The Misappropriation, Embezzlement, Theft, and Waste of Corporate Human and Financial Assets: Sexual Harassment Reconceived

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Abstract
This article suggests how sexual harassment should be treated by companies as a civil misappropriation, embezzlement, conversion, or theft—as well as a civil rights violation. Additionally, some payments associated with sex-based harassment should be considered corporate waste. The misappropriation approach considers not only how sex-based harassment constitutes a civil misappropriation, embezzlement, conversion, or theft, but it also responds to three anticipated objections to sexual harassment as a civil misappropriation: (1) sexual harassment is a minor corporate expense; (2) identification of sexual harassment as civil misappropriation of corporate human assets commodifies targets; and (3) this new concept will change neither corporate responses nor corporate cultures. First, in response, sexual harassment is not a minor expense but one that costs companies billions of dollars annually. It is, therefore, in a company’s financial interest to treat the problem as a theft of valuable assets. Second, only corporate failure to recognize the market value of female professional talent dehumanizes people. Almost all human beings engage in work, and men, in particular, are valued for their work. Thus, the misappropriation solution puts targets on the same plane as privileged men, valued for their market productivity (as opposed to sexual or reproductive utility). Third, the identification of

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sexual harassment as a theft, conversion, embezzlement, or misappropriation, as well as a civil rights violation, encourages companies to modify and improve their remedial responses, corporate culture, profitability, and transparency. By making corporations and harassment targets as potential allies, instead of adversaries, the reconception of sex-based harassment as a misappropriation of corporate human assets incentivizes new collaborations for social and economic justice.

Introduction
Corporate executives and lawyers might imagine many possible responses to workplace sexual harassment. The current framing casts sexual harassment as a civil rights violation for the reason that harassment typically targets a class of people because of their sex. Sex-based harassment is discriminatory and interferes with the class members’ ability to work, obtain an education, and even to walk down a street without intimidating or annoying aggravation. Antidiscrimination law directs targets to sue companies or schools, but rarely the perpetrators. Arguably, a new framing could influence how people view the multifaceted problem and how corporate and other organizations remedy harassing conduct. However, a new framing should highlight and facilitate new and appropriate remedies or allies.

This article offers that new framing of sex-based harassment at work through the lens of misappropriation. This approach defines misappropriation as the dishonest use of someone else’s person, property, or money for one’s own purpose or gain. The idea involves treating sexual harassment as a civil misappropriation of a corporate asset.

1. I use the term sexual harassment, even though not all harassment is sexual in nature. Some sex-based harassment is hostile, demeaning, or otherwise discriminatory, but not necessarily sexual. Therefore, I distinguish between sex-based and sexual. However, I use both terms to convey the breadth of discriminatory and harassing behaviors.

2. See, e.g., Rob Bliss, Director, 10 Hours of Walking in NYC as a Woman, YouTube (Oct. 28, 2014), https://www.youtube.com/watch?v=b1XGPvbWn0A (documenting over 100 incidents of verbal street harassment against one women walking in New York City during a ten-hour period).

3. Throughout this article, I use the term “target” to describe the people abused by harassers. I avoid the term victim because many targets do not self-identify as victims, but as survivors. My use of the term target, out of respect for survivors, does not diminish or minimize the injuries that targets may suffer.

4. I teach all of my law school students the importance of framing a legal issue to facilitate a decision maker’s opinion, which will best advance their clients’ interests. I thank Analiese Smith for recognizing the reframing of sexual harassment in the misappropriation approach.

5. Black’s Law Dictionary defines misappropriation as “[t]he application of another’s property or money dishonestly to one’s own use. See EMBEZZLEMENT,” Misappropriation, Black’s Law Dictionary (11th ed. 2019). Note that the explanation of misappropriation contemplates both civil tort law and criminal law applications.
This framing is similar to criminal embezzlement,6 conversion,7 theft,8 or criminal misappropriation. This design borrows from criminal law concepts and charges that may also have parallel or comparable civil law formulations. As part of this framing, the law would allow for both targets and companies, together, to hold harassers responsible for their abusive behavior and the costs of sexual harassment. When targets know that they can ally with more powerful companies to hold thieving harassers responsible for their corrupt behavior, targets will feel more emboldened to report perpetrators.9 Additionally, the misappropriation proposal considers how this new framing might change the way that law and society address the financial and other damage caused by sexual harassment that is perpetrated by corporate managers and officers. It also responds to three anticipated objections.

First, the misappropriation approach refutes the notion that sexual harassment results in only minor financial losses or intangible damage. In reality, sexual harassment costs companies billions of dollars annually.10 It is, therefore, in a company’s financial interest to treat the problem as the theft of valuable assets. This treatment necessitates more research and corporate collection of data concerning the monetized costs of sexual harassment. Such research might also explain why, if it is really in a corporation’s best interest to eradicate sexual harassment, corporations have not already eliminated the problem. One possible reply: corporations often adopt—and survive after adoptions of—policies that cost them financially.

For example, consider socially conscious corporations that may lose customers due to their social activism. In 2018, Nike debuted an ad campaign that featured Colin Kaepernick, the former NFL player who kneeled during the national anthem to protest racism and.

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6. Black’s Law Dictionary defines embezzlement as “[t]he fraudulent taking of personal property with which one has been entrusted, esp. as a fiduciary.” Embezzlement, Black’s Law Dictionary, supra note 5. While Black’s defines embezzlement as a crime, I use the term in this article to suggest a civil law violation similar to the crime.
7. Black’s Law Dictionary defines conversion:

The wrongful possession or disposition of another’s property as if it were one’s own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another’s right, whereby that other person is deprived of the use and possession of the property.—Also termed tortious conversion; criminal conversion.

Conversion, Black’s Law Dictionary, supra note 5. Note that the term conversion covers both criminal and civil law conceptions of the same behavior.
8. Black’s Law Dictionary defines theft as a crime. Theft, Black’s Law Dictionary, supra note 5 (“The wrongful taking and removing of another’s personal property with the intent of depriving the true owner of it; larceny.”). Again, I use the term to suggest a civil law violation similar to the crime.
9. I thank Hannah Smith for highlighting how this new framing may encourage more reporting.
10. See infra notes 83–85 and accompanying text.
discrimination.\textsuperscript{11} That campaign may have cost Nike some customers and, therefore, revenue. However, Nike CEO John Donahoe explained, “Everyone is welcome to have their opinions on a variety of issues, including employees, consumers and others... [b]ut our job is to help make our mission come to life: making sport a daily habit.”\textsuperscript{12} Nike’s was a calculated risk. Discrimination rarely makes economic sense, but some people engage in it often, without rational validation. The misappropriation solution suggests a reconceived treatment of sexual harassment to reduce corporate losses and maximize recoveries for both corporations and harassment targets.

Second, the misappropriation approach addresses the charge that the remediation of sexual harassment as a misappropriation commodifies the targets of sexual harassment (usually women but not always)\textsuperscript{13} in ways that only add to their objectification and dehumanization. This misappropriation solution does not deny that persons are sometimes treated as commodities.\textsuperscript{14} However, corporate failure to recognize the market value of targeted professional talent dehumanizes targets and contributes to their devaluation in the marketplace. Almost all human beings engage in work, and cisgender men, in particular, are valued for their work. This misappropriation plan puts harassment targets on the same plane as privileged men, valuable in part for their market productivity (as opposed to sexual conformity or reproductive utility) and acknowledged for their market and fiscal contributions.

By acknowledging the market value of harassment targets, the misappropriation approach disincentivizes toleration of harassment and discrimination. It also recommends more effective approaches to ameliorate conditions for all workers and compensate corporations and harassment targets for their losses. Therefore, this article employs the descriptor “human assets” to emphasize the contributions workers make to benefit a company economically. The appellation denotes not just economic worth but also full personhood, dignity, and self-determination. People constitute human assets, in part, because of their


\textsuperscript{13} This article uses feminine pronouns for targets because statistics indicate that most targets self-identify as female. See, e.g., Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010–FY 2021, EEOC, https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2021 [https://perma.cc/HL4G-MW9H] (revealing that women file the vast majority of charges of sexual harassment). However, this article assumes that a harasser could target any person because of (perceived) sex, gender, gender identity, or sexual orientation.

\textsuperscript{14} See infra Part III.
rich complexity, potential for growth and change, and their dedicated willingness to contribute. The misappropriation solution assumes that all persons have value; all are assets, for a variety of reasons.15

Third, the misappropriation plan shows that by defining sexual harassment as a civil misappropriation, conversion, or theft, as well as a civil rights violation, companies will improve their remedial responses and their corporate culture, while simultaneously reducing financial losses. The concurrent benefit to corporate diversity and inclusion is an obvious bonus. Some companies suffer from total systemic corruption, and this section briefly addresses those companies with debauched and perfidious managerial thieves. However, this misappropriation solution lends itself to concrete suggestions for remediation, and the use of tools already available to corporate executives and managers.

The misappropriation framing can help redefine a serious and intractable workplace problem. Note that a new framing need not erase old ones that rest in antidiscrimination law. New frames can work in tandem with other approaches and conceptions of a particular problem. The next section of the Introduction provides a problem for contemplation throughout, and then sets out a roadmap for exploring the misappropriation proposal.

A. The Acme Hypothetical, Starring Mack Manager

Before delving into a roadmap of the misappropriation approach and the specifics regarding sexual harassment, this article begins with an analogy. Imagine that Acme Corp. owns a fleet of delivery trucks for transporting its widgets. Imagine further that Mack Manager takes one of the trucks to move his personal belongings to a new home and then returns the truck. That act is a misappropriation of corporate assets with perhaps minor consequences for Acme. Acme may not have needed the truck when Mack took it for the weekend and then refilled the fuel tank. But change the hypothetical and envision that Mack takes the truck nightly for his “Mack the Midnight Mover” business and does not replaced the used fuel. Then, the costs of the truck’s use and its fuel begin to add up for Acme. Next, suppose that Mack hits another car with the truck while moving. Acme may be liable for damages and is without a truck while the autobody shop repairs it. The costs of Mack’s misconduct increase. In addition to Mack’s direct misconduct, consider that other managers notice Mack’s behavior and begin to use...
other equipment and supplies similarly. Mack fosters a corporate culture that tolerates or even condones theft and misappropriations.

If Mack makes himself a “loan” or takes corporate money, criminal law labels that conduct misappropriation, embezzlement, or theft. For example, California law defines embezzlement as “the fraudulent appropriation of property by a person to whom it has been intrusted.”16 The law further specifies that anyone who “fraudulently appropriates [property] to any use or purpose not in the due and lawful execution of his trust . . . is guilty of embezzlement.”17 Note that these code provisions refer to the wrongful appropriation of property, not just money. The latter provision arguably applies when Mack takes Acme’s truck for his personal use or for use by his “Mack the Midnight Mover” business. The same is true when Mack takes other Acme corporate assets, such as fuel or tools.

Now, however, consider that Mack might take a person, instead of a truck. What if Mack insists that Wanda Welder discuss her future at Acme with him over lunch? What if he fondles her on the job? What if he demands that she meet him in his office regularly during work hours so he can have sex with her? Wanda needs her job so she cannot quit, especially during a pandemic or economic downturn. Because of Mack, she suffers mentally and physically. She begins to call in sick. Her work suffers, and she makes serious errors that could potentially cost Acme thousands of dollars. She takes a disability leave that costs the company more money.

After Mack has harassed a dozen skilled workers in several departments, David Director, Director of Human Resources, determines that Acme has a problem, which David must resolve. David consults with Lani Lawyer who advises that Acme give Mack a $50,000 “golden handshake” to leave.18 Small change to make potentially big

17. The full code section reads:

Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, and any contractor who appropriates money paid to him for any use or purpose, other than for that which he received it, is guilty of embezzlement, and the payment of laborers and materialmen for work performed or material furnished in the performance of any contract is hereby declared to be the use and purpose to which the contract price of such contract, or any part thereof, received by the contractor shall be applied.

Id. § 506.

18. Golden handshakes are separation packages that corporate executives receive when exiting a company. Professor David Yermack writes that “critics assert that it [a golden handshake] represents a giveaway that cannot influence future performance and may indicate broader governance problems with a company.” David
liability go away. This “golden handshake” forestalls a potentially expensive wrongful termination suit, especially if Mack also belongs to a protected class. The question arises, however, whether this payment constitutes corporate waste.\(^{19}\) Now, Acme has paid thousands of dollars in sick leave, reimbursements for faulty widgets, disability leave, lawyer’s fees, and liability avoidance. This bill does not include costs for replacement of lost human capital should Wanda and others leave, retraining of new employees, actual litigation costs, liability awards, and more.

One sees several problems that result from Mack’s harassment and other conduct. Mack has arguably benefited psychologically and financially from the misappropriations. Acme has lost thousands of dollars, directly traceable back to Mack’s misappropriations and conversions. Wanda and other workers have experienced trauma and financial losses due to Mack’s illegal and discriminatory conduct. However, few jurists or businesses currently label these losses as theft or waste.

While sexual harassment remains a civil rights violation, the misappropriation approach demonstrates that it also constitutes criminal or civil theft of corporate assets, both human and monetary. Some people may believe that civil rights have no monetary value. They may view a civil rights violation as a valueless or inexpensive dignitary harm. However, payoffs to perpetrators, settlement sums, lawyers’ fees, decreased business and lost profits due to reputational damage, and other litigation and remediation expenses are also costs of the same civil rights violations. Corporate shareholders have begun to address these misappropriations with derivative suits when corporate officers fail to remedy harassment early and relatively inexpensively.\(^{20}\) Now, with corporate shareholders leading the way, legal institutions and

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19. I thank Professor Max Huffman for suggesting that I explore the concept of corporate waste. The Delaware Supreme Court defined corporate waste:

A [corporate] waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade. Most often the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received.

Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000). Executives can make the claim that the company receives value for the payout. However, if the harasser has committed an illegal act, the question remains whether the payment is justified, ethical, or even necessary.

corporate officers should join shareholders’ efforts to address sexual harassment as the corporate theft that it is. No company should pay an embezzler to leave or stay; similarly, companies should not continue to pay a harasser to stay or give him a golden handshake to leave.\textsuperscript{21}

\textbf{B. Roadmap re Highway Thievery}

Part I of this article explores how current employment civil rights statutes fail to deter sexual harassment and impede claimants in their efforts to seek relief. This review establishes the foundation for the notion that sexual harassment is theft or a conversion of an asset. Part I also addresses critics who argue that sexual harassment constitutes less of a financial problem and more of a dignitary and civil rights issue, which has very little impact on corporate balance sheets. These naysayers are wrong with respect to the financial effects.

Part II employs analogies to criminal law to suggest that everyone should conceive of sexual harassment as a thieving misappropriation, as well as a civil rights violation. Note that the misappropriation plan emphasizes reconceptions. It does not require new laws but instead stresses a new perspective and revision of laws already in force.\textsuperscript{22}

Part II does not review traditional personal injury laws that have historically bolstered antidiscrimination claims in sexual harassment cases.\textsuperscript{23} Arguably, personal injury violations, such as intentional and negligent infliction of emotional distress, do not carry the same stigma or social opprobrium that attach to criminal abuse. The misappropriation approach harnesses the common understanding of the antisocial impact of crimes and applies it to civil claims that parallel those crimes. A civil formulation of criminal sanctions empowers targets and their corporations to hold harassers publicly accountable. Together, targets and companies send a message not only to the individual perpetrator but also to the greater society.

Part III examines the argument that the monetization of sex-based theft further objectifies targets, particularly women and minorities. That argument is false. Part III distinguishes sexual objectification and commodification from financial cost externalization and asset management. It proffers the notion that corporations already treat labor (or

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\textsuperscript{21}See, \textit{e.g.}, Barbara J. Koenig, \textit{Why Isn't Workplace Sexual Harassment Training Working?}, N.M. EMP. L. LETTER, July 2018, at 1, 3 (“One observer has suggested that companies should begin treating sexual harassment as seriously as they would treat embezzlement. An embezzler would be fired immediately, of course.”).

\textsuperscript{22}See, \textit{e.g.}, 42 U.S.C. § 2000e. I thank Professor Naomi Cahn, in particular, for exploring this point with me.

\textsuperscript{23}In her first sexual harassment law book, Professor Catharine MacKinnon rejected tort law approaches. She summed up her analysis, “Tort law considers individual and compensable something which is fundamentally social and should be eliminated.” \textsc{Catharine A. MacKinnon}, \textsc{Sexual Harassment of Working Women} 172 (1979).
portfolios) as a corporate asset. The common moniker “HR” stands for human resources. The human resources division of a company recruits and trains job applicants and administers employee-benefit programs. Even this appellation suggests that human beings are corporate assets. Analyzed rationally, corporations value individuals not only because of their humanity or solely because of their sexual (or gender) utility, but because of their productivity and financial worth to a company. If society treats working targets differently from other workers, it further discriminates against those harmed persons by failing to account, literally, for their respective injuries. Additionally, failure to monetize the harms of sex-based thievery devalues labor assets and prevents companies from recouping their losses.

Part IV tackles the anticipated argument that companies already spend time and energy on preventing and curing hostile environments. Critics insist that companies cannot manage anything more. Part IV explains that, if institutions (including not-for-profit ones) treated sexual harassment like they do theft, they would implement additional and different cost-saving responsive measures. Just like an embezzler, a sexual harasser or discriminating perpetrator is stealing from a company. Corporations should not aid and abet these thieves but should investigate and punish them. Companies might then advertise the discovery of the culprits and the recovery or reappropriation of the misappropriated assets.

Part V concludes this article and offers a challenge to any Fortune 500 company or large organization willing to explore these ideas.

I. Current Sex-Based Thievery and the Legal Response

An understanding of the current failures of antidiscrimination law aids the examination of the benefits of a misappropriation conception. This section clarifies how the narrow treatment of the problem in antidiscrimination laws fosters illogical alliances and hampers effective remediation. By exploring a new perspective of the problem against the backdrop of the old scheme, one can immediately perceive new logical methods of amelioration.

A. A Review of Title VII and Its Shortcomings

Most articles concerning sexual harassment define it by using Title VII of the Civil Rights Act of 1964 (CRA). Ironically, Title VII does not mention sexual harassment but prohibits discrimination in employment based on sex (and other specific classifications). In its 1980 Guidelines, the U.S. Equal Employment Opportunity Commission (EEOC) explained that sexual harassment is a form of sex discrimination. The EEOC advised, “Unwelcome sexual advances, requests for sexual aid. 24
favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment.”\textsuperscript{25} However, this definition focuses on sexual conduct (to the exclusion of hostile or other discriminating behavior),\textsuperscript{26} the identity of the target, and the nature of the target’s perspective regarding her workplace. Arguably, Title VII fails to highlight the resulting societal harms and corporate costs, while simultaneously neglecting to situate the perpetrator at the center of the problem. This article stresses that societal, individual, and corporate injuries result when perpetrators engage in sex-based harassment of any kind, whether sexual, hostile, or otherwise discriminatory.

1. The Target, the Company, and the Adversarial Method

Additional aspects of Title VII impede remediation of sex-based harassment. For example, under Title VII, the aggrieved target must prosecute her own case.\textsuperscript{27} The EEOC, a state agency (if she sues under a state fair employment and practice statute (FEPS)), or an attorney can assist, but the target must have the fortitude to make the initial complaint if she cannot afford or find an attorney. In the case of severe sex-based abuse, a target may not have the strength or ability to file a charge within the brief statute of limitations period.\textsuperscript{28}

Additionally, Title VII and most state FEPS mandate that targets charge their company as a defendant, responsible for the conduct and

\textsuperscript{25} 29 C.F.R. § 1604.11(a) (2021). The full definition reads:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment.

\textit{Id.}

\textsuperscript{26} Hostile conduct and behavior with a disparate impact have now also been interpreted into the definition of sex-based harassment. See, e.g., \textit{Sexual Harassment}, EEOC, https://www.eeoc.gov/sexual-harassment [https://perma.cc/5GQV-XUL2]; \textit{Harassment}, EEOC, https://www.eeoc.gov/harassment [https://perma.cc/3DLL-2ERE].

\textsuperscript{27} \textit{Filing a Charge of Discrimination with the EEOC}, EEOC, https://www.eeoc.gov/filing-charge-discrimination [https://perma.cc/4WUP-38CK]. The site specifies, “All of the laws enforced by EEOC, except for the Equal Pay Act, require you to file a Charge of Discrimination with us before you can file a job discrimination lawsuit against your employer.” \textit{Id.}

\textsuperscript{28} \textit{Time Limits for Filing a Charge}, EEOC, https://www.eeoc.gov/time-limits-filing-charge [https://perma.cc/5SQV-MYG5] (noting that Title VII’s “180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis”).
the hostile work environment. Title VII and many state FEPS do not typically provide for individual liability of the proven perpetrators. While a company may know of or may have participated in the discriminatory behavior, many companies and large non-profit organizations have policies against the conduct about which targets might complain. These companies find themselves defendants when they may be, more naturally, allies of the target complainants. In other words, Title VII and state FEPS create adversarial postures for the companies and the targets that impede the resolution process and decrease the likelihood of perpetrator punishment. Specifically, the law pits the target against the company. It incentivizes the company to defend itself and “defeat” the already injured target, thereby contesting sexual harassment allegations on the side of the accused perpetrator. Meanwhile, the perpetrator often skates free of legal liability exposure.

Some feminist theorists may criticize the assertion that companies and targets are natural allies. They might point to cases in which corporate executives tolerated, condoned, or even encouraged opprobrious conduct by their peers. Undeniably, toxic corporate environments

29. See, e.g., How to File a Charge of Employment Discrimination, EEOC, https://www.eeoc.gov/how-file-charge-employment-discrimination [https://perma.cc/GBE2-235P] (indicating that the mailed charge should specify the name of the employer and the charging office should be the one closest to the employer). Occasionally, the EEOC sues on behalf of a target or group of aggrieved persons for injuries suffered by those individuals. However, the perpetrator is not a party in such actions, and the focus is arguably on the individual target’s injuries.

30. See, e.g., Fantini v. Salem State Coll., 557 F.3d 22, 23 (1st Cir. 2009) (holding that individuals are not personally liable under Title VII); Miller v. Maxwell’s Int’l, Inc., 991 F.2d 583, 587 (9th Cir. 1993) (holding that individuals are not personally liable under Title VII). California’s FEHA (Fair Employment and Housing Act) is one of the few state FEPS that allows for suit against individual defendants. CAL. GOV’T CODE § 12940(c) (West 2021).

31. The inability of many targets to obtain legal counsel and support because of prohibitive costs and lack of knowledge and other resources, arguably, further discourages targets from reporting or challenging the status quo.

32. In Indiana, for example, the law requires that the target obtain written permission from the employer before filing suit in court. The election of civil action provision specifies:

A respondent or a complainant may elect to have the claims that are the basis for a finding of probable cause decided in a civil action as provided by section 17 of this chapter. However, both the respondent and the complainant must agree in writing to have the claims decided in a court of law. The agreement must be on a form provided by the commission.


exist. Those corporations will demonstrate no willingness to assist targets in holding individual harassers accountable. Aggrieved targets might still try to hold those companies liable under antidiscrimination laws. However, this article starts from the premise that most people are basically good and that their companies are too. It assumes that the world is changing for the better and that most people understand that discrimination against and objectification of diligent workers is not only irrational but also immoral. If the contrary is true—that people are evil and the world is going to hell—then there is really no point to this discussion. No laws will fix such a world, and one can stop reading here.35

2. The Perpetrator
While several states allow for individual liability under their FEPS,36 most current antidiscrimination laws insulate individuals from liability.37 Thus, the persons directly responsible for the abusive conduct, the perpetrators, escape consequences meted out by antidiscrimination law on behalf of targets. Most people fail to understand why targets cannot sue their sexual harassers.38 The responsive argument that companies are ultimately in control of their workplaces and are, therefore, liable, does not erase the illogical insulation of the actual perpetrator. The perpetrators duck any consequences, except those work-related penalties doled out by the corporate employers. These consequences may result in significant repercussions for the proven harasser, including termination. However, in some cases, the company offers the perpe-

35. I learned from my mother’s family that companies and their workers have common interests. My great grandfather, industrialist Henry J. Kaiser, is associated with the quote, “Together, we build.” See Ric Anthony Dias, “Together We Build”: the Rise and Fall of the Kaiser Steel Corporation in the New Deal West (June 1995) (Ph.D. dissertation, University of California, Riverside) (introduction available at https://www.proquest.com/openview/4aeb7c6135cc0eb255a239de2dceb3cf/1).

This attitude, that everyone should work together for the common good, permeated Kaiser’s approach to business. It also prompted him and Dr. Sid Garfield to create Kaiser Health Plan and Kaiser Permanente, for the good of the workers and the Kaiser industries that they served. Tom Debley, How It All Started, KAISER PERMANENTE (July 21, 2011), https://about.kaiserpermanente.org/our-story/our-history/how-it-all-started. Fast forward to a new healthcare problem (of a kind), sexual harassment. When organizations can assist in or even direct the prosecution of a civil case against suspected harassers who cause illness, injuries, and financial losses (all noted below), then the target, the company, and society benefit.

36. See, e.g., CAL GOV'T CODE § 12940 (West 2021).

37. IND. CODE § 22-9-1-3 (2021) “Definitions” specifies, “(h) “Employer” means the state or any political or civil subdivision thereof and any person employing six (6) or more persons within the state . . . .” There is no provision for suit by a target against an individual worker under this statute.

38. See, e.g., 20/20: Man to Man (ABC television broadcast, Nov. 6, 1997) (documenting same-sex sexual harassment and demonstrating that people do not understand why complainants do not sue the perpetrators).
trator a pay-off or “golden handshake” just to leave.\textsuperscript{39} Google allegedly paid Andy Rubin $90 million to leave after a colleague accused him of sexual harassment.\textsuperscript{40}

Another reason why law may channel targets to sue corporate employers is that civil lawsuits typically result in only monetary recompense for plaintiffs.\textsuperscript{41} Many perpetrators may have no assets from which to compensate their targets. While it is possible that these asset-less perpetrators may wield some power, the misappropriation approach assumes that they usually wield less because of their limited financial worth. Companies that pursue these perpetrators on behalf of targets, and to clean up the workplace environment, can offer their workers vindication and psychic satisfaction. Such organizations hold a corporate thief accountable. Many targets want this type of vindication.\textsuperscript{42} Many of my former clients explained to me that their motivation was not “the money.” They stressed that they did not want the perpetrator “to get away with this type of behavior.”

