LETTING THE MASTER ANSWER: EMPLOYER LIABILITY FOR SEXUAL HARASSMENT IN THE WORKPLACE AFTER *FARAGHER* AND *BURLINGTON INDUSTRIES*

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In two recent Supreme Court cases, Faragher v. City of Boca Raton *and* Burlington Industries v. Ellerth, *the Court clarified the standard by which employers are held liable for sexual harassment committed by their employees. In this Note, Justin Smith analyzes these decisions and concludes that the Court moved the law in the right direction by resolving conflicting and convoluted agency doctrines applied by the lower courts, by imposing strict liability on employers for all sexual harassment by supervisors, and by allowing a contributory negligence defense for employers in some circumstances. However, he argues that the new liability regime, in which liability standards vary depending both upon the type of harassment and upon the relative positions of harasser and victim in the employment hierarchy, is less than ideal. Applying an economic understanding of causation, the author finds no sound basis for varying liability standards. Instead, he proposes a uniform regime of strict vicarious liability on employers for all sexual harassment by their employees, coupled with an extension of the contributory negligence defense to all sexual harassment cases.*

INTRODUCTION

The past two terms of the Supreme Court represent a watershed in the development of sexual harassment law. After years of inaction, the Supreme Court issued opinions in 1998 and 1999 on teacher-student harassment,[1] student-student harassment,[2] same-sex workplace harassment,[3] employer liability for workplace harass-

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1 See Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1993 (1998) (holding that school district can be held liable under Title IX for teacher's sexual harassment of student).

2 See Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1666 (1999) (holding that school district can be held liable under Title IX for one student's sexual harassment of another).

3 See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1001-02 (1998) (holding that same-sex sexual harassment in workplace is actionable under Title VII).

ment,[4] and limitations on punitive damage awards in harassment cases.[5]

The Court's two important decisions regarding employer liability for the sexual harassment of one employee by another, *Faragher v. City of Boca Raton*[6] and *Burlington Industries v. Ellerth*,[7] were both issued on the last day of the 1997-1998 Term and are only the second and third times that the Supreme Court has addressed the issue, the first time being a 1986 case, *Meritor Savings Bank v. Vinson*.[8] Although the Court took bold steps in the right direction—providing badly needed uniformity by resolving the circuit split on the liability standard, clarifying increasingly convoluted agency doctrines, increasing the ease with which harassment victims can recover, and providing a defense for employers—the Court missed the opportunity to impose a unified and coherent liability theory.

Instead, the Court relied on a more complicated version of the liability regimes that preceded *Faragher* and *Burlington Industries*—regimes in which the liability standards varied depending upon the underlying facts at issue. As a result, fundamental inconsistencies remain in the Court's approach to employer liability for workplace sexual harassment.

This Note considers why, under what circumstances, and by what standard employers should be held liable for the sexual harassment of one employee by another. It analyzes the Supreme Court's approach to employer liability as articulated in *Faragher* and *Burlington Industries*, concluding that this approach represents an improvement but is still far from ideal. This Note argues that there is no sound reason to vary standards of employer liability by the factors that the Supreme Court has chosen; nor, indeed, by any of the factors traditionally used to do so: the status of the harasser, the type of harassment, or the relative access of a party to information regarding specific acts of harassment. Instead, this Note proposes a coherent, unified regime of strict vicarious liability on employers for workplace sexual harassment by their employees—an approach that is both within the Court's power and not precluded by the recent cases.

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4 See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998) (introducing new standard of employer liability under Title VII); Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2270 (1998) (same).

5 See Kolstad v. American Dental Ass'n, 119 S. Ct. 2118, 2124 (1999) (holding that punitive damages could be imposed on employer in Title VII action without showing egregious or outrageous discrimination).

6 118 S. Ct. 2275 (1998).

7 118 S. Ct. 2257 (1998).

8 477 U.S. 57 (1986). A second case, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993), approved, in dicta, of *Meritor*'s approach.

Part I analyzes the current divided regime under which the standard of liability varies depending on both the type of harassment and the status of the harasser. Part I.A provides the general framework of sexual harassment liability regimes. Part I.B lays out the current rule of employer liability. Part I.C analyzes the agency doctrines on which the recent decisions are based. Parts I.D and I.E discuss regimes in which liability varies depending only upon the type of harassment—"quid pro quo" or "hostile environment"—and in which liability varies depending only upon the status of the harasser—supervisor or nonsupervisory coworker. Part I.F analyzes liability based on employer notice—whether employers have access to information regarding specific acts of sexual harassment. Part I.G discusses the problems of policing the boundaries of the new regime. Part II criticizes the underpinnings of divided liability regimes. It proposes an alternative approach, applying an economic understanding of causation to suggest that a uniform strict liability regime will yield the optimal reduction in sexual harassment.

