARA KATE REPA, SEXUAL HARASSMENT ON THE JOB: WHAT IT IS & HOW TO STOP IT 3/35 (1998)).

232. *Cf*. Craswell, *supra* note 230, at 2213 (indicating that if damage awards are related to offense's seriousness, victims of most serious offenses will be most likely to sue).

233. *See supra* text accompanying note 13.

have been devoid of substance.[234] If establishing that policies and procedures exist on paper is sufficient to constitute a prima facie defense, then employees will be left with the burden of demonstrating that these have not been implemented, at least in their case.[235] Further, by rewarding employers for taking remedial action once harassment has occurred, what the affirmative defense may do is not to decrease the occurrence of sexual harassment, but rather to decrease the number of cases that end up in court.[236]

Eliminating the affirmative defense—in effect, creating strict liability—would not be new to sexual harassment. In Missouri, the legislature did not include an affirmative defense in its statute governing supervisory sexual harassment.[237] Similarly, in Massachusetts the Supreme Judicial Court has held that no affirmative defense is available

234. *See, e.g.*, Bisom-Rapp, *supra* note 4, at 975, 1026 (explaining that "recent judicial analyses view the standard for legal compliance as based on the existence of appropriate personnel policies rather than based on the work environment itself. Thus, an employer will not be said to discriminate, notwithstanding its supervisor's creation of a hostile environment, if a standard harassment policy exists and has been communicated to employees" (footnote omitted) and noting that "[I]t does appear that judges are far more persuaded by symbols and process than they are by substance"); Evans, *supra* note 1, at 531–32 ("[A]lthough the *Meritor* Court concluded that 'the mere existence of a grievance procedure and a policy against discrimination' did not automatically insulate an employer against liability, many courts have looked favorably on the existence of such procedures and policies." (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986))). *But see* Gruner, *supra* note 8, at 202 ("[E]ducational steps alone will probably not satisfy current tests for reasonable antiharassment self-policing that is sufficient to establish an employer's defense to liability for harassment. . . . In short, reasonable self-policing to prevent harassment requires affirmative management steps and programs to eliminate this practice and to ensure compliance with related provisions of employment discrimination laws.").

235. *See, e.g.*, Debra S. Katz & Lynne Bernabei, *Sex Harassment Cases Create Uncertainties*, TEX. LAW., July 20, 1998, LEXIS, Txlawr File ("Many employers have anti-discrimination policies on paper and procedures to investigate sexual harassment in place, but they do little to implement these policies and procedures. Employees may be forced to prove that these were not properly implemented in their case, or in other cases."). This task is made difficult by the fact that "employers typically possess most of the documents bearing on liability. Employers are also advantaged in obtaining favorable testimonial evidence. One management advocate observes that '[t]he defense . . . generally controls almost all, if not all, the witnesses other than the plaintiff.'" Bisom-Rapp, *supra* note 25, at 16–17 (alteration in original) (footnote omitted) (quoting Ellen M. Martin, *Dispositive Motions in Federal Employment Discrimination Cases*, ALI-ABA Course of Study, Employment Discrimination and Civil Rights Actions in Federal and State Courts, June 3, 1993, at 873, *available at* WL, C780 ALI-ABA 859).

236. *Cf.* Katz & Bernabei, *supra* note 235 (discussing that in *Burlington Industries, Inc.* and *Faragher*, the Court "clearly attempted to decrease the number of sexual harassment occurrences that actually become lawsuits").

237. *See* Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 767–68 (Mo. Ct. App. 2000).

under the state's discrimination law.[238] Ideally, a study would be conducted comparing the likelihood of success for victims of sexual harassment in these states with success rates in states that allow an affirmative defense. If there is a substantial difference, eliminating the defense could be a promising (and low-cost) way to increase the expected cost of harassment at the federal level.

A less drastic approach—and one that may be perceived as fairer to employers—would be to require employers to establish that their prevention and corrective measures are substantial. After all, the affirmative defense was designed to provide firms with further incentives to create policies and grievance procedures and to encourage conciliation instead of litigation.[239] It is beneficial to employees to have legitimate complaints reconciled in a timely, low-cost manner. By ensuring that policies and procedures are substantive, courts can help fulfill these goals. Moreover, by holding employers to a higher standard of proof, fewer employers would be successful in asserting affirmative defenses—only those with legitimate, implemented policies and procedures—which would increase the likelihood of plaintiffs succeeding.

Given the wide range of tools available to employers, another possibility is to establish a sliding-scale affirmative defense. Instead of an all-or-nothing approach, courts could assess liability based on the degree of precautions and responses taken. The more extensive the employer's procedures and preventive tools, the less liability it would face. This is admittedly not an exact science; courts would have to assess a percentage of liability on a case-by-case basis. While it would be difficult to quantify the effectiveness of this approach as part of a policy initiative, by moving away from the absolute defense the likelihood of a plaintiff succeeding would increase to some degree.

D. Increasing the Number of Employees with Standing to Sue

The likelihood of an employer being sued for sexual harassment could be increased by expanding the definition of sexual harassment to increase the pool of individuals with standing to sue. One way to do this is for courts to accept the bystander injury theory of sexual harassment. This theory is already recognized by the EEOC[240] and by

238. *See* Myrick v. GTE Main St., Inc., 73 F. Supp. 2d 94, 98 (D. Mass. 1999) (citing College-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination, 508 N.E.2d 587 (Mass. 1987)).

239. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

240. O'Connor, *supra* note 1, at 508.

some court decisions.[241] The idea is to recognize how co-workers can suffer when another employee is sexually harassed and to allow them to recover for their injuries.[242] By expanding the number of people eligible to sue, the number of lawsuits will increase, provided that the probability of suit remains the same, thereby increasing the expected cost of harassment.