In other cases, perpetrators wield power, enjoy privileges, and are quite wealthy. Think of Roger Ailes, Bill O’Reilly, and Harvey Weinstein to name just three.\textsuperscript{43} Company executives may be reluctant to punish or terminate such rain-makers, deal-closers, and other productive or brilliant perpetrators. If, however, law allowed for greater sanctions against all abusers and particularly the powerful, wealthy ones, these harassers might think twice about taking unfair advantage of less powerful subordinates. Moreover, companies would be better positioned to


\textsuperscript{40} \textit{Id.}

\textsuperscript{41} Of course, “injunctive relief[,] . . . findings of fact that affirm [a] target’s story, and public shaming of the perpetrator can be vindicating for targets of abuse.” E-mail from Lea Bishop, Professor of Law, IU Robert H. McKinney School of Law, to author (Aug. 20, 2021) (e-mail and attachment on file with author); \textit{see also} 42 U.S.C. § 2000e-5. However, the plaintiff would have to succeed at an expensive and lengthy public trial to obtain these remedies. Vindication can be important, nevertheless. With every case that I filed on behalf of clients in California, I always requested an apology in the prayer for relief section of the complaint. I sometimes obtained one for my clients in a confidential settlement.

\textsuperscript{42} Tamara Relis, \textit{“It’s Not About The Money!”: A Theory on Misconceptions of Plaintiffs’ Litigation Aims,} 68 U. Prrl. L. Rev. 701, 702 (2007) (explaining that “virtually all plaintiffs vehemently insist, ‘it is not about the money!’ with only a minority saying financial compensation was even a secondary aim”).

\textsuperscript{43} The misappropriation plan proffers that when perpetrators have no assets, companies might consider compensating injured workers out of corporate funds because of the amounts that these companies will save in remediating the problem without litigation, as also discussed infra in section I.B.3.
punish and sanction these thieves. At the very least, the subordinates and the organizations might find it easier to collect for their injuries.

The misappropriation solution also contemplates that companies will voluntarily discipline harassers and compensate targets for their injuries. From civil penalty funds, executive financial sanctions, and monies that would otherwise fund contentious litigation, corporations could make targets whole. Additionally, corporations would redirect resources to aid targets in neutralizing harassers. When authorities deal with perpetrators and sex-based harassment early, associated problems are typically less expensive to remedy. Of course, plaintiffs and their counsel can still avail themselves of antidiscrimination laws, particularly in those cases in which a corporation refuses to address biased perpetrator abuse and harassment.

3. Antidiscrimination Law Goals
The original draft of Title VII of the Civil Rights Act of 1964 addressed race but not sex discrimination.\(^\text{44}\) After a conservative Representative proposed adding “sex,” as a prohibited ground for discrimination, the Senate approved the bill with little discussion of the sex provision. Therefore, limited history of congressional intent exists regarding the meaning of discrimination “because of . . . sex.”\(^\text{45}\)

Early sexual harassment feminist theorists argued for broad conceptualization of sex discrimination, and its subset sexual harassment, for comprehensive remediation. For example, Professor Catharine MacKinnon defined sexual harassment as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another.”\(^\text{46}\) She also described the social harm of sexual harassment: “Sexual harassment exemplifies and promotes employment practices which disadvantage women in work (especially occupational segregation) and sexual practices which intimately degrade and objectify women.”\(^\text{47}\) MacKinnon focused on the subordination and objectification of women, as a class.\(^\text{48}\)

Professor Deborah Rhode described the harms more concretely:

For individual victims, harassment often results in economic and psychological injuries, including job dismissals, transfers, coworker hostility, anxiety, depression, and other stress-related conditions. For


\(^{45}\) Id.

\(^{46}\) MacKinnon, supra note 23, at 1. Professor Bishop insightfully notes the economic aspect of the leverage of benefits and imposition of deprivations in MacKinnon’s analysis. E-Mail from Lea Bishop to author, supra note 41.

\(^{47}\) MacKinnon, supra note 23, at 7.

\(^{48}\) Id. This article returns to this notion of the objectification of women. See infra Part III.
women as a group, harassment perpetuates sexist stereotypes and discourages gender integration of male-dominated workplaces. For employers and society as a whole, the price includes decreased productivity and increased job turnover. The estimated cost of harassment for a Fortune 500 company averages $8 million a year.49

Rhode’s 1997 estimate translates to over $14 million per Fortune 500 company today.50 Given Google’s alleged $90 million payout to one executive in 2018,51 Rhode’s estimated figure may have been too low. In this passage, however, Rhode untangled the consequential threads of sexual harassment for the individual target, for women, and for society.

Antidiscrimination laws were purportedly designed to respond to each level of grievous injury. “For example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.”52 “Although Title VII seeks ‘to make persons whole for injuries suffered on account of unlawful employment discrimination,’ . . . its ‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.”53 The U.S. Supreme Court noted that Title VII compensates individuals for their damages but emphasized Title VII’s prevention goal and deterrent effect.

Unfortunately, Title VII is more than half a century old, and sexual harassment scandals continue to erupt in the news media.54 Neither media attention, social approbation, nor #MeToo has solved the problem. Consensus exists that many executives still do not recognize or account for the costs or scale of the problem.55 Yet, if executives and

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50. U.S. INFLATION CALCULATOR, https://www.usinflationcalculator.com (inputing the numbers Professor Rhode provided and the year 1997 to estimate the present value as $14,569,271.02 in 2022) (last visited June 17, 2022).
shareholders actually understood and credited the continuing costs of the harm caused by sexual harassment, they might feel greater concern for the huge costs of our sole reliance on outdated and damage-capped antidiscrimination laws. That sole reliance and the failure to address costs mean lower bonuses, dividends, and profits, not to mention the lower productivity and injury of traumatized workers. Even the Securities and Exchange Commission (SEC) is beginning to investigate sexual harassment (or, more precisely, the failure to disclose its associated costs and problems).

B. The Costs of Sex-Based Harassment

The costs and consequences of sexual harassment highlight how it comprises not just an injury or healthcare crisis for each target, but also a misappropriation or conversion of valuable corporate resources. Research has shown that sex-based harassment has significant negative psychological, physical, and financial effects. One can divide these losses into those suffered by targets and those borne by companies. Moreover, a target’s damages often translate into financial losses for a company.

1. Costs Borne by Individual Targets

Many harassed targets experience physical, psychological, and financial injuries. Physical effects include high blood pressure, stomach problems, headaches, and other stress-related ailments. The stress can impact cardiovascular function, autoimmune diseases, and metabolic function and may lead to hair loss, hives, loss of appetite, weight gain or loss, nausea, sleeplessness, lethargy, inability to concentrate, neck pain, and muscle aches.

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58. Portions of this discussion were first published in Drobac & Russell, supra note 57, at 329–34.


60. See, e.g., id. I also recall seeing these physical and psychological symptoms in my own clients during my years of law practice.
Psychological effects of sexual harassment can include depression, anxiety, stress, and even Post Traumatic Stress Disorder (PTSD), which may include flashbacks and panic attacks. These symptoms can lead to substance abuse problems and attempted suicide. Workplace sexual harassment undermines an individual’s “workplace authority, reduces targets to sexual objects, and reinforces sexist stereotypes about appropriate gender behavior.” Sexual harassment can result in anger, harm to self-esteem and self-worth, reduced job satisfaction, increased healthcare costs, increased absenteeism, work withdrawal, and a deterioration of co-worker relationships.

Many women who experience sexual harassment in their twenties and early thirties suffer financially during this formative career stage. Lost promotions, abandoned jobs, wrongful terminations, and other consequences can depress lifelong earnings. Teens who experience sexual harassment at their first jobs “learn” that sexual harassment is “normal” and should be expected. Even if they know intuitively that sexual harassment is wrong or illegal, these teens may also come to believe that nothing they can do (alone) will change the workplace. Finally, sexual harassment affects not only directly targeted women, but also other workers in the hostile environment, partners, and families.

2. Traditional Views of Costs Borne by Targets and Companies
Some theorists have historically underestimated the costs of sexual harassment. Several legal theorists implied that sexual harassment results in minor financial losses, as they distinguished sexual harassment from embezzlement. For example, writing about predicate acts for employee whistleblower status, Professor Frank Cavico used the examples of sexual harassment and embezzlement. He suggested that, “wrongdoing’ must include business or corporate wrongs that invade fundamental moral rights, such as an employee’s right to privacy, that cause psychological harm, for example by sexual harassment, and inflict financial harm, for example by embezzlement. By contrasting

61. Id. at 20.
64. Id. at 335.
65. Id. at 352.
67. Id.
sexual harassment and embezzlement, Cavico implied that sexual harassment was not a financial harm.

Writing in 1999, five years before Cavico, Professors Richard Posner and Gertrud Fremling argued:

An implicit assumption is that the expected cost of harassment to female workers is not so great that there is no feasible wage premium that would compensate them in advance for bearing that cost. This seems a realistic assumption, since otherwise employers would be pressing for criminal sanctions for harassment in just the same way that they favor criminal sanctions for embezzlers.68

In this passage, Fremling and Posner suggested that employers do not press for criminal sanctions for harassment because the costs associated with sexual harassment are so low that employers can arguably pay women a wage premium to bear the cost. Of course, employers do not offer such a premium.69

Additionally, Fremling and Posner grossly underestimated the costs of sexual harassment. They probably also underestimated the lack of data, low rates of reporting, and company concealment of harassment.70 Fremling and Posner continued:

That employers do not advocate such remedies indicates that sexual harassment is not as potentially costly to employers as embezzlement is and that the market can deal with harassment without government intervention. The emphasis that the law places on employer liability for sexual harassment may reflect not the economics of the practice, but simply the fact that Title VII has been the principal statutory vehicle for making sexual harassment a tort litigable in federal courts.71

Query whether Fremling and Posner had any evidence that sexual harassment is not as costly as embezzlement to employers. Economists, accountants, and insurers should make that calculation and double-check this dated assertion.

More importantly, however, what Fremling and Posner missed completely in their analysis is that sexual harassment is a form of embezzlement, as will be discussed more fully below. Had they recognized this fact, then they could have challenged Title VII’s emphasis on employer liability as an illogical way to address “the economics of the practice.” Like Fremling and Posner, Cavico failed to perceive sexual harassment as a form of embezzlement with significant, financial

69. And, if corporations did offer a premium so that women would endure sexual harassment, would anyone call that corporate pimping and prostitution?
70. I thank Dr. Russell for this observation. E-mail from Mark Russell, Lecturer, U. of Queensland Sch. of Bus. to author (Aug. 16, 2021) (e-mail and attachment on file with the author).
71. Fremling & Posner, supra note 68, at 1092.
consequential harm. In the twenty years since these theorists wrote, the law has not changed to account for the costs or to punish the frontline perpetrators.

3. Costs Borne by Companies

Arguably, corporations suffer on a macro-scale some of what targeted employees experience on a micro-level. To date, robust and specific data concerning the actual financial impact of sexual harassment in the United States has been difficult to find. A 2005 estimate of the costs of sexual harassment caused by “absenteeism, lost productivity, and employee turnover exceeded $6 million per Fortune 500 company.” Additional costs can include added insurance costs, litigation expenses, and employee recruitment cost increases because of terminations and the difficulty in attracting talented workers to a hostile environment. For example, in the first quarter of 2017, Twenty-First Century Fox paid $45 million “to settle allegations of sexual harassment.” In the same year, it received a $90 million insurance payment for investor claims arising from the sexual harassment scandal at Fox News.

72. But see Jennifer Ann Drobac & Mark Russell, The Company Reporting of Australian Sexual Harassment, 36 Austl. J. Corp. L. 131 (2021). Dr. Russell and I note in this article that the Deloitte accounting firm did report on the cost of sexual harassment in Australia. We explain, “At the national level, a Deloitte report estimated that in 2018 workplace sexual harassment cost the Australian economy $3.5 billion annually including $2.6 billion in lost productivity. The Deloitte report also estimated that in 2018 complainants spent $103.5 million in accessing the health and justice systems.” Id. at 138 (citing Austl. Hum. Rts. Comm’n, Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces 81 (citing Deloitte Access Econs., supra note 55)).


74. Int’l Ctr. for Rsch. on Women, supra note 73, at 7.

75. Twenty-First Century Fox, Inc., Quarterly Report (Form 10Q), at Note 11: Additional Information n.(c) (May 10, 2017). The note reads:

Other costs for the three and nine months ended March 31, 2017 included approximately $10 million and $45 million, respectively, of costs related to settlements of pending and potential litigations following the July 2016 resignation of the Chairman and CEO of Fox News Channel after a public complaint was filed containing allegations of sexual harassment.

See also Eliza Anyangwe, Sexual Harassment: The Hidden Costs for Employers, Fin. Times (Mar. 14, 2018), https://www.ft.com/content/af64eea0-207f-11e8-8d6c-a1920d9e946f. See generally Int’l Ctr. for Rsch. on Women, supra note 73.