I

THE CURRENT DIVIDED LIABILITY REGIME

By any measure, sexual harassment in the workplace is a pervasive problem[9] that results in much litigation. More than 6000 charges of sexual harassment are filed with the Equal Employment Opportunity Commission (EEOC) and state agencies annually,[10] and it is estimated that only five to ten percent of harassment incidents are formally reported.[11] Although the majority of cases involve men harassing women, the Supreme Court has recognized that harassers

[9] See reports cited in David Benjamin Oppenheimer, Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors, 81 Cornell L. Rev. 66, 91 n.120 (1995). These reports include: Barbara A. Gutek, Sex and the Workplace 46 (1985) (reporting that 53.1% of women surveyed reported having experienced sexual harassment); United States Merit Sys. Protection Bd., Sexual Harassment in the Federal Workplace—Is It a Problem? 2-3 (1981) (finding that of 23,000 federal employees, 42% of women report some form of sexual harassment); United States Merit Sys. Protection Bd., Sexual Harassment in the Federal Government: An Update 2 (1988) (follow-up survey disclosing no significant change); Working Women's Inst., Sexual Harassment on the Job: Results of a Preliminary Survey Research Series Report No. 1 (1975) (reporting that 70% of female respondents stated that they had been sexually harassed).

[10] In the 1991 fiscal year, 6675 charges were filed. See 3 Lex K. Larson, Employment Discrimination § 46.01[2] & n.12 (2d ed. 1999) (citing sexual harassment statistics supplied by EEOC).

[11] See 137 Cong. Rec. H8182 (daily ed. Oct. 22, 1991) (statement of Rep. Kaptur).

can be of either sex and harassing behavior can be directed at members of the same or opposite sex.[12]

Title VII of the Civil Rights Act of 1964[13] prohibits workplace discrimination based on race, color, religion, sex, or national origin,[14] and the Supreme Court has construed it to hold employers liable for one employee's sexual harassment of another.[15] The provision outlawing discrimination based on sex was inserted into Title VII on the floor of the House of Representatives, so courts have had little legislative history to assist them in interpreting the statute.[16] Although Title VII was amended in 1991,[17] Congress declined to fashion a regime for employer liability. As a result of the statute's broad language and the lack of legislative guidance, the judiciary has had wide latitude in determining what kind of behavior (and committed by whom) constitutes illegal sex discrimination, when the employer is to be held liable for its and its employees' actions, and the standard of liability to impose on employers for the harassing acts of their employees.[18]

Following the Supreme Court's lead, the judiciary has looked to the common law of agency for guidance.[19] However, after *Meritor* and prior to the Supreme Court's recent decisions, agency principles

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12 See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1001-02 (1998) (holding that same-sex sexual harassment in workplace is actionable under Title VII). This Note does not address the question of what kind of behavior or what classes of harasser and victim create actionable sexual harassment. Any references to harassers using masculine pronouns or to victims using feminine pronouns simply reflect the reality of the overwhelming majority of cases.

13 42 U.S.C. § 2000e to 2000e-17 (1994).

14 Title VII states that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Id. § 2000e-2(a)(1).

15 See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

16 See id. at 63-64. The inclusion of the category "sex" was added at the last minute in a failed effort to illustrate the absurdity of the bill and defeat its passage. See Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813, 816-17 (1991).

17 See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (codified at 42 U.S.C. § 1981a (1994)).

18 This latitude led to varying determinations by lower courts prior to *Faragher* and *Burlington Industries*. *Burlington Industries* came to the Court from an en banc decision of the Seventh Circuit, Jansen v. Packaging Corp. of America, 123 F.3d 490 (7th Cir. 1997), aff'd sub nom. Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998). The *Jansen* court's eight opinions and 203 pages had failed to clarify the issues and incorporate the large literature on employer liability. Instead, the opinions highlighted the lack of agreement among judges as to both approach and result. Tellingly, the court's per curiam opinion pleaded for the Supreme Court to "bring order to the chaotic case law in this important field of practice." Id. at 494-95.

19 As Chief Judge Richard Posner explained in *Jansen*, "Title VII creates a statutory tort of employment discrimination but imposes liability only on the 'employer'; what is to count as the employer's discriminatory act, and so warrant a remedy under Title VII, is a question of agency." 123 F.3d at 506 (Posner, C.J., concurring and dissenting).

failed to provide uniform law regarding employer liability for sexual harassment under Title VII. The lower courts disagreed on the proper agency principles to apply and whether such principles should be derived from the Restatement of Agency, federal law, state law, or some other source.[20]

Faragher and *Burlington Industries* constitute the Court's attempt to resolve the numerous thorny questions raised by the application of agency principles to sexual harassment. In both cases (as in *Meritor*), the Supreme Court emphasized that courts should look to the common law of agency in interpreting Title VII.[21] And in all three cases, the Court used the Restatement of Agency as its source for common law doctrine.