One argument against this approach is that it would require many new preventive techniques that would drive up costs to employers, thereby adding little benefit. Given that bystander injury is similar to hostile environment sexual harassment, only minor changes are likely to be needed to tailor existing prevention programs to address this concern.[243] Nonetheless, further study is needed before embracing this approach. If the costs to employers of additional preventive measures are large relative to the increase in the number of individuals likely to sue, this approach may not yield significant results. On the other hand, if the additional prevention costs are in fact small relative to the increase in lawsuits, the increase in the expected cost achieved may be worthwhile. Like altering the affirmative defense and increasing available remedies, nearly the entire cost would be borne by employers.

IV
OTHER APPLICATIONS

Income plays a role not only in the sexual harassment arena, but also in other areas of employment law. The fact that low-income employees are less likely to sue than high-income employees will affect the expected cost of engaging in a prohibited activity wherever the primary enforcement mechanism is the aggrieved employee's private cause of action. Additionally, any statute that varies liability with the size of an employer will have similar marginal cost effects as Title VII. As in the Title VII context, I will suggest potential remedies to the problems identified.

A. Fair Labor Standards Act

The Fair Labor Standards Act of 1938 (FLSA)[244] represents Congress's first effort to establish minimum labor standards.[245] The Act

241. *See id*. at 509–12 (discussing several cases accepting theory).
242. *See id.* at 544.
243. *See id.* at 540.
244. 29 U.S.C. §§ 201–219 (1994 & Supp. V 1999).
245. William C. Posternack & Joan E. Gestrin, *Federal Wage and Hour Laws*, *in* ILL. INST. FOR CONTINUING LEGAL EDUC., LABOR LAW HANDBOOK 14-1, 14-5 (1999).

serves three primary purposes. First, it establishes a minimum wage—currently $5.15 per hour.[246] The minimum wage provision also prohibits wage differentials based on gender.[247] Second, the FLSA requires premium pay for overtime work equal to one and one-half times the regular wage rate.[248] Finally, the FLSA restricts the ability of firms to employ children.[249] This Article will focus on the minimum wage and premium pay provisions of the FLSA.

In the event the Act is violated, the employer is subject to both criminal and civil penalties.[250] An action to impose civil liability can be brought by either the Secretary of Labor or the aggrieved employees.[251] A successful employee can recover unpaid minimum wages or unpaid compensation, as well as an equal amount as liquidated damages.[252] The FLSA also provides for an award of attorney fees to successful plaintiffs.[253] If an employer retaliates against an employee for raising a claim under the FLSA, it may be further liable for legal or equitable relief, "including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."[254]

At first glance, it might appear unlikely that variations in income would play a significant role in a minimum wage law, since all those covered are low-income employees. In fact, the FLSA covers a wide range of income groups, particularly in its overtime and wage differential provisions. An account manager making $95,000 per year, for example, may be protected by the FLSA's overtime provisions.[255]

246. 29 U.S.C. § 206(a)(1) (Supp. V 2000).

247. *Id*. § 206(d) (1994). This prohibition was added to the FLSA in 1963 with the passage of the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

248. 29 U.S.C. § 207(a) (1994).

249. *Id*. § 212.

250. *Id*. § 216.

251. *Id*. § 216(b)–(c).

252. *Id*. § 216(b). For a violation of the Equal Pay Act, employers may also be required to reimburse a successful plaintiff for the costs of obtaining benefits provided by the employer to members of the opposite sex. *See* Gerald S. Hartman & Kelly S. Jennings, *The Classic Equal Pay Act Case*, *in* LITIGATING EMPLOYMENT DISCRIMINATION CASES 1999, at 169, 182 (PLI Litig. & Admin. Practice Course, Handbook Series No. 604, 1999) (citing Pedreyra v. Cornell Prescription Pharmacies, 465 F. Supp. 936 (D. Colo. 1979); Taylor v. Franklin Drapery Co., 443 F. Supp. 795 (W.D. Mo. 1978)).

253. 29 U.S.C. § 216(b).

254. *Id*. Specifically, equitable relief is granted if the employer retaliates against the employee in violation of 29 U.S.C. § 215(a)(3).

255. Michael A. Faillace, *Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21st Century*, 15 LAB. LAW. 357, 357–58 (2000).

As in the context of sexual harassment, employers may take differing levels of precautions to avoid FLSA violations. Most obviously, an employer could affirmatively choose to violate the FLSA if it thought that it would not be held liable, or that its expected liability was lower than its expected savings from violating the law. Even among employers who want to obey the law, however, there may be varying levels of preventive measures taken. Some employers might remind employees of their rights, so they can bring inadvertent violations to the employer's attention. A firm could also provide training to its payroll department to inform them of the intricacies of the FLSA. Going further, an employer might extensively audit its payroll records to ensure that it is in compliance with the FLSA. An employer, then, can utilize various tools to prevent, detect, or correct violations, depending on the perceived need.

1. Probability of Suit

To the extent that individual employees must obtain counsel in order to recover damages, the probability of a suit is likely to vary with income. This is largely because the size of a claim under the FLSA will vary directly with income, unless punitive damages are awarded. Recall that the FLSA permits damages equal to unpaid compensation plus an equal amount in liquidated damages. Consider two individuals, one making $6 per hour and another making $20 per hour. If each employee works fifty hours per week for one year, but is compensated for all hours at the regular wage rate, then both employees have a claim under the FLSA for unpaid overtime compensation. The employee making $6 per hour could recover a maximum of $3120,[256] while the higher-paid employee could recover $10,400.[257] The higher-paid employee is more likely to find an attorney to take his case on a contingency-fee basis.[258] This is because the payoff for the lawyer is substantially higher. Even if each employee could afford to hire an attorney, all else being equal, the lower-income employee would be willing to spend far less on attorney's fees, court costs, investigation, etc., to pursue the case because the recovery is much lower.