76. Twenty-First Century Fox, Inc., Quarterly Report (Form 10Q), at Note 9: Commitments and Contingencies (Feb. 7, 2018). This section of the Report, under “Shareholder Litigation,” states:

On November 20, 2017, a stockholder of the Company filed a derivative action . . . captioned City of Monroe Employees’ Retirement System v. Rupert Murdoch, et al., C.A. No. 2017-0833-AGB. The lawsuit named as defendants all directors of the Company and the Estate of Roger Ailes (the “Ailes Estate”),
published 2016–2017 timeline of sexual harassment allegations, suits, and departures at Fox News—including the resignation of Roger Ailes and termination of Bill O"Reilly—highlights the damage caused. Of course, brand and reputational costs depend upon the industry but might include the withdrawal of advertising dollars, protests, boycotts, loss of investment capital (including human capital), and loss of other lucrative business relationships. For example, a growing number of companies have faced boycotts and social media campaigns designed to challenge sexist corporate policies and practices. Senator Elizabeth Warren announced in July 2019 that she would join the #CancelTerranea boycott. Terranea is one of California’s largest hospitality employers that “has attracted negative press for its handling of claims of sexual harassment.” The boycott cost the ritzy resort

and named the Company as a nominal defendant. The plaintiff alleged that the directors of the Company and Rupert Murdoch as a purported controlling stockholder breached their fiduciary duties by, among other things, failing to properly oversee the work environment at Fox News. The plaintiff also brought claims of breach of fiduciary duty and unjust enrichment against the Ailes Estate.

On November 20, 2017, the parties reached an agreement to settle the lawsuit and filed a Stipulation and Agreement of Settlement, Compromise, and Release with the Court (the “Settlement Agreement”). Pursuant to the terms of the Settlement Agreement, the parties agreed that the director defendants and the Ailes Estate would cause their insurers to make a payment in the amount of $90 million to the Company, less any attorneys’ fees and expenses awarded by the Court to the plaintiff’s counsel. In addition to the payment to the Company, the Settlement Agreement provides that the Company shall put in place governance and compliance enhancements, including the creation of the Fox News Workplace Professionalism and Inclusion Council, as set forth in the Non-Monetary Relief agreement agreed to by the parties. These governance and compliance enhancements shall remain in effect for five years. On November 28, 2017, the Court issued a Scheduling Order which, among other things, set the settlement hearing for February 9, 2018, and approved the forms of the notices to stockholders, which were disseminated in accordance with the Scheduling Order.

This section makes clear that the governance and compliance enhancements remain in effect for only five years. See also Anyangwe, supra note 75.

78. INT’L CTR. FOR RESCH. ON WOMEN, supra note 73, at 8.
79. See, e.g., Sam Levin, Uber’s Sexual Harassment Case Shines Light on a Start-up’s Culture of Defiance, THE GUARDIAN (Feb. 21, 2017), https://www.theguardian.com/technology/2017/feb/21/uber-sexual-harassment-discrimination-scandal [https://perma.cc/AHW6-889D] (explaining that Uber “is facing a widespread backlash [including a boycott] after a former engineer went public with her story of sexual harassment and discrimination by management and repeated rebuffs from the HR department, adding fuel to the #DeleteUber campaign that went viral last month”).
conferences and contracts and led to a decline in revenue. However, analysts rarely quantify these losses of capital and relationships. Additionally, reported numbers for such relationship costs do not appear to exist across time for specific industries or for the U.S. economy as a whole. Few corporations declare losses due to sexual harassment in their financial disclosures. It is unclear how many companies collect and retain this data.

A recent study by Shiu-Yik Au, Ming Dong, and Andréanne Tremblay analyzed more than 1.65 million Glassdoor and Indeed job reviews concerning reported instances of sexual harassment at more than 1,100 firms. Professor Au and his team matched an annualized sexual harassment incidence rate to corporate profitability and stock market performance. Companies with the worst sexual harassment issues underperformed the stock market by an average of 19.9% per year, “represent[ing] an average loss in market capitalization of US$2.1 billion per firm.” Their research spans from 2011 to 2017, thus predating the #MeToo movement, and demonstrates that sexual harassment correlates with severe costs to companies since long before the movement. Au and his team also controlled for poor overall firm performance.

In January 2018, Democratic senators, led by Senator Kirsten Gillibrand, sought such cost data and asked the U.S. Labor Department about the economic impact of sexual harassment. Still headed by Alex Acosta (who resigned in July 2019 after news of his 2008 secret

82. See Drobac & Russell, supra note 57, at 349–61; see also Drobac & Russell, supra note 72.
84. Shiu-Yik Au, The Real Cost of Workplace Sexual Harassment to Businesses, CONVERSATION (Sept. 2, 2019, 12:37 PM), https://theconversation.com/the-real-cost-of-workplace-sexual-harassment-to-businesses-122107[https://perma.cc/EJV2-JREJ] (“The market capitalization of the 101 firms we identified as the worst sexual harassers had a combined market capitalization of approximately US$1.1 trillion in 2017 dollars) [sic]. This translates to a total loss of US$212.2 billion per year (US$1.1 trillion multiplied by 19.9 per cent), or an average annual dollar loss of US$2.1 billion per firm.” (citing Au, Dong & Tremblay, supra note 83, at 19)).
85. Id.
86. Au, Dong & Tremblay, supra note 83, at 6, 13, 29–30.
plea deal with accused child sex-trafficker Jeffery Epstein), the Labor Department had no ready statistics. In April 2018, the Labor Department’s Bureau of Labor Statistics (BLS) declined to do an investigation:

The [Labor] Department takes workplace sexual harassment very seriously. . . . However, collecting this information would be complex and costly. . . .

Questions about workplace harassment are very sensitive in nature. Employers may have difficulty providing the data you are requesting, as such information may not always be reported by victims and the release of such information may be subject to privacy or other restrictions.

Apparently, an investigation into the financial impact of sex-based misconduct was too difficult for the Labor Department because of the lack of reporting.

In their reply to the Labor Department and the BLS, the senators stated, “While your letter indicated the Department takes workplace sexual harassment ‘very seriously,’ your lack of commitment to collect this data undermines your assurances.” They also referred the Labor Department to a U.S. Merit Systems Protection Board (MSPB) 1994 estimate stating “that over the course of two years, sexual harassment in the federal workforce cost the government a total of $327.1 million as a result of job turnover, sick leave, and decreased productivity. . . . Surely the government’s capacity to collect data has only become more sophisticated” since 1994. In its 2018 coverage of this exchange, the Washington Post noted “[t]hat $327.1 million would be worth $556 million today, according to a BLS inflation calculator.”

Senator Gillibrand and her team next asked the Government Accountability Office (GAO), a nonpartisan agency that works for Congress, to investigate the question. I contacted Senator Gillibrand’s office and received the following response: “Thanks for reaching out.

90. Drobac & Russell, supra note 57, at 333.
93. Davidson, supra note 87.
94. Id.
We are working with GAO on a report, but we can’t discuss [sic] more at the moment.\(^95\) Given the pandemic and other intervening priorities, I do not anticipate more from Senator Gillibrand and the GAO. However, I trust researchers such as Professor Au and his team that sexual harassment costs U.S. businesses and government employers billions of dollars and much more over time. Clearly, though, more research on the full costs of sexual harassment is needed.

As part of its reframing of sexual harassment, the misappropriation approach calls for more research to determine actual costs, by industry, and by company across the nation. If companies and their shareholders focus on the bottom line regarding the costs of sexual harassment, management will find more effective ways to remediate the problem and staunch the asset bleed that sexual harassment causes at corporations across the nation. Once corporate stakeholders and others see the costs of sexual harassment, an approach based on misappropriation becomes logical. This reframing to focus on costs and lost profits does not require the erasure or dismissal of a civil rights perspective. It simply adds to the metaphorical tool kit for remediation.

C. The Measurement of Costs or Asset Losses

If not just for their workers, companies should consider the losses that they suffer annually because of sexual harassment for their shareholders and do something about it. First, companies should investigate their direct costs. If a company discovered that someone was embezzling funds in the accounting department, it would investigate. Direct costs that companies should calculate must include monetary judgments, settlement amounts, unanticipated severance pay, associated lawyers and auditors’ fees, other litigation costs, training expenses, and recruiting costs (to replace employees lost because of sexual harassment).

Second, indirect costs should include valuations for lost productivity, associated lost market share or profitability, absenteeism, and losses due to employee turnover. Furthermore, actuaries and auditors should quantify the sum of these indirect costs, by some measure as the costs of the unlawful abuse of human capital by corporate managers. The designation of the costs in this way will allow management, investors, employees, civil rights advocates, and insurers to see sexual harassment as an abuse of corporate assets akin to the misappropriation of corporate funds or the theft of other corporate assets.\(^96\)

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\(^95\) E-mail from Jasmin Palomares, Legis. Aide for Senator Kirsten Gillibrand, to author (July 19, 2019) (on file with author).

\(^96\) One might argue that workplace injuries not caused by sexual harassment might similarly warrant quantification and report communication. I focus on sexual harassment because the EEOC found it so prevalent across sectors in the U.S. workplace. See Feldblum & Lipnic, \textit{supra} note 59, at 7.
Two possible measures for valuing an abuse of human capital could prove useful. An accountant might aggregate a worker’s salary and other remuneration, plus training and education costs, and prior work experience. One might imagine other relevant enhancements, depending on the person and the job. The accountant would determine the average number of years that such an employee might have continued to provide value to the company and use that number as a multiplier to arrive at a total figure. This method might serve if the targeted employee quit because of unbearable harassment or if the harasser terminated the target in a retaliatory move.

A second method might entail a valuation of the target’s outputs or production and assess how the harassment interrupted or lowered that productivity. For a harassed lawyer at a firm, that calculation might focus on the lawyer’s annual lodestar, the average number of billable hours that the target works, multiplied by her billed hourly rate. Non-billable work such as firm committee service or pro bono work that enhances the firm’s reputation and community goodwill might also figure into the calculation. Then accountants might compare how that worker’s productivity has suffered since the onset of the harassment. They can then compare the cost of prevention and remediation with the costs of litigation, bad press, and lost business, etc.

Because current antidiscrimination laws focus on the target and her injuries and environment, they divert attention away from broader societal harm and the significant losses that companies suffer. The goal of the misappropriation approach is not to negate the damage to the target or deny the toxic environment. Current antidiscrimination law, however, has not solved this problem. By emphasizing the societal and corporate (or organizational) harms, the misappropriation solution recruits new, perhaps more powerful, partners in the eradication of sexual harassment. Rather than jettison these antidiscrimination tools, though, the misappropriation plan recommends that we use some additional tools already at our disposal.

II. Comparing Criminal and Civil Antidiscrimination Law

Criminal law prevents harms to not only individuals but also to society writ large. Prosecutors bring cases on behalf of the “People,” the “State,” or the “Commonwealth,” rather than on behalf of any individual target or victim. Our designation of the “Commonwealth,” the “State,” or the “People” to prosecute perpetrators serves as a constant

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98. See, e.g., CAL. GOV’T CODE § 26500 (West 2021) (“The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.”).
Sexual Harassment Reconceived

reminder of our broad utilitarian goal. With a strict liability offense, such as statutory rape, society demonstrates its concern not with the actor’s guilty mind, or mens rea, but with the harm to society’s children and to one child in particular. In a criminal rape case, the survivor serves only as a witness to the crime against her (and the people or the state). If jurists could apply the broader focused lens of criminal law in a civil sexual harassment case, society might see new outcomes. In a sexual harassment case, the traditional criminal law lens might refocus attention from the narrow examination of the target’s injury to a broader recognition of the harms suffered by the company and all of us in society more generally.

Another function of the criminal justice system involves punishment of the perpetrator who commits the bad act, or actus reus. Punishment serves several subsidiary aims: deterrence (both general and specific), rehabilitation, retribution, and incapacitation. Criminal law typically imposes fines and penalties on the perpetrator, not on others who might have prevented the harm such as parents, spouses, or employers. One can see how the civil law punishment of the convicted perpetrator of sexual harassment might serve several of the criminal law’s subsidiary aims. Serious punishment might deter the harasser and other persons with power, who might emulate the harasser’s conduct. Additionally, appropriate consequences might rehabilitate a harasser. Those harassers who are merely “clueless” might resume work after sensitivity training and counseling. Suspension or employment termination might incapacitate a perpetrator—at least so that he could not continue to abuse coworkers and subordinates in the same company.

If targets charged perpetrators rather than their corporate employers under a revised civil law theory that incorporated the criminal law perspective, then the corporation would become a natural ally, or even

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101. I argue that at least three types of perpetrators sexually harass workers: “the clueless, those who could not care less (the care-less), and the corrupt predators.” In my textbook, I explain:

[Drobac] suggests that the clueless, once advised that their conduct is offensive, will feel remorse. They will try to make amends and change their behavior. Usually, the complainant need not sue these individuals for relief. A direct communication or complaint to a common supervisor or human resources professional, who can counsel the clueless party, cures the problem. These offenders take responsibility for their conduct and try to correct their behavior in the future. Drobac estimates that most mild workplace harassment comes from these types of harassers, male and female.

DROBAC, BAKER & OLIVERI, supra note 44, at 204.
a co-plaintiff. The company would have no (or less) reason to seek a nondisclosure agreement (NDA) from a respondent who admitted liability or who settled. Currently, NDAs stifle notice to other employers that an executive has a history of sexual harassment and abuse of subordinates. NDAs also mask the amount of any settlement and, therefore, some of the costs of sexual harassment incurred by companies. Additionally, NDAs hinder the development of antidiscrimination and other personal injury law because other plaintiffs and their counsel never learn what theories of recovery worked or failed in litigation. Finally, NDAs prevent notice to other potential offenders and to potential future targets. NDAs thwart general deterrence and influential resistance by targets and their allies.