A. The Framework of a Vicarious Liability Regime

The lack of congressional guidance and the indeterminacy of agency principles have left the judiciary with almost total freedom both in deciding to recognize the claim of sexual harassment[22] (as illegal workplace discrimination based on sex) and in fashioning a liability regime. Because of this judicial freedom, courts have been able to choose from among many potential liability regimes. To design a

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[20] Even those courts that sought to use the Restatement disagreed on the pertinent sections. See infra Part I.C (discussing several agency doctrines based on different sections of Restatement). Moreover, the "principles" to be extracted from those sections were themselves uncertain. Policy considerations might mandate the application of certain principles and prevent the use of others. Finally, there was disagreement as to the relevance and applicability of the Restatement, which was adopted in 1957, seven years before the enactment of Title VII and almost three decades prior to the Supreme Court's recognition of sexual harassment claims under Title VII. The conflicts in case law and legal scholarship illustrated that the general application of agency principles, or even the strict application of the Restatement (when courts tried to apply it faithfully like a statute, as many post-*Meritor* courts did), were unlikely to yield determinate answers without additional guidance from the Court. As Posner noted in *Jansen*: "Since neither the text nor the legislative history of Title VII indicates what agency principles the authors of the statute had in mind, the formalist gropes for another text, finds the Restatement, and treats it inappropriately as a surrogate statute." However, the Restatement "turns out to be hopelessly vague in its bearing on the issue of employers' liability for sexual harassment, being vaguely worded and addressed to other issues. So judges can in good faith reach opposite results when they seek guidance in the Restatement to employers' liability for sexual harassment." 123 F.3d at 509-10 (Posner, C.J., concurring and dissenting).

[21] See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2290 n.3 (1998) (confirming approach that circuit courts had already begun to take by mandating that courts use "agency principles" in interpreting Title VII); Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2269-70 (1998) (same); *Meritor*, 477 U.S. at 72 (same).

[22] See Catharine A. MacKinnon, Sexual Harassment of Working Women (1979) (arguing that sexual harassment is type of sex discrimination); see also Estrich, supra note 16, at 818 (describing MacKinnon's role in developing legal claim of sexual harassment).

complete liability regime, courts must answer four questions regarding who should be held liable and what the standard of liability should be.

First, the liability regime must specify who can be held liable—the harasser, the employer, or both. Liability for sexual harassment might attach directly to the harassing employee or vicariously to the harasser's employer.[23] Vicarious liability is the imposition of liability on one party (a principal) for the acts of another (an agent).[24] Courts could impose liability only on the harasser, not the employer, for an act of sexual harassment. Alternatively, courts could impose liability on the harasser's employer only, not on the harasser individually. Or liability could be imposed on both parties.

Second, if the employer can be held liable, the liability regime must specify the standard of vicarious liability. The employer might be automatically liable whenever the harasser is found to have committed sexual harassment (strict vicarious liability). Alternatively, the employer might be liable for the harasser's acts only if the employer itself was negligent in preventing, learning of, or remedying the harassment or in hiring the harasser (vicarious liability based on negligence).[25] There are other possibilities. For example, the employer might be liable only if it was negligent in failing to learn of or remedy the harassment (constructive notice liability), frequently formulated as whether the employer "knew or should have known" of the harassment and did nothing to prevent it from continuing.[26] Or the employer might be liable only if it was negligent in remedying the harassment after learning of it (actual notice liability).[27]

Third, the liability regime must specify how liability should be apportioned. If both the harasser and the employer can be held liable, then another standard is needed to apportion liability between them. For example, liability as between the harasser and the employer might be joint and several or several only. A right to contribution might be allowed between the parties. The employer might be allowed a right

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[23] There are various tests to determine when conduct rises to the level of harassment. For the purposes of analyzing liability, it will be assumed that an act of sexual harassment, however defined, has occurred.

[24] See Richard A. Epstein, Cases and Materials on Torts 454 (6th ed. 1995); Alan O. Sykes, The Boundaries of Vicarious Liability, 101 Harv. L. Rev. 563, 563 & n.1 (1988).