256. The employee was underpaid $3 per hour for each hour of overtime worked all year. Since the employee worked ten overtime hours per week for fifty-two weeks, he is entitled to $3 x 10 x 52 = $1,560, and may recover an equal amount in liquidated damages.

257. This employee was underpaid $10 per hour, entitling him to $10 x 10 x 52 = $5,200, plus he may recover an equal amount in liquidated damages.

258. *See supra* note 105 and accompanying text.

Beyond the difficulty of finding an attorney, other considerations may discourage low-income employees from pursuing a valid claim. As in the case of Title VII, low-income employees may be reluctant to bring claims under the FLSA because they fear losing their jobs. Indeed, commentators have observed that there is a high risk of retaliation against employees who seek remedies under the FLSA.[259] This risk, coupled with the low value of individual claims,[260] may lead low-income employees to be reluctant to speak out against an employer, particularly if jobs are scarce.[261]

Employees also may not file suit because they are unaware of their entitlements under the law.[262] While all employees may have difficulty determining their benefits under the FLSA, it is likely that low-income employees will be disproportionately uninformed.[263] The information problem is exacerbated by the fact that many employers have difficulty determining whether their employees qualify for FLSA protection.[264] If employers err in categorizing workers by excluding too many employees from the benefits required by the FLSA, a higher number of employees will be insufficiently compensated for their work. Firms whose employees are likely to sue may soon correct such mistakes, but firms whose employees fail to sue might continue to underpay their workers indefinitely.

2. Expected Remedy

Even if all income groups were equally likely to sue, the employer would still face a lower expected remedy with respect to lower-income employees because the remedy is directly proportional to the wage level. The difference between expected remedies is exacerbated by the liquidated damages provision. In the above example, before

259. *See, e.g.*, Outten & Klein, *supra* note 129, at pt. 3 (discussing specifically low-income employees); Brock, *supra* note 129, at 799.

260. In 1992, Clyde Summers estimated the average overtime claim to be $400, and the average minimum wage claim to be a mere $200. Summers, *supra* note 23, at 497.

261. It is important to note, however, that once retaliation occurs, the value of a claim may rise dramatically, particularly if the jurisdiction follows the Seventh Circuit practice of allowing for punitive damages in retaliatory discharge cases. *See* Peter S. Rukin, *Representing Workers Under the Fair Labor Standards Act and Illinois Minimum Wage Law*, 87 ILL. B.J. 208, 210 (1999) (citing Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108, 112 (7th Cir. 1990)).

262. *See* Faillace, *supra* note 255, at 359; Rukin, *supra* note 261, at 208; Summers, *supra* note 23, at 496.

263. *See supra* Part II.A.3.c (discussing lack of knowledge of legal rights among low-income individuals).

264. *See* Faillace, *supra* note 255, at 359 (indicating that both employers and employees have difficulty ascertaining their rights and obligations under FLSA).

liquidated damages, the difference between the remedies for the two employees was just over $3600. After liquidated damages are taken into account, the difference doubles to over $7200. Thus, while the liquidated damages provision raises the level of the expected remedy for the lower-paid employee, by tying liquidated damages directly to the size of the unpaid compensation, the FLSA widens the gap between income groups as to the expected cost of violating the Act.[265]

This gap might not be a significant problem if punitive damages are available and substantially raise the expected cost of violating the Act for all groups. Unlike Title VII, however, the FLSA does not expressly permit an employee to recover punitive damages.[266] Moreover, the Eleventh Circuit Court of Appeals has ruled that punitive damages are not available under the FLSA.[267] No circuit court has held that punitive damages are available in non-retaliatory discharge cases. While the United States Supreme Court has not yet addressed the issue directly, it has held that the liquidated damages provisions of the FLSA are compensatory in nature.[268]

Although the FLSA does not discuss punitive damages in private causes of action, it does authorize criminal penalties for employers who violate the Act. Upon conviction, an employer may be fined up to $10,000 and/or be imprisoned for up to six months.[269] A criminal complaint, however, can only be pursued by the government, not individual employees. In theory, then, the likelihood of facing criminal sanctions should not vary with the income of the employee. It is possible, however, that criminal complaints are more likely to be brought against those employers who repeatedly incur civil liability. To the extent high-income employees are more likely to sue, employers with a large percentage of high-income employees would then face a higher

265. This, of course, depends on whether liquidated damages are equally likely for all income groups. Under the FLSA, liquidated damages are presumptive; the burden is placed on the employer to establish they are not appropriate. *See* Posternack & Gestrin, *supra* note 245, at 14–23; Rukin, *supra* note 261, at 210 (citing 29 U.S.C. § 260 (1994)). Even where an employer acted in good faith, liquidated damages can be awarded. Bernard v. IBP, Inc. of Neb., 154 F.3d 259, 267 (5th Cir. 1998) (citing 29 U.S.C. § 260).

266. *Compare* 42 U.S.C. § 1981a(a) (1994), *with* 29 U.S.C. § 216 (1994 & Supp. V 1999).

267. Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 933–34 (11th Cir. 2000) (in part basing its holding that punitive damages are not permitted by FLSA on finding that remedies permitted by FLSA in private cause of action are all compensatory in nature). *But see* Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108, 112 (7th Cir. 1990) (holding that punitive damages are appropriate in cases of retaliatory discharge).

268. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945).

269. 29 U.S.C. § 216(a) (1994).

probability of having a criminal complaint filed against them. If this is the case, the criminal sanctions, like liquidated damages, may further widen the gap between the expected costs of under-compensating high- and low-income employees.