A. The Blend of Criminal and Civil Law

Civil law purists might criticize the melding of criminal law and civil law perspectives and goals. They might argue that criminal laws mandate more rigorous legal proofs and standards than civil laws because under many criminal laws the state can deprive the convicted of his liberty. Such critics explain that these two systems, therefore, are appropriately distinguished. However, not all criminal laws provide for incarceration upon conviction. Moreover, some criminal laws carry civil penalties. Additionally, embezzlement, misappropriation, and theft are typically chargeable under either criminal or civil laws. Similarly,

102. See Drobac & Russell, supra note 57, at 320.
103. But see 26 U.S.C. §162(q). A 2018 federal tax law made a significant change to an employer’s ability to deduct settlement payments and legal expenses resulting from sexual harassment claims. If the employer requires an NDA as part of a settlement agreement, it cannot deduct these expenses. While this tax code provision may deter some employers from insisting on gag provisions, law makers do not know how many companies still use such provisions and hide litigation expenses in general accounting figures.
105. In California, for example, misappropriation of money may violate California Penal Code § 487, “Grand Theft.” “Misappropriation of client funds can also be a basis for civil liability, including fraud, conversion or legal malpractice.” Mark L. Tuft, Ellen R. Peck & Kevin E. Mohr, Misappropriation of Entrusted Funds or Property, CAL. PRACT. GUIDE: PRO. RESP. 9:398 (Supp. 2021). Under California Civil Code § 3294, a party can obtain civil damages for oppression, fraud, or malice. Note that a clear and convincing standard applies under this provision. This standard, while not as strict as the “beyond a reasonable doubt” standard, is more rigorous than the “preponderance of the evidence” standard.

Section 3294 reads:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had
“[a]n action for fraud may be brought under civil law or prosecuted by
the state through criminal law.” Conversion also constitutes both a
violation of criminal law (typically under the name larceny, theft, or
conversion) and civil law in many jurisdictions. As a civil law viol-
ation, conversion is typically brought as an intentional tort claim.
One can see how sex-based harassment is similar to a misappropria-
tion, fraud, or conversion—especially when Mack makes use of Wanda
or her services and productivity in a manner not approved by her or
Acme. The misappropriation approach recommends the use of civil law
penalties, which carry the “preponderance of the evidence standard.”
This preponderance standard requires that Acme and Wanda need
prove only that it was more likely than not that Mack misappropriated
her labor and services, causing injury to both Wanda and Acme.

While companies might still report criminal corporate thievery to
district attorneys and prosecutors, the misappropriation approach does
not focus on that option as the first response. The criminal “beyond a
reasonable doubt standard” was designed to safeguard the due process
rights of the criminally accused who are subject to imprisonment.
Of course, criminal prosecution may be appropriate for some accused
harassers and violent predators. However, the misappropriation solu-
tion seeks financial redress for targets and their innocent companies
(i.e., companies that sincerely strive to create a safe and equitable
workplace). As discussed next, however, many criminal laws provide
for civil financial penalties. Courts apply the preponderance standard

advance knowledge of the unfitness of the employee and employed him or her
with a conscious disregard of the rights or safety of others or authorized or rati-
fied the wrongful conduct for which the damages are awarded or was personally
guilty of oppression, fraud, or malice. With respect to a corporate employer, the
advance knowledge and conscious disregard, authorization, ratification or act
of oppression, fraud, or malice must be on the part of an officer, director, or
managing agent of the corporation.

Id. (emphasis added). But see Moss v. Morgan Stanley, 719 F.2d 5, 16 (2d Cir. 1983)
(rejecting any misappropriation theory in a civil suit involving fraudulent trading under
securities laws); Roman P. Wuller, Insider Trading: Circumventing the Restrictive Con-
tours of the Chiarella and Dirks Decisions, 1985 U. Ill. L. Rev. 503, 520.

106. Geraldine Szott Mohr, Federal Criminal Fraud and the Development of Intan-
gible Property Rights in Information, 2000 U. Ill. L. Rev. 683, 688 (citations omitted).
107. See, e.g., CAL. PENAL CODE § 484-502.9 Larceny (West 2021); IND. CODE § 35-43-
4-3 (2020) (“(a) A person who knowingly or intentionally exerts unauthorized control
over property of another person commits criminal conversion . . . .”).
and-personal-injuries/conversion.html [perma.cc/B34J-QCD7]. For a definition of “con-
version,” see supra note 7.
www.law.cornell.edu/wex/preponderance_of_the_evidence [perma.cc/STN5-W7K6].
110. See Beyond a Reasonable Doubt, CORNELL L. SCH. LEGAL INFO. INST. (May 2020),
https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt [perma.cc/GN4L-FWN8].
in those civil law penalty actions. Thus, civil misappropriation suits and associated penalties might provide for financial relief whether actual financial losses are low or high.

The misappropriation solution also emphasizes the remediation or prevention of toxic workplaces, whether or not a company seeks the imprisonment of perpetrators through a prosecutor or district attorney. Therefore, the misappropriation approach stresses that corporations, management, shareholders—all of us—need to understand the financial costs of sexual harassment. When we do, we will see it as the misappropriation or conversion that it comprises. Moreover, we will address sexual harassment differently than we do today. Society needs revised laws, not necessarily new ones. It needs more intelligent, rational use of the laws already on the books.

California, a populous state with comprehensive civil and vehicle codes, furnishes numerous statutory schemes that could serve to enhance current antidiscrimination law approaches. For example, California law provides for civil penalties for conversion, which under criminal law might constitute theft. To prove a case of conversion, the plaintiff must show, “(1) the plaintiff’s ownership or right to possession of the property; (2) the defendant’s conversion by wrongful act inconsistent with the property rights of the plaintiff; and (3) damages. In California, conversion is a strict liability tort: Questions of good faith, lack of knowledge, and motive are ordinarily immaterial.” The civil penalty provision explains that the wrongful conversion of personal property allows for recovery of the value of the property plus interest and for “fair compensation for the time and money properly expended in pursuit of the property.” By loose analogy, one can see how sex-based harassment arguably constitutes a wrongful act inconsistent with a

111. See, e.g., CAL. BUS. & PROF. CODE § 17206 (West 2021). Section 17206 provides in part:

(a) Any person who engages . . . . in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation . . . . in a civil action brought in the name of the people of the State of California by the Attorney General . . . .

Id. A court interpreting this statute held:

However, the fact that certain conduct is a crime will not prevent the issuance of an injunction if the conduct also falls within a specific statute authorizing an injunction. Here the unfair competition law specifically authorizes injunctions and civil penalties in addition to the remedies of the penal law. . . . Section 17205 provides: “Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.”

People v. E.W.A.P. Inc., 165 Cal. Rptr. 73, 76 (Ct. App. 1980) (citations omitted).

112. CAL. CIV. CODE § 3336 (West 2021).

113. In re Emery, 317 F.3d 1064, 1069 (9th Cir. 2003).

114. CAL. CIV. CODE § 3336.
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target’s interest in her own body or in the job benefits for which she works. This harassment also interferes with the employer’s property interest in the target’s labor productivity and the profitability expected from that productivity.115

Other civil and criminal laws also complement each other or blend criminal and civil sanctions. For example, some public nuisance laws carry civil penalties specifically for injured parties. One such example, California’s “Red Light Abatement Law,” specifies, “[E]very building or place in or upon which acts of . . . lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.”116 It further states, “The court may assess a civil penalty not to exceed twenty-five thousand dollars ($25,000) against any and all of the defendants, based upon the severity of the nuisance and its duration.”117 Finally, it explains, “In cases involving human trafficking, one-half of the civil penalties collected . . . shall be deposited in the Victim-Witness Assistance Fund . . . to fund grants for human trafficking victim services and prevention programs provided by community-based organizations.”118 One can imagine an expansion of this civil penalty for a “Sexual Harassment Abatement Law” and similar funding for harassed and abused workers in other contexts.

A different type of penalty exists in California’s Tom Bane Civil Rights Act.119 That act provides for a suit by an attorney general, district attorney, or city attorney against any individuals “in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured.”120 If a state law

115. Dr. Mark Russell makes the excellent point that the Financial Accounting Standards Board (FASB) defines “assets” as follows: “Assets are probable future economic benefits obtained or controlled by a particular entity as a result of past transactions or events.” Fin. Acct. Standards Bd., Statement of Financial Accounting Concepts No. 6, ¶ 54 (1985). The FASB offers additional language, “An asset is a present right of the entity to an economic benefit.” Fin. Acct. Standards Bd., Statement of Financial Accounting Concepts No. 8, Conceptual Framework for Financial Reporting, Chapter 4, Elements of Financial Statements ¶ E16 (2021). Dr. Russell explains that “economic benefits” are “broader than profitability[,] and would capture the productivity of more employees.” Thus, the harassment of one employee could influence a host of economic benefits, not merely the profitability of one worker. E-mail from Mark Russell to author, supra note 70.

117. Id. § 11230(b).
118. Id. § 11230(d).
120. The full paragraph reads:

(b) If a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney
attorney does sue, she “may also seek a civil penalty of twenty-five thousand dollars ($25,000).”121 The penalty “shall be awarded to each individual whose rights under this section are determined to have been violated.”122 Section (e) of the Tom Bane Civil Rights Act states, “If a court issues a temporary restraining order or a preliminary or permanent injunction . . . , ordering a defendant to refrain from conduct . . . , the order issued shall include the following statement: VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE UNDER SECTION 422.77 OF THE PENAL CODE.”123 This hybrid civil rights law incorporates many of the advantages of a criminal prohibition. Prosecution by the state emphasizes the societal interest. Civil penalties for the targeted victims recompense them for their injuries. Finally, violation of any court ordered restraints or injunctions provides for criminal penalties against the offenders.

Similar laws, which pertain to fraud, conversion, misappropriation, and theft, exist across the nation.124 These laws that provide for criminal sanctions and civil law remedies (or exist as companion statutes) identify the bad actors and unite “the people” and the injured victims in holding those bad actors responsible for their conduct. Corporations, shareholders, targets, and even clients and patrons could borrow from a similar combination of criminal and civil law approaches to address the broad financial costs of sex-based harassment. Additionally, corporations could redirect their attention away from fighting the target to working with her and assessing corporate losses that result from the misappropriation of company assets.

B. Sexual Harassment as Theft: Mack’s “Joyride”

To access the beneficial concepts inherent in the application of a criminal law perspective to sexual harassment, one must adjust the definition of sex-based harassment. In addition to a discriminatory act, sex-based harassment should be viewed as an involuntary taking,

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General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

121. Id.
122. Id.
124. While a survey of the laws of all fifty states is beyond the scope of this article, I invite students to prepare law review notes on the topic and hope that students will send me their published work.
deliberately, recklessly, or negligently engaged in by the perpetrator. The taking includes not only a dignitary injury and possibly a physical molestation, but it may also result in lost or impaired productivity, and secondary costs of repair and remediation. These harms may have a lasting effect on corporate productivity and profitability. For example, the Weinstein Company filed for bankruptcy after realizing the costs of Harvey Weinstein’s harassment and other related misappropriations. 125

Unlike common theft imagined by most people, however, sex-based harassment does not always constitute a permanent taking. Mack Manager may coerce and extract sexual favors, but Wanda usually returns to the welding shop, assembly line, or accounts receivable department. How can criminal law shed light on this kind of a taking?

A provision of the California Vehicle Code offers an example of how a different perspective might help in the adjusted definition of sexual or sex-based harassment. This Code provision prohibits what is commonly known as “joyriding.” 126 Section (a) makes the taking of a car, temporarily or permanently, without the owner’s permission, a “public offense.” 127 Intent to steal is irrelevant. Moreover, this provision applies

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126. California Vehicle Code § 10851(a) specifies:

Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense . . . .

127. Id.
to accomplices and parties who aid in the “unauthorized taking” or “stealing.” The third section (c) notes that consent of the owner cannot be presumed simply because the owner has given someone permission to take the vehicle on a prior occasion. Conviction under this criminal law triggers not only potential imprisonment in a county jail, but also possible fines.

One can see how this code provision and other similar laws could track sexual harassment. For example, the groping of an employee’s breasts is, arguably, like an illegal joyride (“joyful” only to the groper, not the owner of the breasts). Anyone who enables the harasser is an accomplice. The perpetrator may not intend a “theft” of the breasts, but mental state is irrelevant under the California statute. The momentary or temporary molestation for the thrill of the taking or the rush of the domination could itself constitute the offense. Moreover, prior consent by the breast owner to anyone, including the perpetrator, does not excuse the unauthorized taking by the perpetrator in the current instance.

Using the same joyride statute, now consider that the person who possesses the vehicle might not be the owner, but merely a lessee or a renter of the car. The perpetrator who steals the car for the joyride has then interfered with not only the owner/lessor’s interest but also the lessee’s.

Returning to the analogy for sexual harassment, one can see how a “theft” or “joyride” could result in a loss to a target and any other interest holder. In other words, the sex-based harassment of Wanda interferes with not only her ownership rights in her own body but also those of Acme, the party who leases her labor and welding services (on an

128. *Id.*
129. Section (c) states:

In any prosecution for a violation of subdivision (a) or (b), the consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of the owner’s consent on a previous occasion to the taking or driving of the vehicle by the same or a different person.