[25] Certain courts and commentators refer to such liability as direct rather than vicarious because it is predicated on the negligence of the employer. See, e.g., Oppenheimer, supra note 9, at 97. I prefer Sykes's term, "vicarious liability based on negligence," because it highlights the fact that the employer is liable not for the immediate consequences of its negligence but for the consequences of the harassing acts of its employee(s) that it negligently fails to prevent, discover, or remedy. See Sykes, supra note 24, at 578.

[26] See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990).

[27] Under the actual notice standard, the employer is held to a more lenient overall standard such as recklessness or knowledge.

of indemnification against the harasser. Alternately, the employer might be subjected to "financial responsibility liability," whereby the harasser is liable first and the employer acts as a guarantor, liable only for the balance in the event of the harasser's insolvency.[28]

Fourth, the liability regime must specify whether the preferred vicarious liability standards should remain uniform or vary based on underlying factors. Differences in types of harassment might call for the imposition of varying standards rather than a uniform regime. For example, *Faragher* and *Burlington Industries* impose varying standards depending on whether harassment culminates in a "tangible employment action."[29] Or liability standards might vary depending on the status of the harasser—whether the harasser is a supervisor or a nonsupervisory coworker. The Supreme Court also approved of this approach in *Faragher* and *Burlington Industries*.[30] In addition, because an employer's ability to monitor and obtain information regarding harassing behavior varies depending on the kind of harassment at issue, liability standards might also vary depending on whether the employer reasonably can obtain notice of specific acts of harassment.

Because most circuits have determined that the employer can be held vicariously liable, but that no action is available against the harasser individually,[31] this Note confines its analysis exclusively to the liability of the employer and assumes that no action is available against the harasser personally. As a result, this Note focuses on the second and fourth questions: what the standard of employer liability should be and whether that standard should vary or remain uniform.

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[28] See Alan O. Sykes, The Economics of Vicarious Liability, 93 Yale L.J. 1231, 1277-79 (1984) (discussing Becker v. Interstate Properties, 569 F.2d 1203 (3d Cir. 1977)).

[29] A "tangible employment action" is an employment decision with clear and direct, rather than passive or implicit, consequences, such as a "discharge, demotion, or undesirable reassignment." Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2291-93 (1998); Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2269-70 (1998).

[30] See discussion infra Part I.D.

[31] See Robert B. Fitzpatrick, Individuals as Defendants: Liability Issues 69 (ALI-ABA Course of Study July 7, 1997) (surveying circuits and noting that few cases have allowed causes of action directly against individuals); see also Tomka v. Seiler Corp., 66 F.3d 1295, 1313-14 (2d Cir. 1995) (discussing cases and holding only employers liable). But see Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1557-60 (11th Cir. 1987) (finding "terminal manager" to be statutory employer under Title VII). The issue of who should be held liable, the harasser, the employer, or both, is an important question that is the subject of much scholarly attention. See, e.g., Michael D. Moberly & Linda H. Miles, The Impact of the Civil Rights Act of 1991 on Individual Title VII Liability, 18 Okla. City U. L. Rev. 475, 483-84 (1993) (discussing possibility of personal liability); Rebecca Hanner White, Vicarious and Personal Liability for Employment Discrimination, 30 Ga. L. Rev. 509 (1996) (arguing against personal liability); Scott B. Goldberg, Comment, Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII, 143 U. Pa. L. Rev. 571 (1994) (arguing in favor of personal liability).

To construct a complete liability regime, however, it would be important to consider the first and third questions, whether harassing employees should be held individually liable and how liability should be apportioned between the harasser and the employer. For now, these theoretical questions remain unresolved in the academic literature.

B. *The Rule of Employer Liability Following* Faragher *and* Burlington Industries

In *Faragher*, the Supreme Court considered the standard of employer liability for sexual harassment when a supervisor engages in hostile work environment sexual harassment but does not take a formal action to change the subordinate victim's employment status.[32] From 1985 to 1990, Beth Ann Faragher was employed part time and during summers as an ocean lifeguard for the Parks and Recreation Department of the City of Boca Raton. During the course of her employment, Faragher was subjected, as were other female lifeguards, to uninvited and sexually offensive touching, gestures, and comments by one of her immediate supervisors, David Silverman, a Marine Safety Lieutenant, and by Silverman's supervisor, Bill Terry, the chief of the Marine Safety Division. In 1990, Faragher resigned, and in 1992 she brought suit against Silverman, Terry, and the city, alleging violations of Title VII and Florida law.[33]

In *Burlington Industries*, the Court considered the standard of employer liability when a subordinate employee refuses a supervisor's unwelcome sexual advances and job-related threats but ultimately suffers no adverse, tangible job consequences.[34] From March 1993 to May 1994, Kimberly Ellerth worked as a salesperson for Burlington Industries, a firm with more than 22,000 employees in fifty plants around the United States, in a two-person office in Chicago. During the course of her employment, Ellerth was subjected to repeated offensive remarks and gestures by her supervisor's supervisor, Ted Slowik, a mid-level manager in New York. Additionally, on three occasions Slowik made comments that could be construed as threats to deny Ellerth tangible job benefits if she did not submit to his demands.[35] After quitting her job, Ellerth filed suit in October 1994 al-

[32] In other words, when there is no tangible employment action. See *Faragher*, 118 S. Ct. at 2280.