3. Agency Enforcement

As in the case of Title VII, the agency responsible for enforcing the FLSA—the Wage and Hour Division within the Department of Labor[270]—lacks sufficient funds to pursue the large number of meritorious claims.[271] For low-income employees who cannot get a private attorney and are forced to rely on the Department of Labor for representation, a failure of the Department to pursue a claim is decisive.[272]

A further complication is that once the Secretary of Labor decides to proceed against an employer, the employee is foreclosed from doing so.[273] For a lawyer determining whether to take a case, the possibility of having the potential cause of action terminated will weigh against doing so. This causes more claims to be of insufficient value to justify an attorney taking the case, leaving more low-income employees without an advocate. If the Secretary eventually does file a claim against a particular employer, the employee is not harmed, but if the Secretary fails to do so, the employee is left uncompensated. Since there is no exhaustion requirement under the FLSA[274]—meaning the employee does not have to wait for a right to sue letter as in the Title VII context—a strategic employee could first seek an attorney, filing a complaint with the Department of Labor only as a last resort. There would still be a risk, however, that the Department of Labor would learn of the suit, or similar suits against the same employer, and decide to bring an action.

4. Class Actions

The ability of aggrieved employees to pursue a class action is severely hampered by the FLSA. The statute expressly prohibits opt-out class actions.[275] Thus, even if the employer routinely denies over-

270. *Id.* § 204 (1994 & Supp. V 1999). The Equal Pay Act is enforced by the EEOC. Similar criticisms have been lodged against the EEOC with respect to the FLSA as in the context of Title VII. *See, e.g.*, Houghton, supra note 6, at 159, 172.
271. *See* Brock, *supra* note 129, at 808.
272. *See id*. at 809.
273. *See* 29 U.S.C. § 216(c) (1994).
274. Rukin, *supra* note 261, at 211.
275. "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b) (1994).

time pay to its employees, each individual affected must identify himself and opt in to the action. While discovery may reveal some potential class members,[276] it may be difficult for an employee or attorney to determine ex ante whether there will be sufficient class members, and thus sufficient damages, to justify the costs of the action. This reduces the likelihood that an attorney will take an FLSA case where individual claims are small. Interestingly, the restrictions of the FLSA have prompted many class actions to be brought under state law.[277] In so far as state laws allow for opt-out class actions and provide remedies similar to the FLSA, the lack of a federal opt-out class action may not have a substantial adverse impact.

5. Changing the Expected Cost of Violating the FLSA

As with Title VII, one way to increase the expected cost of violating the FLSA would be to increase access to the legal system for low-income employees. Information could be provided to both employers and employees to ensure that the parties know their rights and responsibilities, and mediation procedures could be used to provide a low-cost alternative to litigation. The Department of Labor could be provided with more resources to pursue cases, or legal services could be expanded.[278] Congress could also amend the FLSA to require the Department of Labor to send a letter confirming whether it intends to pursue a claim within a specified period of time. This would enable an aggrieved employee to provide assurance to a potential attorney that the case will not be terminated by the Secretary of Labor's involvement. To allay the fear of retaliation against employees who file claims, the Supreme Court could affirm the Seventh Circuit's determination that punitive damages are available in retaliation cases. By increasing the costs of retaliation, employers will be further deterred from the practice.

The remedies available under the FLSA could also be altered to raise the expected cost of underpaying low-income employees. One approach would be to allow punitive damages for any willful violation of the FLSA. Another possibility is to target the criminal sanctions available under the FLSA toward employers of low-income employ-

276. *See* Rukin, *supra* note 261, at 211.

277. *See* Outten & Klein, *supra* note 129; Paula M. Weber & Natalie A. Beccia, *Litigating Employment Class Actions in State and Federal Court*, *in* 1 28TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 1999, at 271, 275 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-614, 1999); *see also id.* at 312–17 (discussing various state law class action requirements).

278. For a discussion of the pros and cons of these proposals, see *supra* Part III.A.

ees. To the extent resources for pursuing FLSA criminal complaints are limited, focusing on low-income workforces could yield the greatest reduction in violations since it is these employers that internalize the smallest percentage of the costs of violating the FLSA.[279] Yet another possibility would be to set liquidated damages at a fixed amount (say, $10,000) rather than basing them on the compensatory award. Doing so would prevent liquidated damages from compounding the gap between low- and high-income employees that results from differing wages.

Finally, Congress could amend the FLSA to provide for opt-out class actions. This would allow a single employee to represent all similarly situated employees, thereby forcing the employer to internalize the full cost of its violations. It seems probable that an employer violating the FLSA against one employee would likely violate it against other employees, and since the cost of each violation may be small,[280] actions under the FLSA are ideal candidates for opt-out class actions.[281] If it is the case that all states have provisions similar to the FLSA—i.e., that allow opt-out class actions and provide similar protections and remedies—a federal opt-out class action provision may not be necessary. But to the extent states do not have such provisions, providing a federal class action could greatly enhance the expected cost of violating the FLSA.

B. Family and Medical Leave Act

The Family and Medical Leave Act (FMLA)[282] requires qualified employers to provide eligible employees with up to twelve weeks of unpaid, job-protected leave to care for the birth or adoption of a child, to care for their own serious health condition, or to care for a family member who is seriously ill.[283] A qualified employer is one who em-

279. These employers face the lowest probability of being sued civilly and thus, all else equal, expect to pay the lowest percentage of the civil remedy and have the lowest litigation costs.

280. *See* Summers, *supra* note 23, at 497.

281. "The purpose of Fed. R. Civ. P. 23 is to provide an 'efficient mechanism to bring before the court the claims of numerous similarly situated plaintiffs through a limited number of class representatives.'" Weber & Beccia, *supra* note 277, at 276 (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974)); *see also* Brock, *supra* note 129, at 800 n.139 ("[C]lass actions aggregate many claims that are otherwise too small to be worth an attorney's time to litigate individually." (citing Stephen C. Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1089 n.114 (1980))).

282. Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381–6387, 29 U.S.C. §§ 2601–2654 (1994 & Supp. V 1999).

283. 29 U.S.C. § 2612(a)(1) (1994).

ploys fifty or more employees at worksites within a seventy-five mile radius of each other.[284] An employee is eligible for unpaid leave if he or she (1) has been employed by a qualified employer for at least twelve months, and (2) has worked 1,250 hours or more during the previous twelve-month period.[285] While only eleven percent of American firms are qualified employers, over half of the private sector workforce is entitled to FMLA leave.[286]

The FMLA provides aggrieved employees with a private right of action, but this right terminates if the Secretary files an enforcement action.[287] An employer who violates the FMLA is subject to liability for any wages, salary, or other compensation denied or lost. If this amount is zero, an employer is liable for any actual monetary losses sustained as a direct result of the violation, up to an amount equal to twelve weeks of wages or salary.[288] Like the FLSA, the FMLA provides that an employee can obtain an equivalent amount in liquidated damages.[289] The FMLA also permits courts to award "such equitable relief as may be appropriate, including employment, reinstatement, and promotion."[290] Finally, successful plaintiffs are entitled to attorney fees and other costs of action.[291]

Employers can take a variety of measures to ensure the FMLA is being properly implemented. In addition to providing notice as required under the Act,[292] firms could develop procedures for detecting absences that may entitle an employee to FMLA leave, train supervisors who will be handling FMLA claims, and even interview employees once they return to work following an absence that might be covered by the FMLA.[293] Additionally, firms could have lawyers re-

284. *Id*. §§ 2611(2)(B)(ii), (4)(A) (1994 & Supp. V 1999).
285. *Id*. § 2611(2)(A) (1994).
286. *See* Patricia McGovern et al., *The Determinants of Time off Work After Childbirth*, 25 J. HEALTH POL., POL'Y & L. 527, 537 (2000) (indicating that 45% of workforce is not entitled to FMLA leave); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 761 (2000) (estimating that 11% of U.S. employers are covered, while 55% of employees are eligible to take FMLA leave).
287. 29 U.S.C. § 2617(a)–(b) (1994).
288. *Id*. § 2617(a)(1)(A).
289. *Id*.
290. *Id*. § 2617(a)(1)(B).
291. *Id*. § 2617(a)(3).
292. *See* Christopher A. Parlo, *Recent Developments Under the Family and Medical Leave Act*, *in* 2 29TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, at 599, 633 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-638, 2000) (citing 29 C.F.R. § 825.208(a) (2000)).
293. *See* Daniel S. Alcorn, *No-Fault Attendance Policies: How Employers Can Avoid FMLA Violations*, 88 ILL. B.J. 597, 600 (2000) (describing in detail these recommendations).

view personnel files to make sure the FMLA has been applied properly. Again, the lengths to which an employer will go to ensure FMLA compliance will depend, at least in part, on the extent to which the employer feels it is necessary to minimize liability.

1. Similarities to the FLSA

As with the FLSA, the expected remedy under the FMLA varies with income. First, higher-income employees will have higher wages and more benefits. Second, higher-income employees will be able to incur more costs—such as nursing or child care—in the event of a violation. Since liquidated damages are equal to the compensatory award, the gap between the expected remedies for different income groups will be exacerbated,[294] and like the FLSA, neither punitive nor emotional distress damages are permitted.[295] While aggrieved employees may be able to recover front pay damages,[296] these too will vary with income.

Because the remedy will be smaller for low-income workers, they will have greater difficulty finding lawyers to take their cases on a contingency-fee basis, which further depresses the expected cost of violating the FMLA with respect to low-income workers.[297] Individuals who rely on contingent fee arrangements with attorneys may also have difficulty pursuing a valid claim because, as with the FLSA, if the Secretary of Labor chooses to bring a cause of action, the employee's right of action terminates.[298] This forces the attorney to bear the risk of obtaining no return on her investment of resources in a case, which reduces the expected return on cases, thereby inducing attorneys to require a higher potential remedy before they will take a case.[299]

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294. *See supra* text accompanying note 265.

295. *See* Kim J. Askew, *The Family and Medical Leave Act of 1993: 2000 Update*, ALI-ABA Course of Study, Employer and Labor Relations Law for the Corporate Counsel and the General Practitioner, May 4, 2000, at 495–96, *available at* WL, SE52 ALI-ABA 483; Parlo, *supra* note 292, at 656 (citing Lloyd v. Wyo. Valley Health Care Sys., 994 F. Supp. 288 (M.D. Pa. 1998)).

296. *See* Stacy A. Hickox, *Absenteeism Under the Family and Medical Leave Act and the Americans with Disabilities Act*, 50 DEPAUL L. REV. 183, 190–91 (2000) (discussing Rogers v. AC Humko Corp., 56 F. Supp. 2d 972 (W.D. Tenn. 1999)).

297. *See supra* note 105 and accompanying text.

298. 29 U.S.C. § 2617(a)(4) (1994).

299. *See supra* Part IV.A.3.

2. Probability of Suit

The reduced propensity of low-income workers to sue generally is exacerbated in the context of the FMLA because no relief is available to an employee until there is both a violation of the Act and a monetary loss.[300] An employee who stays on the job after being denied leave cannot recover damages unless there is some monetary loss, such as nursing care costs for a loved one.[301] This means that if an employer refuses to grant an employee FMLA leave, the employee has three options: (1) stay on the job and incur no monetary losses; (2) stay on the job but pay for nursing or similar care for a relative; or (3) take leave anyway and risk being fired. Since there is no guarantee that incurred costs will be compensated, the latter two options involve a risk that the employee will be forced to bear the associated costs.[302] Low-income workers will be less able to accept this risk.[303] As a result, fewer FMLA violations are likely to be brought by low-income workers.