*Id.* § 10851(c).
130. Section (a) explains that “upon conviction thereof, [the convicted parties] shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment.” *Id.* § 10851(a).
131. Professor Bishop notes that intellectual property also treats “a wrongful appropriation of value as a crime, even if the economic damages to the rightful owner of the property (and financial gain to the thief) were minimal.” E-mail from Lea Bishop to author, *supra* note 41; see 17 U.S.C. § 506. She explains that criminal prosecution for copyright infringement happens rarely, as an additional charge for people caught with child pornography. In theory, however, someone commits a crime when he appropriates $1000 of retail value by violating another person’s copyright. Professor Bishop postulates that the existence of that crime deters people, encourages payment for violations, and enhances civil penalties awarded by courts. E-mail from Lea Bishop to author, *supra* note 41.
hourly or annual basis). Whoever takes Wanda’s body, or abuses Wanda to the extent that her work suffers, has also stolen her productivity, time, and services for Acme, her corporate employer. Thus, company executives, auditors, accountants, and insurers should secure valuable company assets (including Wanda) by immediately responding to their misappropriation by corporate thieves.

C. Langdellian Law v. Real Life

Another reason to treat sexual harassment as theft is because the perpetrator who steals one asset (a human one) might be stealing another (an inanimate one). Jurists need a new perspective to see the legal implications of multifaceted theft. In law school, students study contracts, criminal law, and other subjects in discrete segments that Harvard Law School Dean Christopher Langdell delineated. Langdell caused students to distinguish a tort (a personal injury) from a crime, a contractual promise from a fiduciary duty. Real life, however, does not divide quite as neatly into Langdellian pigeonholes. As noted, some torts are also crimes. Some breaches of contractual promises might also constitute crimes or torts. Arguably, sexual harassment is a multi-aspect, legal hybrid. It constitutes a breach of the employment contract, a tort, sometimes a crime (assault, battery, rape, etc.), perhaps a breach of fiduciary duty, and even more.

Examples of how corporate executives engage in multiple and varied thefts abound. For example, in 1998, Astra USA, Inc. alleged that its former president and CEO, Lars Bildman, misappropriated and embezzled millions of company dollars for his lavish lifestyle, created a climate of sexual harassment, and destroyed company records in an extensive attempted coverup. Astra first suspended and then terminated Bildman in 1996, following an investigation of his conduct. In 2009, the Massachusetts Supreme Judicial Court ruled that “[New York’s ‘faithless servant’ doctrine allows the company to go after $5.6 million in salary and $1.2 million in bonuses paid to Bildman.”

132. Christopher Columbus Langdell was the Dean at Harvard Law School at the end of the nineteenth century who developed the case method system and divided law school teaching into discreet subject areas such as contracts, criminal law, constitutional law, etc. See Christopher Columbus Langdell, ENCYC. BRITANNICA (July 2, 2021), https://www.britannica.com/biography/Christopher-Columbus-Langdell [https://perma.cc/863V-FES8A].


In 2010, a woman fired by the City of Ozark alleged discrimination because males who had been accused of more serious offenses were not similarly terminated. She alleged that “one employee committed harassment and misappropriated city funds and vehicles; . . . [and] one employee committed sexual harassment, embezzled money, and acted as a sexual predator.” In 2014, the founder of American Apparel, Dov Charney, was accused of sexual harassment and misappropriation of company assets. One 2014 report explained, “The allegations against Charney are numerous and significant. A shareholder, [Tammy G. Federman] for instance, sued Charney, American Apparel and its directors in June, and alleged that Charney authorized severance packages, raises and bonuses in exchange for agreements that protected him from liability for sexual misconduct.” In 2007, the Montana Highway Patrol (MHP) terminated an officer after a hearing and review. The MHP concluded that the officer had misappropriated state resources, engaged in sexual harassment, and lied to investigators.

This brief discussion of several anecdotal cases suggests that thieves steal numerous kinds of assets, some of which may be priceless or have different valuation bases. These bad acts constitute crimes, breaches of contract, breaches of fiduciary duties, torts, and more (under the traditional Landellian model). Companies should treat those thefts at least consistently or should punish the arguably more egregious theft of corporate human assets more severely. The failure to punish the theft of human assets signals devaluation of human labor and, arguably, disregard of human dignity. On a practical level, the failure to punish harassers contributes to low morale, employee turnover, and other costs associated with sex-based harassment.

Another problem with any approach in sexual harassment, embezzlement, or other types of misappropriation is that these behaviors are often not obvious and can be difficult to prove. Noting the often-clandestine nature of sexual harassment, Professors Frederick Schauer and Richard Zeckhauser suggested, “Given the unwitnessed and behind-closed-doors nature of most acts of sexual harassment, the likelihood that any given charge of sexual harassment will satisfy a decision maker to a high degree of confidence is likely to be lower than for acts more likely to be committed publicly or to have produced physical evidence.” Schauer and Zeckhauser then list other acts like sexual harassment that perpetrators commit repeatedly “and in which

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139. Again, I thank Hannah Smith for helping me develop this conclusion.
140. Holland Hart LLP, supra note 138.
the charge of committing the act is likely to be establishable only to a
low degree of confidence for a decision maker.”141 They include on that
list embezzlement and plagiarism.142 Proof difficulties, however, do not
justify the tolerance of embezzlement and theft. Similarly, they should
not justify the toleration or, worse, ratification of sexual harassment.

III. Sexual Objectification, Human Commodity,
and Human Asset Management

The question arises why jurists have not called sexual harassment just
what it is before now, the theft of a corporate human asset. One imme-
diate answer is because such a label is uncomfortable, and it confronts
and highlights the economic consequences of sexual harassment. Argu-
ably, when someone labels targets or oppressed workers as assets, we
imagine that we are treating those targeted survivors as disrespect-
fully as a harasser has done. The concern arises that we are objectify-
ing these people. Consider, though, that the failure to treat a targeted
worker as a corporate asset might be even more discriminatory.

Feminist scholars and others have extensively explored the top-
ics of sexual objectification and human commodification.143 A summary
of the breadth of views and philosophical commentary on these top-
ics rests beyond the scope of this article. This section merely provides
some definitions to distinguish sexual objectification and human com-
modification from human asset management and valuation.

Part of the problem with the designation of a human being as a
corporate asset is that it offends normative conceptions that human
beings are not commodities or objects. So, let’s start with commonly
held views regarding objectification. According to the popular online
encyclopedia, Wikipedia, sexual objectification refers to “the act of
treating a person solely as an object of sexual desire.”144 It also means
“treating a person as a commodity or an object without regard to their
personality or dignity.”145 This practice of reducing people to their worth
as only a sex object or without regard to their dignity “is a type of dehu-
manization.”146 We recognize this phenomenon. This behavior describes
what sexual harassers do.

141. Frederick Schauer & Richard Zeckhauser, On the Degree of Confidence for
142. Id.
143. See, e.g., Evangelia (Lina) Papadaki, Feminist Perspectives on Objectification,
[https://perma.cc/KK2Z-Z89F].
144. Sexual objectification, WIKIPEDIA, https://en.wikipedia.org/wiki/Sexual_objecti-
fication [https://perma.cc/77MP-EV3V]. I use Wikipedia specifically because it captures
the normative conceptions that I address.
145. Id.
146. Id.
Another type of dehumanization, commodification explains the transformation of something or someone into an object of trade or a commodity. Human sex traffickers treat their human captives as both sexual objects and as human commodities. Slave traders similarly treat their human captives as human commodities. A black marketer who sells human livers or kidneys illegally commodifies human organs. Both objectification and commodification imply a target person’s lack of autonomy and self-determination—a lack of full personhood. Even if a person consents to sell his organs or her body, the law voids that consent as corrupted, detrimental, or perhaps coerced. To distinguish an appellation of “human asset” from a common description of a commodity or object, one needs to recognize what is unique, special, and particularly valuable about a human asset.

A. Kantian Moral Philosophy and Objectification, Commodification, and Asset Classification

To explore the distinction between objectification, commodification, and asset classification further, consider all three in the context of one moral philosophy, Kantian ethics. Both sexual objectification and human commodification violate Immanuel Kant’s Categorial Imperative. According to Kant, respect for “humanity,” which Kant defined as the rational nature of human beings, constitutes moral conduct. With the “Formula of the End in Itself,” Kant proposed treating humanity always as an end and “never merely as a means” to an end. One uses another person as a tool, or as a mere means to an end, when the proposed activity reflects an underlying principle to which the other could not consent. Clearly, rational and informed consent matter in this maxim. Sex-based objectification occurs when another person becomes a tool, a mere means to the end result of the oppressor’s sexual


148. The federal National Organ Transplant Act of 1984 (NOTA), 42 U.S.C. § 274e, specifies a five-year prison sentence and/or a fine of up to $50,000 for anyone convicted of buying or selling human organs in the United States.


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gratification or domination penchant. Commodification similarly treats persons (or their parts) merely as tools, objects of trade without dignity or autonomy.

With reference to dignity, R. George Wright elaborated on this Kantian concept of humanity. Wright suggested that “[i]f people have the capacity to make rational moral choices freely, autonomously, and self-originatingly, beyond being pulled about mechanically by the tugs of nature, that capacity will be the source and embodiment of moral worth, dignity, and their status as ends in themselves.” What indicates value and dignity is free choice, not necessarily the moral correctness of any choice. As we know from Meritor Savings Bank v. Vinson, the first U.S. Supreme Court opinion to analyze sexual harassment, acquiescence is not consent. Simply because Wanda acquiesces to Mack’s demands for sexual favors does not mean that she freely consents. Thus, his taking still constitutes a theft (or a conversion).

Sexual harassment commodifies targets whereby harassers trade job favors or entry into the workplace for stereotypical sexual favors or for the opportunity to abuse or dominate the target. This exchange is not a free bargain. Note that supervisors generally do not disclose their actual harassment practices to job applicants or new hires. Managers “disclose” their respective patterns of Title VII violations only after the hire, when the new worker has already incurred job search costs, and perhaps, rejected other career opportunities. Sex-based harassment also objectifies harassment targets, reducing them to their sexual and reproductive capacities or their roles as subordinated servants. Alternatively, it denudes them of their specialized market skills and talents, subjecting them to bullying, hostility, and animus. This article emphasizes throughout that sex-based harassment is not always sexual.

The classification of a person as an asset (someone who merely benefits the corporate purposes) does not immediately violate Kant’s formula. If Mack Manager treats workers as valuable human beings and not merely as a means to increase profits, to experience sexual gratification, or to feel dominance and control, Mack behaves morally. When individuals treat other human “assets” as ends in themselves, they satisfy the Categorical Imperative. Sexual harassment is unwelcome by definition. Therefore, if Mack sexually harasses Wanda, he treats her merely as a means to an end.

B. Corporate Human Assets, Not Objects

This treatment of human beings as assets or capital is not a new conception. In 2001, Andrew Mayo suggested, “The concepts of ‘human

154. Wright, supra note 152, at 274–75 (footnotes omitted).
155. Once again, I thank George Wright for this clarification.
assets’ and ‘human capital’ are complementary. It is the intrinsic worth of our people that comprise the human capital available to us, and at the same time that worth is a value-creating asset.” 157 Men have typically been considered valuable “assets” at a company. Few would think of male oppression and degradation if they heard “David Director, he’s such an asset to Acme.” If law and society deny targets the opportunity to become valuable corporate assets, they discriminate against these harassed workers. Similarly, a failure to acknowledge the corporate commercial value of a female or feminine worker’s contributions risks reinforcement of the separate sphere’s doctrine. 158 The idea that female/feminine efforts belong in the home and not in the marketplace economy regains traction. 159 Additionally, the denial of the variety of ways that females, and feminine and non-cisgender workers contribute commercially arguably strengthens the stereotype that women and other non-cisgender minorities are “valuable” only for their reproductive capacity, varied sexual talents, or stereotypical conformities.

The idea that we should treat all workers equally as corporate human assets lends support for the notion that a taking of a corporate human asset is a theft. One might argue that a concept equating sex-based harassment with theft suggests that the company owns the “asset.” This mischaracterization of the employment relationship should not deter an exploration of the treatment of sexual harassment as theft. Consider that the corporation controls the asset in limited ways for the period that she works at the company.

By analogy, if I permit my neighbor to use my car and Mack takes it for a joyride, Mack’s act still constitutes a theft of my car. If I lease (as a salaried employee) or rent (as an hourly worker) my time and services to Acme, and Mack takes me for a “joyride” on company time, Mack’s act constitutes not only a theft perpetrated against Acme, but Mack has also stolen me. Mack has commodified and objectified me,

157. Andrew Mayo, The Human Value of The Enterprise: Valuing People as Assets—Monitoring, Measuring, Managing 19 (2001). In accounting circles and in more technical parlance, people are not “assets.” For this article, I again considered replacing the word “assets” with “resources” but stay with the first term because it more literally conveys the commodified nature and financial value of the resources stolen or misappropriated through sexual harassment. See also Drobac & Russell, supra note 57, at 320–21 & nn.14, 15 (discussing workers as corporate assets).


and then stolen me. He has treated me merely as a means to his personal ends, as a tool. My classification as an asset to Acme merely reconfirms my value, worth, and dignity as a vital member of the work team. It also aligns our interests. We are not adversaries against each other but allies against Mack who has robbed each of us.

IV. Responses to Sex-Based Thievery

At first glance, the response to the theft of corporate human assets may not look much different than common current responses to sex-based harassment. Embezzlement or theft can be difficult to trace. The same is true for sexual harassment when a company faces two sources of conflicting information. Which witness is telling the truth; which set of books is “correct”? The misappropriation solution assumes, however, that, when a company believes that an embezzler is operating in its midst, executives will act quickly to investigate the suspicion or allegation. If executives suspect the theft is sizeable (and not just the pilfer of pens from the supply closet), they will immediately secure expert assistance. Logically, the first steps taken could dictate whether or not the resolution of the problem is successful for the company. Logically, prevention starts before a problem occurs.