[33] See Faragher v. City of Boca Raton, 111 F.3d 1530, 1533-34 (11th Cir. 1997), rev'd, 118 S. Ct. 2275 (1998).

[34] In other words, when there are unfulfilled threats of a tangible employment action. See *Burlington Indus.*, 118 S. Ct. at 2262.

[35] On the first occasion, in the summer of 1993, Slowik made remarks about Ellerth's breasts and stated, "Kim, I could make your life very hard or very easy at Burlington." On the second occasion, during a promotion interview in March 1994, Slowik expressed his

leging sexual harassment and constructive discharge in violation of Title VII.[36]

Although the Supreme Court issued separate opinions in the two cases, it used identical language to set forth a new standard of employer liability for sexual harassment by a supervisor. The rule states:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence .... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[37]

Neither case determined the standard of employer liability for the harassment of an employee by a nonsupervisory coworker, but the cases made reference, in dicta, to the standard developed by the lower courts for vicarious liability based on negligence (or constructive notice).[38]

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reservation that Ellerth was not "loose enough" and proceeded to rub her knee. Ellerth did receive the promotion but Slowik made additional demeaning remarks when informing her of it. Finally, in May 1994, Slowik denied Ellerth's request to insert a logo into a fabric sample and added "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." Id. at 2262.

36 See id. at 2263.

37 *Faragher*, 118 S. Ct. at 2292-93; *Burlington Indus.*, 118 S. Ct. at 2270.

38 See *Faragher*, 118 S. Ct. at 2289-90 (noting that liability for coworker harassment has been "uniformly" judged under negligence standard); see also infra note 92 (discussing difference between negligence and constructive notice standards). The liability standard for harassment by nonsupervisory coworkers was not called into question by *Meritor*, *Faragher*, or *Burlington Industries*, and it has never been considered by the Supreme Court. Almost all circuits that have addressed hostile-environment harassment by nonsupervisory coworkers have held employers subject to a constructive notice standard. See, e.g., Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 119 (3d Cir. 1999) (approving of jury instruction using constructive notice standard for harassment by nonsupervisors); Burrell v. Star Nursery, 170 F.3d 951, 955 (9th Cir. 1999) (holding employers liable under constructive notice standard for harassment by nonsupervisory coworkers (citing Nichols v. Frank, 42 F.3d 503, 508 (9th Cir. 1994))); Blankenship v. Parke Care Ctrs., Inc., 123 F.3d 868, 872-73 (6th Cir. 1997) (same); Varner v. National Super Mkts., Inc., 94 F.3d 1209, 1213 (8th Cir. 1996) (same); Andrade v. Mayfair Management, Inc., 88 F.3d 258, 261 (4th Cir. 1996) (same); Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) (same); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (applying constructive notice standard but improperly terming it "respondeat superior"); Swentek v. USAIR, Inc., 830 F.2d

Thus, *Faragher* and *Burlington Industries* introduced a tripartite regime in which liability varies depending both on the type of harassment and on the status of the harasser. The three resulting liability standards currently in place are: (1) for harassment by a supervisor that results in a tangible employment action, the employer is subject to strict vicarious liability; (2) for harassment by a supervisor that does not result in a tangible employment action, the employer is subject to strict vicarious liability, but it can offer an affirmative defense that it was non-negligent and the harassment victim was negligent; and (3) for harassment by nonsupervisory coworkers, the employer is subject to vicarious liability based on negligence (dicta).

In practice, this regime requires a court to make a series of inquiries. First, it has to determine the status of the harasser. If the harasser is a supervisor, employer liability is strict; if the harasser is a nonsupervisory coworker, employer liability is based on negligence. If the court initially determines that the harasser was a supervisor, it then proceeds to determine the type of harassment. If the harassment results in a tangible employment action, the employer is automatically liable; if the harassment does not result in a tangible employment action, the employer can attempt to establish the affirmative defense.