3. Marginal Cost

Since the FMLA does not apply to an employer until it has hired fifty employees, the marginal cost of hiring the fiftieth employee will be high. The purpose of exempting firms with fewer than fifty employees is to protect small businesses.[304] In doing so, however, the Act provides a disincentive to a firm considering expanding its workforce above the fifty-employee threshold, as this would require the firm to incur costs to understand and implement the law. Before the FMLA was passed, the estimated cost of compliance was enormous.[305] Many commentators observe that employers have reported

300. *See* Kelly N. Honohan, Note, *Remedying the Liability Limitation Under the Family and Medical Leave Act*, 79 B.U. L. REV. 1043, 1046–47 (1999)

301. *See* Parlo, *supra* note 292, at 655.

302. *Cf*. Honohan, *supra* note 300, at 1056 (indicating that many employees will find risk of job loss too great).

303. *Cf.* Selmi, *supra* note 286, at 765 ("Just under 4% of the surveyed employees indicated that they needed leave but did not take it, with nearly two-thirds of those employees indicating that they did not take leave because they could not afford to do so." (citing COMM'N ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 98–99 (1996))).

304. *See* Maureen Porette & Brian Gunn, Note, *The Family and Medical Leave Act of 1993: The Time Has Finally Come for Governmental Recognition of True "Family Values*," 8 ST. JOHN'S J. LEGAL COMMENT. 587, 595 (1993) (citing *Family Leave Waits for Clinton*, 48 CONG. Q. ALMANAC 353, 354 (1992)).

305. *See* Honohan, *supra* note 300, at 1046 ("One critic argued that complying with the Act could cost employers billions of dollars and create a disincentive to expand, since they must provide leave only if they employ fifty or more employees." (citing 139 CONG. REC. S1256 (daily ed. Feb. 4, 1993) (statement of Sen. Dole))).

fairly low implementation costs thus far, in part due to infrequent utilization of the FMLA.[306] However, this may be the result of inadequate measures taken by employers to ensure compliance.[307]

Employees also are not eligible for FMLA benefits until they have been employed by a firm for a full year. This provides employers with an incentive to use short-term employees, as doing so allows them to avoid the FMLA's requirements. Of course, the cost of keeping a worker for more than a year will be outweighed by the benefits of experience and saved training costs in some circumstances. In particular, higher-skilled jobs or those requiring intensive on-the-job training will be least amenable to rapid turnover. Many low-skilled jobs, however, are easily learned, causing the benefits from experience to be low. An employer might conclude that it is better to accept high turnover rates than to provide FMLA benefits. Similarly, an employer might choose to use part-time workers, since employees are not eligible for FMLA leave unless they worked 1250 hours in the previous year.

4. Changing Incentives

One way of forcing firms to bear more of the costs for violating the FMLA is to permit emotional distress and punitive damages. Doing so would allow employees to recover for violations even if they experience no monetary losses. Since low-income employees are least able to bear monetary losses and, therefore, may be forced to remain on the job or forego care for a loved one, they would benefit disproportionately from such a change. Another possibility is to amend the FMLA to provide for criminal sanctions or civil penalties, forcing firms to internalize some cost for violating the FMLA even when there are no monetary losses. As in the FLSA context, the Secretary could then target these sanctions at employers of low-income workers.[308] Amending the liquidated damages provision to untie it from the com-

306. *See* McGovern et al., *supra* note 286, at 538 ("[T]he majority of employers report little or no increases in administrative costs, costs of continuing employees' benefits while they are on leave, and hiring costs." (referring to survey conducted by Commission on Leave in 1996)); Selmi, *supra* note 286, at 764–65 (indicating that cost of FMLA to employers has been low and that utilization rates of FMLA benefits are low).

307. *See* Alcorn, *supra* note 293, at 599–600 (suggesting there is implementation problem and proposing procedures to reduce liability); McGovern et al., *supra* note 286, at 538 (indicating that highest costs were experienced by employers with over 1000 employees and attributing this size effect "to the increased likelihood that larger employers have more leave-takers and tend to have formal policies that may require greater time and effort to bring into line with the act's requirements").

308. *See supra* note 279 and accompanying text.

pensatory award could also help close the gap in the expected remedies between income groups.[309]

With respect to the marginal cost problems discussed above, the FMLA could be amended to require all employers to provide FMLA leave, but the length of leave could vary with the size of the firm. A sliding scale could be used, for example, requiring 2.4 weeks of leave per ten employees up to a maximum of twelve weeks. Similar sliding scales could be used to vary the amount of entitled leave with the number of hours the employee has worked in the previous year and the amount of time an employee has been with a firm. Doing so would reduce incentives for employers to keep workforces small, encourage high turnover, or utilize part-time workers.

Finally, as with the FLSA, an employee's right of action could be permitted to continue even if the Secretary files suit in order to alleviate the risk to attorneys of taking an FMLA case on a contingency-fee basis. Alternatively, the Secretary could develop expedited procedures for providing right-to-sue letters so an attorney can be assured that its investment will not be lost on the whim of the Secretary of Labor.

C. Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification Act (WARN)[310] requires employers to provide notice of mass layoffs and plant closings to affected employees or their representatives, to the state dislocated worker unit, and to the chief elected official of the local government.[311] The statute defines "employer" as a business enterprise employing one hundred or more full-time employees, or one hundred or more employees who in the aggregate work at least 4000 non-overtime hours per week.[312] Whether notice is required in a given circumstance depends on the number of employees affected; this number in turn depends on the type of employment action taken. For plant closings or shutdowns, notice is required when fifty full-time employees at a single site lose their jobs during a thirty-day period.[313] With mass layoffs, notice is required if a third of the firm's employees lose their jobs, provided that at least fifty employees are laid off. Additionally, if five hundred employees are laid off, notice is required

309. *See supra* Part IV.A.5.
310. Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109 (1994 & Supp. V 1999).
311. *Id.* § 2102(a).
312. *Id*. § 2101(a)(1) (1994).
313. *Id*. § 2101(a)(2).

even if they do not comprise a third of the workforce.[314] Finally, when an employer takes multiple employment actions within ninety days that if taken together would trigger the notice requirement, notice must be provided unless the actions resulted from "separate and distinct actions and causes and are not an attempt by the employer to evade" the notice requirements.[315]

Unlike the other statutes discussed in this Article, the only enforcement mechanism provided by WARN is private suits brought by those aggrieved by the violation or their representatives.[316] Class actions are expressly authorized by the statute.[317] Successful claimants may recover back pay and benefits for up to sixty days, reduced by wages or other benefits paid by the employer to the employee during the period of violation.[318] Additionally, a civil fine of up to five hundred dollars per day of violation may be imposed for failure to notify the local government, unless the employer "pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff."[319] The statute provides for a discretionary reduction in the liability or penalty if the employer demonstrates that it acted in good faith, reasonably believing that its actions were not a violation of the Act.[320] Finally, like the other statutes, WARN allows for the award of attorney fees to the prevailing party.[321]

Given the complexity of WARN,[322] it is likely that different employers will take varying degrees of care to avoid violating the Act. Some might hire highly experienced attorneys to review their pro-

314. *Id*. § 2101(a)(3).
315. *Id*. § 2102(d).
316. *Id*. § 2104(a)(5).
317. *Id*. (stating that employee or representative may sue "for other persons similarly situated").
318. *Id*. § 2104(a)(1)–(2).
319. *Id*. § 2104(a)(3).
320. *Id*. § 2104(a)(4).
321. *Id*. § 2104(a)(6).
322. *See* Lynne C. Hermle, *Fighting the Personnel Fires: Dealing with Employment Issues Arising from Mergers and Acquisitions in a High Tech Environment*, *in* 1 ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY 2000, at 747, 757 (PLI Corp. Law & Practice Course, Handbook Series No. 1186, 2000) ("The provisions of WARN, even after interpretation by DOL in its regulations, are less than definite and should be approached with great caution by employers and their counsel."); Sandra J. Mullings, *WARN: Judicial Treatment of Exemptions, Exclusions, and Excuses*, 39 ARIZ. L. REV. 1209, 1212 (1997) ("WARN has been described as a 'clumsily drafted and unduly confusing statute' and 'imprecise, vague [and] difficult to interpret.'" (alteration in the original) (quoting Wilson McLeod, *Judicial Devitalization of the WARN Act?*, 44 LAB. L.J. 220, 220 (1993); Ethan Lipsig & Keith R. Fentonmiller, *A WARN Act Road Map*, 11 LAB. LAW. 273, 273 (1996))).

posed actions, while others might rely on managers to make a determination of whether the notice requirements apply. The level of care chosen may well depend on the anticipated liability for a violation.[323]

1. Expected Remedy

Like the FLSA and FMLA, the expected remedy will vary with the income of the workforce. The entire remedy for actions brought by or on behalf of employees is comprised of back pay and benefits; the civil penalty is only imposed for failure to notify a local government. The statute specifically states that the enumerated remedies are exclusive,[324] precluding punitive damage awards. Because the expected remedy is smaller for low-income employees, they will likely have more difficulty finding an attorney to take the case on a contingency-fee basis.[325]

2. Probability of Suit

Victims of WARN violations will be among an easily identifiable group—namely, those who are laid off or terminated from their jobs. This makes class actions easier to implement under WARN than under the other statutes discussed in this Article, since a lawyer, upon discovering a WARN violation from a prospective client, can file a claim on behalf of all those similarly situated. While it is still the case that the expected remedy will be greater for higher-income employees, by amassing claims the class action should make it worthwhile for lawyers to pursue a cause of action even if each employee's recovery would be small.

Though the availability of the class action should make it more likely that cases will be brought, commentators have observed a surprisingly small amount of litigation under WARN.[326] It may be that the complexity of WARN makes it difficult for aggrieved employees and lawyers with little experience practicing under WARN to under-

323. *Cf*. Hermle, *supra* note 322, at 762 ("Careful planning and implementation are necessary to minimize the likelihood of litigation emanating from a post-merger or acquisition RIF. . . . [T]he company should keep in mind the fact that it may be called upon to justify its decision in court.").

324. 29 U.S.C. § 2104(b).

325. *See supra* note 105 and accompanying text.

326. *See* Meredith Klapholz, Comment, *Judicial Interpretations of the WARN Act Exceptions and Their Implications in the Health Care Industry*, 3 U. PA. J. LAB. & EMP. L. 113, 116 (2000) (discussing 1993 General Accounting Office study that found "in fifty-four percent of the closures which appeared to meet WARN criteria, no WARN notice was given to the dislocated worker units" (citing Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 BERKELEY J. EMP. & LAB. L. 1, 59 (1993))).

stand the entitlements it provides, or that in general employers are complying with the notice requirements or providing sufficient wages, benefits, or severance packages to satisfy employees.[327] If it is believed that WARN is being under-enforced, it would be important to determine the most salient factors in order to determine how best to induce further enforcement.

One criticism of WARN is that, unlike the FMLA, FLSA, and Title VII, it does not provide for agency enforcement.[328] This means that if an aggrieved employee cannot get a private attorney, she will be foreclosed from seeking redress. This is particularly troubling for those employees whose claims are small or who live in areas without attorneys fluent in the WARN provisions. Employers who recognize the inability of their employees to effectively challenge layoffs or plant closings—so that the probability of suit is nearly zero—will have little incentive to scrutinize WARN and ensure compliance.