A. Prevention and the Pre-Complaint Environment

Perhaps not surprising, the advice often given to companies regarding embezzlement centers on attention to ripe conditions. Most people already know what theft is. They do not need to be trained regarding its general definition. They may not know, however, how to spot the conditions that make an environment ripe for embezzlement or theft. So, organization leaders learn how to identify the conditions. Experts advise executives to look for motive, opportunity, and means.160

In contrast, for sex-based harassment, most experts emphasize a company policy and employee training regarding the definition and reporting of sexual harassment. Such a policy helps to protect corporate clients from most liability.161 EEOC guidance emphasizes that the


Similar to embezzlement, “[s]exual harassment under Title VII presupposes intentional conduct.” Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998). Most complainants cannot demonstrate intentional discrimination by a corporate respondent. However, the Burlington Court elaborated by noting that employers might be liable for negligent conduct. It held:
sexual harassment policy should explain what behaviors constitute discriminatory harassment and offend Title VII.¹⁶² Unlike experts on theft and embezzlement, the EEOC does not spotlight training regarding the conditions or motivations that may lead to discriminatory harassment.¹⁶³ In addition to recommending policies that illustrate examples of illegal behavior, the EEOC also advises that policies should detail how a complainant must notify the company of any problems.¹⁶⁴ Note that this burden again falls on the already injured target. With respect to the mandates of prevention, most companies do not train employees regarding what conditions or motivations lead to sex-based harassment. Even the focus on a prevention policy results from a Court-created affirmative defense.

1. The Affirmative Defense

In Burlington Indus., Inc. v. Ellerth, the Court laid out a two prong standard for an employer’s defense when a supervisor allegedly engages in sex-based harassment that does not result in a tangible job detriment.¹⁶⁵ “The defense comprises two necessary elements: (a) that the

Thus, although a supervisor’s sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.

Id. at 759. This passage makes clear that the motives of the harassing supervisor are irrelevant. The important issue is whether the company knew (or should have known) of the behavior and stopped it. Thus, companies must recognize the behaviors, not what motivates those behaviors. This Court’s emphasis on the malignant actions ignores that human resources personnel might be able to recognize illegal behaviors more quickly if they recognize the motivations and ripe situational circumstances to remediate those conditions early.

¹⁶² The EEOC explained the importance of a company policy:
EEOC recommends that a policy generally include:

• A clear explanation of prohibited conduct, including examples;
• Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;
• A clearly described complaint process that provides multiple, accessible avenues of complaint;
• Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
• A complaint process that provides a prompt, thorough, and impartial investigation; and
• Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable “harassment” but which, left unchecked, may lead to same.

Feldblum & Lipnic, supra note 59, at 38.
¹⁶³ Id.
¹⁶⁴ Id.
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. This affirmative defense makes no specific requirement for a policy against harassment or discrimination. It mentions prevention but the Court’s defense obligates merely reasonable care to prevent or to correct promptly.

Companies demonstrate reasonable care through their policies that, in turn, respond to each prong of the affirmative defense. Companies effectively satisfy the first prong by having a policy that prohibits the offensive behaviors and details avenues for reporting violations. Professor (and now Dean) Theresa Beiner explains “Further, the existence of such a policy is useful in meeting the second element of the defense.” To satisfy the second prong of the affirmative defense, corporate counsel merely provides a copy of the corporate policy and compares a target’s response to the policy’s mandates to find deficiencies. Clearly, this affirmative defense is not a zero-tolerance stance and does not require that companies monitor the conditions, which might lead to sex-based harassment.

Additionally, this affirmative defense applies only for supervisor harassment that does not result in a tangible employment consequence. If the supervisor engages in quid pro quo harassment (i.e., tries to trade employment benefits for sexual favors or other conduct (because of sex)), the employer principal could be strictly liable. The limits of the affirmative defense make no sense if one assumes that most organizations prohibit all forms of sex-based harassment, including and especially the kind that leads to tangible economic consequences. Why automatically penalize an organization when the supervisor ties economic benefits to the harassment? In those cases, no amount of reasonable care will matter, and organizations have no added incentive to ferret out and punish discriminatory conduct. Such a proactive response by a corporation likely increases the potential for liability. Once the perpetrator behavior and associated economic results occur, the employer principal is liable.

Presumably, the idea behind strict liability derives from the traditional notion that the employer should be held strictly liable when its agent causes harm or ties economic job benefits to sex-based favors or harassment. Respondeat superior refers to the Latin for “let the master

166. Burlington Indus., Inc., 524 U.S. at 765. In Faragher, the Court detailed the same two-prong standard. Faragher, 524 U.S. at 807.
168. Id. at 286.
answer” (for the misdeeds of the employee servant). When an agent supervisor holds out economic advantages or limits economic penalties, then arguably, the principal appears more culpable for hiring and retaining such an unfit agent. However, the courts have held that sex-based harassment is outside the scope of the employment. Some theorists may contest that conclusion, but that debate leads to no new advantage for the goals of the misappropriation approach.

Without exhaustively re-exploring the theories of agency law and principal/agent employment law, the misappropriation solution recommends against a strict liability approach to encourage organizations to cooperate with targets. By allying with targets, companies can help make targets whole by punishing perpetrators and by voluntarily paying for the predictable costs of their agents’ malfeasance. If companies expend no effort to make their targeted employees whole, then the target is still free to hold the organization responsible under established antidiscrimination laws. At that point, the company is guilty of negligence in failing to correct promptly sex-based harassment and in aiding and abetting (through its negligent, reckless, or intentional conduct) the perpetrator’s sex-based harassment.

2. Motive, Opportunity, and Means
Rather than rely on a “prevention” policy that deals with sex-based harassment post hoc, companies should consider an ex ante approach. What works for embezzlement and theft could work for sexual harassment. People will understand when managers describe sexual harassment as an unauthorized taking (of another person’s body, dignity, or productivity) or a sex-based demeaning of another person. Sex-based harassment is not “flirtation,” “friendliness” or “horseplay” (whatever that is). To safeguard workers, however, companies should pay attention to the workplace environment and notice when a harasser might be operating, the same way that companies guard against theft. Does a manager have access and power? Does this manager exhibit signs of domination? Does an executive behave inappropriately or with hostility directed to women (or other workers in a protected class)? Does a manager engage in sexual or secretive behavior? What motivates a

170. See, e.g., Janken v. GM Hughes Elecs., 53 Cal. Rptr. 2d 741, 745 (Ct. App. 1996) (holding that “harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives”); Reno v. Baird, 957 P.2d 1333, 1336 (Cal. 1998).
171. See, e.g., Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998) (“We have always regarded that requirement [that a reasonable person would find the behavior hostile or offensive] as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’”).
harasser? Does the harasser have the opportunity to engage in unlawful conduct?

Twenty years ago, Professor Beiner advocated for an understanding of the social science evidence regarding and circumstances leading to sex-based harassment. She suggested, “Social scientists have posited that sexual harassment is a function of both the person and the situation.”172 She stressed the importance of environments that objectify particular targets, especially women.173 She explained, “Increasing evidence suggests that controlling the workplace environment may be the key to reducing, and even ending, harassment.”174 She added, “In particular, the general atmosphere on the job, the attitudes of supervisors, the diversity of the workforce, as well as what behavior is tolerated or not tolerated, all appear to relate to the amount of harassment that occurs in the workplace.”175

The motivating factors that allow sexual harassment to occur track those for embezzlement. The first motivation that experts list for embezzlers is financial need, actual or perceived.176 Sheila Blackburn suggests, “It can even be an irrational desire on the part of the embezzler to make things ‘right’ because the embezzler views himself or herself as someone who is underpaid and underappreciated.”177 Financial stress and resentment can also drive sex-based harassment. William Petrocelli and Barbara Kate Repa note, “Focusing on the economics of men’s work and women’s work exposes sexual harassment as a way for the men who harass women to express their resentment and try to reassert control when they view women as their economic competitors.”178 This analysis confirms that sex-based harassment results less from sexual desire but more from an assertion and confirmation of power.

Petrocelli and Repa further explain, giving historical context. They suggest that the entry of large numbers of women, into the labor market in the 1960s and 1970s, correlate with two reactions to these women:

On one hand, some men resented female employees and perceived them as a threat in traditionally male dominated work environments.
In these cases, the women were subject to overt discrimination, that

173. Id. at 294–97.
174. Id. at 294.
175. Id. at 294–95.
177. Id.
is, they received lesser-valued job assignments, lack of promotions, lower pay, and sexual harassment to cause embarrassment and humiliation.

The second reaction was to exploit the presence of women and make sexual favors and submission to sexual behaviors conditions of employment, that is to keep from being fired, demoted, or otherwise adversely affected at work. Both are forms of sexual harassment.179

These passages make clear that economics, resentment, and exploitation also trigger sex-based harassment.180

Still discussing embezzlers, Sheila Blackburn next advises, “There may be . . . some unaddressed addiction or mental illness, or some other catastrophic personal crisis.”181 These causes—addiction (to power or sex), mental illness, or personal crisis—might also explain sex-based harassment. Recall the behaviors of Roger Ailes, Bill Cosby, and others whose conduct appeared addictive, unstable, or sick—at least to some observers.182

Psychiatrist Dr. Prudy Gourguechon suggests that at least three psychological factors contribute to disruptive behavior including sexual harassment. “These include (1) predisposing personality vulnerabilities, (2) current psychological factors and mechanisms and (3) contributing social and environmental influences.”183 Writing twenty years after Beiner, Gourguechon once again emphasizes personality and situational factors. Within predisposing vulnerabilities, Gourguechon breaks it down into five common traits: “[l]ack of or limited empathy...

179. Id. Their explanation continues:

Women of all ages, backgrounds, races and experience are harassed on the job. Women in traditional Woman’s Work, such as waitresses and secretaries, are often given menial, degrading tasks. They are called “Honey,” “Sweetie” and other demeaning names. And they are led to believe that a certain amount of male domination and sexism is normal. All of this reinforces the idea that women workers are of little value in the workplace. Women who try to break into traditionally all-male work, such as construction jobs, medicine or investment banking, often suffer even more intense harassment clearly aimed at getting them to leave.

Id. at 9.

180. However, Dr. Mark Russell correctly notes that economics can also be part of the solution. When corporations disclose the misappropriation of assets and the financial effects of harassment, they help to ameliorate the problem and hold harassers accountable, literally and figuratively. E-mail from Mark Russell to author, supra note 70.


for others;” “[g]randiosity”; “[o]mnipotence”; “[a] buried sense of inade-
quity”; an “[e]xaggerated need for admiration”; and “[p]oor impulse
control or lack of discipline.”\textsuperscript{184} One or more of these behaviors might be
used to understand numerous high-profile harassers. Presumably, HR
personnel could watch for such traits that might undermine corporate
functions in a variety of ways, including harassment.

With respect to the second grouping of psychological factors,
Gourguechon lists another six traits: “[d]eployment of defense mecha-
nisms, especially disavowal”; “[r]ationalization”; “[e]xcessive drinking”;
 “[r]ecent life change or significant loss”; “[l]oneliness”; and “[o]verstim-
ulation.”\textsuperscript{185} Neither a drinking problem nor a divorce necessarily leads
someone to engage in sex-based harassment. Again, however, these are
markers for HR personnel to monitor, along with the office environ-
ment. According to Gourguechon, social and environmental enhancers
include: “[b]eing surrounded by admirers and sycophants”; “[b]eing
away from family and other social mediators”; “[i]solation from the real
world of everyday social interactions”; and “[i]mmersion in an environ-
ment that values power and connections over substance.”\textsuperscript{186}

Gourguechon explains why harassment by executives occurs. She
writes, “At its most basic, the act of harassment starts with a wish
and a feeling. This is followed by the absence of an inhibitory force.
. . . Without an inhibitory or restraining force, the harasser says or
does the inappropriate or damaging thing.”\textsuperscript{187} Motive, opportunity, and
means. What signals a climate ripe for embezzlement might similarly
indicate one in which harassment occurs. Observant HR personnel and
responsible executive oversight might provide meaningful inhibitory
or restraining force. Gourguechon adds, “The harasser operates on the
principles of entitlement and diminished inhibition. I feel it, I want it,
I’m going to get it. Because I’m entitled to whatever I want.”\textsuperscript{188}

With an understanding of which factors make conditions ripe for
sex-based harassment, HR personnel can do more proactively than
simply distribute an antidiscrimination policy or assign online harass-
ment training videos. Gourguechon cautions, “Powerful individuals
who are habitual harassers and bullies generally lack insight into their
behavior and resist any gentle intervention attempts.”\textsuperscript{189} Therefore,
HR personnel must have the authority and backing to challenge top-
level executives. Additionally, these factors are just several indicators
associated with harassing conduct, which may result in either illegal
sex-based harassment or another type of theft. Managers and human

\textsuperscript{184.} \textit{Id.}
\textsuperscript{185.} \textit{Id.}
\textsuperscript{186.} \textit{Id.}
\textsuperscript{187.} \textit{Id.}
\textsuperscript{188.} \textit{Id.}
\textsuperscript{189.} \textit{Id.}
resource personnel must learn the many warning signs that indicate a climate in which sex-based harassment might thrive. Then, they can question and analyze when circumstances look suspicious.