C. *Agency Doctrine Following* Faragher *and* Burlington Industries

The central question in both *Faragher* and *Burlington Industries* was how to follow *Meritor*'s directive to apply agency principles to establish employer liability. Agency law provides a number of doctrines that impose liability on a principal for the acts of an agent.[39] However, until the Court's recent decisions the circuits had split over

552, 558 (4th Cir. 1987) (applying rule that employers are liable under constructive notice standard for harassment by nonsupervisory coworkers); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987) (same). The Seventh Circuit was an exception, applying a straight vicarious liability standard based on negligence rather than one of constructive notice. See, e.g., Zimmerman v. Cook County Sheriff's Dep't, 96 F.3d 1017, 1018 (7th Cir. 1996) (imposing negligence standard).

[39] The Restatement (Second) of Agency § 219 (1958), reads:

> When Master is Liable for Torts of His Servants
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> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
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> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> (a) the master intended the conduct or the consequences, or
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> (b) the master was negligent or reckless, or
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> (c) the conduct violated a non-delegable duty of the master, or
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> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

the proper application of agency law to employer liability for sexual harassment.[40]

In *Faragher*, the Court considered two Restatement doctrines: (1) respondeat superior (literally, "let the master answer"), under which a master is vicariously liable for the torts of a servant that are committed within the scope of employment;[41] and (2) "aided by the agency relation," under which a master is vicariously liable for the torts of a servant who was aided in accomplishing them by the existence of the agency relationship.[42]

1. Respondeat Superior Doctrine

Before *Faragher* and *Burlington Industries*, the uncertainty regarding the application of respondeat superior centered on the authority that the employer delegated to the employee[43] and the boundaries of an agent's "scope of employment."[44] These inquiries often were intertwined because whether an action fell within the scope of employment typically involved an investigation of the kind of work the employee was empowered to perform.[45] Although a minor-

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[40] Numerous commentators and judges have discussed the best way to read the Restatement. Oppenheimer's article surveys the scene and describes the various branches of the Restatement. See Oppenheimer, supra note 9.

[41] See Restatement (Second) of Agency § 219(1) (1958). The rationale behind the common law doctrine is that an employer (or master) delegates express or implied authority to its employees (or servants) to carry out job-related functions. See id. § 7. When employees act with the actual or apparent authority of the employer, the employer becomes liable for their actions. See id. § 8. As the Restatement notes, "in the law of master and servant the use of the fiction that 'the act of the servant is the act of the master' has made it seem fair to subject the non-faulty employer to the negligent and other faulty conduct of his servants." Id. § 219 cmt. a.

[42] See id. § 219(2)(d).

[43] See id. § 7.

[44] See id. § 228.

[45] As Oppenheimer notes,

> Recognition of the supervisor's harassment as within the scope of employment depends to some extent on the point of view of the observer. From the point of view of the employer, the supervisor's harassment may bear no relation to the job the supervisor was hired to perform. The employer may thus view the harassment as not simply outside the scope of employment, but as a completely private matter between the supervisor and employee, in which the existence of an employee-supervisor relationship is irrelevant. From the viewpoint of the supervisor himself, he may or may not consciously regard his ability to subject the employee to his unwanted conduct as a privilege of his employment position. But from the employee's point of view, the supervisor's ability to harass her is created precisely by the agency relationship, which affords the supervisor the authority to call her into his presence, to retain her in his presence over her objections, to use his responsibility to act as the voice of the employer to place her in a compromising position, and to take liberties with her personal privacy beyond the reach of a co-equal acquaintance, or a

ity of courts had held that sexual harassment could fall within the scope of employment and result in strict vicarious liability,[46] a majority of courts had decided that it could never come under the scope of employment unless the employer had specifically delegated the authority to harass.[47]

The Supreme Court resolved the disagreement by holding that sexual harassment by a supervisor does not fall within the scope of employment.[48] Although the Court noted the tension between many sexual harassment cases and other tort cases in which the scope of employment had been construed more broadly,[49] it found respondeat superior inapplicable to sexual harassment cases.

The Court offered two justifications for its decision: first, the assumption that Congress did not want courts to ignore traditional agency law distinctions; and second, the fear that finding sexual harassment within the scope of employment of a supervisor would allow similar claims in cases of nonsupervisory coworker harassment (thereby triggering strict vicarious liability).[50] As the Court noted, "[t]he rationale for placing harassment within the scope of supervisory authority would be the fairness of requiring the employer to bear the burden of foreseeable social behavior, and the same rationale would apply when the behavior was that of co-employees."[51] This result

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> stranger. The authority that the employer has given him to supervise leaves her vulnerable to his wrongful acts.

Oppenheimer, supra note 9, at 88 (footnotes omitted).