3. Marginal Cost

Because WARN does not apply to firms with fewer than one hundred employees, the marginal cost of the hundredth worker will be very large, particularly if the employer is in an industry that experiences cyclical layoffs. An employer would have to learn a complex body of law—or pay to have an attorney scrutinize potential employment actions—and give up some mobility due to WARN's notice requirements and to the potential liability if a mistake is made during a move.[329] Indeed, one criticism of WARN when it was being considered by Congress was that it could impede "the free flow of economic resources and corporate mobility, both of which are essential to private economic growth."[330] It should be noted that an employer is subject to an additional marginal cost under WARN for the hundredth

327. *Cf*. *id*. at 117 (listing lack of effective enforcement, lack of resources to pursue litigation, unfamiliarity with law, and over-compliance with statute as possible reasons for low level of WARN litigation).

328. *See Field Hearings on H.R. 3878, the American Jobs Protection Act, and on the Mexico Free Trade Agreement and Its Impact on American Jobs and the American Workplace Before the House Comm. on Educ. & Labor*, 102d Cong. 112 (1992) (statement of Julie H. Hurwitz, Executive Director, Maurice and Jane Sugar Law Center for Economic & Social Justice) ("[B]ecause the law does not provide for any governmental enforcement, reporting or oversight requirements, there is no way of knowing who is complying with the law and who is not.").

329. In other words, the expected cost of changing locations increases if there is a risk of incurring liability in the process.

330. Klapholz, *supra* note 326, at 114–15.

employee, and then an increased marginal cost associated with a higher statutory cap under Title VII for the 101st employee.[331]

In terms of its decision of how many employees to terminate upon a plant shutdown, there will be an increase in the marginal cost of terminating the fiftieth worker in a thirty-day period, as that subjects the employer to WARN's notice requirements. In terms of the lay-off requirements, the marginal cost of laying off the fiftieth worker will only be increased if there are fewer than 151 employees, as no notice is required unless those laid off comprise a third of the workforce. There will, however, be an added marginal cost to laying off the worker that crosses the one-third threshold. For firms with more than 1500 employees, the added marginal cost will come into play when considering laying off the five-hundredth employee, as that automatically triggers WARN's requirements. The key here is that the employer will have an incentive to terminate or lay off just under the threshold that triggers notice requirements. This does not mean to imply that employers will never find it worthwhile to terminate or lay off a larger number of employees and adhere to the notice requirements, but rather that if a firm is considering laying off approximately a third of its employees in ten days, it can avoid the potential for liability under WARN by laying off one-third of its employees minus one.

4. Changing Incentives

The disparity in the expected remedy between income groups could be reduced by permitting punitive damages or by targeting fines at firms laying off or terminating the lowest-income workers.[332] Similarly, the Department of Labor could be authorized to enforce WARN and target its limited resources at employment actions against those least likely to sue. Such a policy would help low-income groups, as well as other groups in isolated areas that may not be able to pursue claims because lawyers in the area are either unwilling or unqualified to handle WARN cases.

The incentives created by high marginal costs of certain employees could be reduced by having the requirements or liability vary on a sliding scale. The length of notice required, for example, could depend on the percentage of employees laid off or terminated. This would reduce the distortions introduced to the employer decision-making process and further the goal of providing notice.

331. *See supra* Part II.D.2.

332. *See supra* note 279 and accompanying text.

CONCLUSION

One purpose of this Article has been to shed light on how the preventive measures taken by employers may vary with the expected cost of violating a statute. The expected cost analysis suggests that different firms may rationally implement different levels of prevention tools and grievance procedures depending on the income of their employees. If variation exists, and the occurrence of sexual harassment or other statutory violations is more frequent at the firms taking fewer measures, then there is a compelling argument that the expected cost of harassment must be increased in order to avoid disparate treatment based on income. Few would argue that low-income individuals deserve less protection of their rights than high-income individuals.

My discussion of ways to increase the costs of statutory violations is largely motivated by this problem of disparate treatment based on income. Some of the measures this Article discusses would better solve this problem than others. Expanding punitive damages, for example, could be a great equalizer by lifting the recovery for low-income workers closer to that of high-income individuals. Similarly, providing greater access to the courts will disproportionately benefit low-income workers, thereby increasing the cost of harassment closer to that of higher-income groups. Raising statutory caps, on the other hand, may do little to change the variation between income groups; the cost would just be higher for all groups. It is likely that a combination of the measures discussed would be necessary to fully achieve equality in preventive tools across income groups. Further empirical study is necessary to fully gauge the extent of the problem and to provide insights into which tools could best solve it.

Some argue that the federal government has already imposed inordinate costs on employers in the form of liability for statutory violations.[333] It may be that Title VII has achieved the full level of desired deterrence. An empirical question, then, is the extent to which sexual harassment continues to exist and the extent to which increasing penalties have been effective in reducing the incidence of it. If prior in-

333. *See, e.g.*, Evans, *supra* note 1, at 521 (noting costs of sexual harassment, in that "[c]onsidering how costly the federal government has made the practice, it's amazing that employers still hire women." (quoting Robyn Blumner, *Women Might Price Themselves Out of Jobs*, ST. PETERSBURG TIMES, Oct. 4, 1998, at 1D)); Grimsley, *supra* note 109 ("Reesman, of the employer group, said news of big settlements can inspire workers suffering perceived grievances to come back again and again with monetary demands. She said these demands are making some companies more combative and more willing to fight cases all the way through the courts." (referring to Ann Reesman, General Counsel of the Equal Employment Advisory Council based in the District of Columbia)).

creases in the expected cost of sexual harassment have been successful at deterring the practice, a powerful argument can be made that further increases are warranted and should be continued until further improvements are obtained. If, however, preventive techniques implemented by firms are not achieving results, increasing the expected cost of harassment alone would be futile.