3. Preparedness
Suspicion of embezzlement may first arise not because of some complaint or because of anything obvious. Often, executives and auditors will not notice the thief engaged in a transgression. The same is true for sex-based abuse. Unless the perpetrators are particularly sick and openly flagrant, or aided by abettors in the environment, harassers operate like thieves and know to abuse others in secret. Therefore, and as noted, corporate executives should watch for indicators or other signs of malfeasance. Sometimes, office gossip or random remarks hint at a problem: “That’s just Harry”; “Don’t let him get you alone”; “You think that’s bad; you should see him in surgery!” Sometimes, a specific complaint alerts HR. Either way, managers must be vigilant and ready to trace evidence of abuse or malfeasance.

Professor Beiner also provided several examples of factors in workplace environments in which sex-based harassment was more likely to occur, and for which responsible personnel might prepare. She included environments that objectify women with posted pornography or unaddressed, uninvited sexual attention to women. One might think that in the post–#MeToo era, such environments would no longer exist. Shockingly, they still do. A survey of recent New York Times sexual harassment articles suggests that the behavior is occasionally more subtle than posted pornography, but not always. Recent stories include a “star dancer at New York City Ballet who came under fire for sharing vulgar texts and sexually explicit photos.” Another concerns a suit again a restaurant corporation, Batali & Bastianich Hospitality Group. According to reports about the restaurant company, “[t]he men created a misogynistic culture where women regularly endured sexual comments, groping and kisses against their will. One manager told servers to get breast implants or make other changes in their appearance . . . . Male colleagues would tell women to get on their knees or discuss the attributes of their mouths.”

Beiner also discussed workplaces in which employers routinely ignored or ratified illegal discriminatory conduct. When leadership

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194. Id.
Sexual Harassment Reconceived

devalues targets, subordinates are more likely to engage in sex-based harassment.195 The recent New York Times list also includes cases that reveal a lack of responsible leadership.196 For example, one story reports that California-based “Activision fostered a ‘frat boy’ workplace culture. Executives sexually harassed women . . . and male employees openly joked about rape and drank alcohol while engaging in ‘inappropriate behavior’ toward women at their cubicles during events known as ‘cube crawls.’”197 According to a lawsuit in the case, “the company’s executives and human resources department failed to address misconduct when they were informed of it.”198 They may also have failed to disclose material information to SEC about the problems.199

Beiner also noted that a lack of inclusion and gender diversity among workers correlates with sex-based harassment. This observation reveals the importance of an intersectional approach that considers not only sex but also race, national origin, alternate abilities, religion, and other characteristics.200 She explained, “Indeed, social science evidence suggests that once a ‘critical mass’ of non-traditional employees is present at a workplace, incidents of harassing behavior will decrease and the character of the workplace will change to incorporate these new employees as part of the local norm.”201 Beiner’s discussion supports the notion that attention to the environment, and particularly motives, opportunity, and means might lead to early detection of risks and triggers. Corporate efforts to improve diversity and inclusion, to monitor the workplace for discrimination (and deal with it promptly), and to model respectful conduct toward all workers might go a long way to curbing outbreaks of discriminatory conduct.

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196. See Times Topics, Sexual Harassment, supra note 191.
198. Id.
Corporate preparedness includes specific steps in addition to the ones already detailed. For example, corporate leadership should provide every employee with a copy of the company employee manual. The handbook should include not only a prohibition of corporate theft, but also a sexual harassment policy that tracks state mandates and specifically describes harassment as a type of theft. The manual should also make clear that suspected harassment will be investigated and, if found, punished. Harassers, just like corporate thieves, should be subject to graduated discipline, including, if appropriate, termination. The handbook should emphasize that commitment to corporate security and the dignity and well-being of all workers.

It is not enough, however, to provide employees with a manual and have them sign a receipt and acknowledgment of comprehension. All employment contracts, and particularly those for ranking corporate executives, should contain a morals clause. This clause can be simple. For example, most people understand the Eighth Commandment, “Thou shalt not steal.” A morals clause in an employment contract need merely announce that harassment constitutes a misappropriation, conversion, or theft, as well as a breach of contract. A substantiated violation of the morals clause subjects the party to immediate discipline, possibly including termination. Such a violation would necessarily abrogate any golden handshake provision or promise of severance pay.

Severance pay following allegations of sexual harassment has already come under scrutiny as corporate waste in several shareholder derivative suits. For example, shareholders sued Hewlett Packard (HP) in 2010 after HP gave former CEO Mark Hurd a separation...
agreement worth approximately $40 million. Hurd had resigned following allegations of sexual harassment by a former HP contractor, Jodie Fisher. The board of directors found that Hurd had not violated HP’s sexual harassment policy but “had violated company business policies through filing false expense reports to cover up a personal relationship between the two.” These facts beg the question whether Hurd misappropriated both human and HP monetary assets. After Hurd departed, HP stock prices immediately tumbled, prompting the shareholder suit.

Explaining the HP case, Professors Hemel and Lund wrote, “Even though Hurd’s employment contract did not entitle him to any severance payment upon termination, the Court of Chancery concluded that the plaintiffs had not met the high bar for pleading [corporate] waste because Hurd provided some consideration for the severance payment, including a commitment to participate in succession planning.” A month later, Oracle founder and CEO Larry Ellison hired Hurd and named him co-president. Hemel and Lund noted, “If Hurd’s ouster suggested that the heads of publicly traded companies would face serious reputational consequences for inappropriate sexual behavior, the long-term outcome sent precisely the opposite message.” While the HP case did not result favorably for shareholders (and perhaps others), it demonstrates that classification of sexual harassment as a form of misappropriation might bolster remediation efforts, discourage severance payments, hinder executive transfers to new positions of power, and highlight corporate waste.

None of the remediation efforts, discussed in this section, requires much dramatic innovation. They simply call for rephrased literature and repeated comparisons to known and stigmatized behaviors: embezzlement, conversion, and theft. Some perpetrators may consider the label “harasser” to be a badge of power and macho strength. But it is hoped that few would consider the tag “thief” or “embezzler” to be a positive one. And, if society has come to the point where thieves and scoundrels are accepted as our new princes and heroes, nothing said in this article will make much difference. All the preparation in the world will not cure this world.


210. Id.


212. Preimesberger, supra note 209.

213. Hemel & Lund, supra note 20, at 1616.
B. An Investigation

Once managerial leaders suspect a problem, they will investigate. The investigation must be timely and thorough. Leaders cannot wait months or even weeks to investigate in response to complaints regarding Dr. Larry Nassar's sexual abuse of young female gymnasts. During the time that it took the FBI and other gymnastics officials to act, Nassar abused an estimated 70–120 more young women and girls. Therefore, the most important part of any investigation involves first securing the situation. Executives need to ensure that everyone is safe. If a company suspects a violent predator, it must move quickly to alert police and safeguard employees. It may also be necessary to place the accused employee on paid leave during the investigation until the company can determine if the claims are credible.

Most situations will not involve such high stakes risk, however. Therefore, if suspicions involve behaviors less dangerous than rape or physical assault, company leaders should alert human resources and corporate counsel. Both will immediately develop a coordinated strategy to preserve any evidence of wrongdoing and abuse. Again, this process tracks what corporate leaders would do for a suspected theft. Corporate personnel should also consider whether the case warrants investigation by outside experts. If employees think that executives and HR personnel will not be fair and unbiased in their investigation and response, investigators may not get the cooperation that they need. Employees will fear retaliation. Retention of experts from outside the corporation may improve the results of the investigation, as well as insulate corporate personnel from claims of conflicts and bias.

In the case of sexual harassment, evidence may include documents, props, electronic files (including emails, video recordings, voice messages, texts, etc.), and witness testimony. Efforts to gather evidence and determine the history of what actually happened should ensure the preservation of this evidence. Therefore, investigators will want to take witness testimony and emphasize that employees should not speak with others about the investigation. Investigators should explain that confidentiality on a “need to know” basis helps in the avoidance


of the destruction of evidence and the preservation of uncorrupted accounts of what truly happened. Because of this need to gather original testimony, investigators should interview all witnesses separately. The interview of the alleged harasser (or thief) typically happens last to preserve evidence from destruction by the suspected perpetrator. Obviously, if there is a chance that the thief will realize that an investigation is underway, every attempt should be made to put the accused on paid administrative leave, pending the outcome. Additionally, the company should make sure that the suspects do not have access to electronic files. Corporations do not want to give suspects the opportunity to retaliate against co-workers, pressure or sway witnesses, or otherwise destroy evidence.

While some managers may feel inclined to question the harasser first, I recommend gathering as much information as possible before confronting a suspected employee. The company will want to avoid a wrongful termination suit or discrimination charge by the accused (particularly if the accused is a member of a protected class). Therefore, investigators will typically take no disciplinary action involving the accused until the preponderance of the evidence suggests a case of sex-based harassment. Then, investigators will want to question the alleged perpetrator about any allegations. Investigators will shield the identity of witnesses, as much as is possible. Investigators will gather responsive information from the suspect and assess that person’s credibility, as is done for all witnesses. In my experience, some harassers will admit to some or most conduct that they do not consider illegal. Some will admit to conduct to secure a less severe punishment or to avoid termination. Some will deny charges and create a situation in which corporate leadership will have to balance all the evidence and make a determination or conclude that it cannot make any final conclusion.

C. The Resolution

Different conclusions flow from various determinations. If management cannot reach consensus on a violation of company rules, it should indicate to the concerned parties that no determination could be made and redistribute the harassment policy. Management should retain all investigation files and more closely monitor the involved parties. Second, if the company finds no theft or harassment, the matter is


recorded, but the company takes no further action with the accused. It might revamp its procedures to create more transparency, however. Whether the end result is an indefinite conclusion or a finding of no violation, HR should keep documentation on all allegations and investigations. A new allegation might later reveal a pattern that investigators could not confirm previously.

If corporate leadership finds serious abuse or egregious harassment, it gathers all evidence (as it would in the case of embezzlement) and terminates the thief. No golden handshakes, no severance package, no fanfare—just an immediate boot out the door. It should also change passwords, if relevant, and again revamp procedures to ensure that the situation is less likely to occur again. If the harassment verified is less than serious or egregious, personnel should mete out punishment that is proportional to the violations of state and federal law and company policy. Whether or not the harassment is or might become public, the company should consider issuing a press release. This release would inform the public that (1) the company learned of suspected abuse/theft; (2) the company investigated the matter and confirmed (or not) the harassment/theft; (3) the company terminated the abuser/thief (or otherwise disciplined the perpetrator); and (4) the company recouped or otherwise restored or repaired the stolen assets (human or monetary). Such a release might also instill confidence in employees that the company is sincere in its efforts to maintain a safe and equitable work environment. Moreover, such a message serves the deterrence goal and sends a message to all potential harassers that the company will not tolerate such illegal conduct.

Finally, if the confirmed perpetrator has assets and has caused significant enough damage, the company should investigate one further option. It should consider whether it and the harassment targets should pursue civil damage claims for conversion (and any other relevant causes of action) against the perpetrator for their respective losses and injuries.

**Conclusion and Challenge**

The misappropriation approach makes the case that sex-based harassment should be reconceived as a form of theft, conversion, embezzlement, or a misappropriation of corporate human assets. To understand just how expensive the problem is, however, companies must begin

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219. CBS Gives No Indication It Will Release Moonves Findings, ASSOC. PRESS (May 9, 2019, 2:21 PM), https://spectrumnews1.com/ap-top-news/2018/12/18/cbs-gives-no-indication-it-will-release-moonves-findings [https://perma.cc/24SP-EV8R] (discussing the termination of Les Moonves and Jennifer Drobac’s contention, “It’s better for CBS to put it out there and own the problem, explain why it is no longer a problem and demonstrate how they took it seriously, so they can instill greater confidence in the new management.”).
to track and monetize (at reasonable and proportionate expense) the costs of sexual harassment, if they are not already doing so fully. They should also report such losses as part of their SEC filings and to aid the U.S. Department of Labor and state labor commissions. Moreover, corporations should simultaneously look at the externalized costs. Just as polluters contaminate our environments without paying for their toxic damage, so corporations may be exporting and externalizing their toxic practices and discriminatory “emissions.” Violators should pay for the clean-up. Once understood and calculated, the costs of sex-based harassment will reveal how much a harasser takes from the corporation from which he steals.

By acknowledging the human and economic value of harassment targets, the misappropriation plan also disincentivizes toleration of harassment and discrimination. It encourages more effective approaches to ameliorate conditions for all workers and to compensate corporations and harassment targets for their losses. It promotes methods of remediation that unite the victims of any executive conversion of corporate assets with their corporate employers.

Third, the misappropriation solution suggests that by defining sexual harassment as a civil misappropriation, conversion, or theft, as well as a civil rights violation, companies can improve their remedial responses, their corporate culture, and their proverbial bottom line. This new approach has detailed remediation suggestions that corporations can implement.

Finally, I challenge any Fortune 500 company or large organization to treat sexual harassment as a misappropriation. Invite my research colleague Dr. Mark Russell and me to consult with corporate executives and to investigate sexual harassment in a new way. We could collaborate to find thieves and calculate the financial losses and damage done. Together with legal counsel and insurance adjusters, we could implement a strategic business plan to prevent future corporate misappropriations and improve corporate morale, profitability, and prospects. A company might thereby demonstrate its dedication to equal rights, shareholders, employees, and diversity and inclusion. By allowing researchers to quantify the costs of sexual harassment, such a company would also contribute to the growing body of knowledge regarding the costs of sex-based harassment and efficient new ways to remedy it. Such a company could become an industry leader rather than another industry scandal.

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