46 Supervisors typically are empowered to make job-related decisions, direct subordinates, and influence the work environment, whereas nonsupervisory coworkers are generally given no such authority. Because greater authority is delegated to supervisors, some judges, like Judge Diane Wood, had found harassment by supervisors to trigger respondeat superior. See Jansen v. Packaging Corp. of America, 123 F.3d 490, 574 (7th Cir. 1997) (Wood, J., concurring and dissenting) ("The conduct of the supervisor that must be assessed is not the act of harassment in isolation, but instead his broader course of action."), aff'd sub nom. Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998). Similarly, Judge Richard Arnold had argued that the scope of employment test was easy to meet because "acts on the employer's premises, or during errands at his behest, or other acts plausibly related to employment" will be within the scope of employment. Davis v. City of Sioux City, 115 F.3d 1365, 1371 (8th Cir. 1997) (Arnold, J., concurring and dissenting).

47 See, e.g., Harrison v. Eddy Potash Inc., 112 F.3d 1437, 1444 (10th Cir. 1997).

48 See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2288-90 (1998).

49 See id. at 2287 ("These [sexual harassment] cases ostensibly stand in some tension with others arising outside Title VII, where the scope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts that were in no sense inspired by any purpose to serve the employer.").

50 See id. at 2288-89.

51 Id. at 2289.

would upset the established standard of vicarious liability based on negligence for harassment by nonsupervisory coworkers.[52]

Thus, the Court affirmed the Eleventh Circuit's decision that respondeat superior was inapplicable but disagreed with the lower court's reasoning (and the reasoning of most lower courts). According to the Restatement, an employee's acts only fall within the scope of employment if, in addition to being the kind of acts the employee is hired to perform and occurring within authorized time and space limits, they are motivated in part by a purpose to serve the employer. Whether an employee is motivated by a purpose to serve the employer is known as the "business-purpose" test. The Eleventh Circuit had construed the business-purpose test narrowly, finding that it was not satisfied by a supervisor's sexual harassment.[53] In dissent, Judge Rosemary Barkett had argued that respondeat superior imposes strict liability on the employer because the Restatement takes a broad view of both delegated authority and scope of employment,[54] and that such a view is appropriate.[55]

The Supreme Court, however, noted that business-purpose requirements were sometimes construed narrowly and other times

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[52] See id. ("It is quite unlikely that these [nonsupervisory coworker harassment] cases would escape efforts to render them obsolete if we were to hold that supervisors who engage in discriminatory harassment are necessarily acting within the scope of their employment."). The better result would have been for the Court to overturn the lower-court negligence standard and institute a uniform regime of strict vicarious liability. See infra Part II.

[53] According to the court, because the harassers were seeking to further personal ends, rather than any business purpose, they were acting outside of the scope of employment. See Faragher v. City of Boca Raton, 111 F.3d 1530, 1536 (11th Cir. 1997), rev'd, 118 S. Ct. 2275 (1998). Thus, for the majority, a supervisor neither used delegated authority nor acted within the scope of employment when committing hostile-environment harassment.

[54] The Restatement notes:

> The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service . . . .

Restatement (Second) of Agency § 236 cmt. b (1958).

[55] See *Faragher*, 111 F.3d at 1542 (Barkett, J., concurring and dissenting) ("[A]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment." (citing Restatement (Second) of Agency § 230)). Although respondeat superior typically is invoked for an employee's negligence, it can also be applied to intentional acts. An act "may be within the scope of employment although consciously criminal or tortious." Id. (citing Restatement (Second) of Agency § 231). Some commentators also favor a broad application. See Oppenheimer, supra note 9, at 86 ("Unless the non-work-related interactions can be surgically separated so as to have no relation to the supervisor-subordinate relationship, all of the supervisor's harassment of subordinates falls within the scope of his employment."); Katherine S. Anderson, Note, Employer Liability Under Title VII for Sexual Harassment After *Meritor Savings Bank v. Vinson*, 87 Colum. L. Rev. 1258, 1272-73 (1987).

broadly and that the test had at times been replaced by one of foreseeability.[56] The Court stated: "An employer can . . . reasonably anticipate the possibility of [harassing] conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim."[57] Under this view, as long as the harassment bears some connection to the employment relationship, the business-purpose test may well be satisfied.[58]

2. *"Aided by the Agency Relation" Doctrine*

The Supreme Court based its holding affirming employer liability on the doctrine that an employer is liable for the torts of its employees if the employees were aided in accomplishing the tort by the existence of the agency relation.[59] This time agreeing with Judge Barkett's broad reading of the doctrine in her dissent below,[60] the Court reversed the Eleventh Circuit majority, which had construed the doctrine narrowly in deciding that the harassers had not been aided by the agency relation.[61] As Judge Barkett had noted, the employment relationship permits the supervisor to maintain, even compel, regular contact with a subordinate victim.[62] Thus, the Court decided that "a harassing supervisor is always assisted in his misconduct by the supervisory relationship."[63]

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[56] See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2287 (1998) ("The rationales for these [respondeat superior] decisions have varied, with some courts . . . explaining that the employee's acts were foreseeable and that the employer should in fairness bear the resulting costs of doing business . . . .").

[57] Id. at 2288.

[58] "Where this rule is retained, the courts accept any connection between the motivation for the wrongful act and the employee's work as sufficient to bring the conduct within the scope of employment." Oppenheimer, supra note 9, at 84. The California Supreme Court has offered a broad reading: "[W]here the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of the injury . . . ." Perez v. Van Groningen & Sons, Inc., 719 P.2d 676, 680 (Cal. 1986) (internal quotation marks omitted) (quoting Lockheed Aircraft Corp. v. Industrial Accident Comm'n, 172 P.2d 1, 3 (Cal. 1946)).

[59] See *Faragher*, 118 S. Ct. at 2290; Restatement (Second) of Agency § 219(2)(d) (1958).

[60] See *Faragher*, 111 F.3d at 1543 (Barkett, J., dissenting) (stating that harassment of Faragher occurred while defendants were "engaged in their responsibilities" to maintain "productive, safe work environment" and manage their employees, and thus harassment "was clearly 'incidental to' authorized conduct").

[61] See id. at 1537.

[62] See id. at 1542.

[63] *Faragher*, 118 S. Ct. at 2290. As a result,

> in implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and . . . the aided-by-agency-relation principle embodied in

Finding that an employee was "aided by the agency relation" in committing acts outside of the scope of employment is the most straightforward route to imposing strict vicarious liability utilizing agency-law principles. The aid provided by the agency relationship bears a logical relationship to the extent to which the employer "causes" the harassment. Moreover, the comments to the Restatement recognize this relationship.[64] In the sexual harassment context, the appropriate analysis is of the extent to which the harassing employee's relationship with the employer aided in fostering or increased the likelihood of the commission of workplace sexual harassment.[65]

3. *Other Agency Doctrines*

The Supreme Court raised but explicitly declined to consider employer liability based on a third agency doctrine: imputed (or vicarious) knowledge.[66] Under this doctrine, the harasser's position in the employment hierarchy determines the standard of employer liability. Employers are subject to strict vicarious liability if the harasser holds a high enough position to be considered the alter ego of the employing company.[67] Although the Supreme Court has not yet considered

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§ 219(2)(d) of the Restatement provides an appropriate starting point for determining liability.

Id.

[64] Restatement (Second) of Agency § 8A cmt. a states:

> The rules designed to promote the interests of these enterprises are necessarily accompanied by rules to police them. It is inevitable that in doing their work, either through negligence or excess of zeal, agents will harm third persons or will deal with them in unauthorized ways. It would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully. The answer of the common law has been the . . . imposition of liability upon the principal because of unauthorized or negligent acts of his servants and other agents.

[65] But see *Faragher*, 111 F.3d at 1537 ("[T]he common law rule does not use 'aided' in such a broad sense."), rev'd, 118 S. Ct. 2275 (1998).

[66] See *Faragher*, 118 S. Ct. at 2294 ("We are satisfied that liability on the ground of vicarious knowledge could not be determined without further factfinding on remand, whereas the reversal necessary on the theory of supervisory harassment renders any remand for consideration of imputed knowledge entirely unjustifiable . . . ."); see also Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2267 (1998) ("[Restatement § 219(a) addresses liability] where the agent's high rank in the company makes him or her the employer's alter ego. None of the parties contend Slowik's rank imputes liability under this principle.").

[67] Posner has provided a justification for this doctrine:

> Since the acts of a corporation are acts of human beings, to say that the "corporation" has committed some wrong (rather than just that it is liable . . . for an employee's wrong) simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong; the deliberate act of such a person is the corporation's deliberate act. Whether his supervisors knew or should have known what he did is irrelevant . . . .

this doctrine,[68] several lower courts have used it to impose vicarious liability.[69]

In *Burlington Industries*, the Court mentioned, but did not consider, a fourth agency doctrine: employer liability for the violation of a nondelegable duty.[70] The en banc panel of the Eleventh Circuit in *Faragher* also mentioned the nondelegable duty doctrine but ignored the doctrine in its analysis.[71] Under this doctrine, if an employee's harassment violates a "nondelegable duty" of the employer, the employer is subject to strict vicarious liability.[72] Thus, the employer's

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Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986) (citations and emphasis omitted). Note the possibility that the same reasoning might apply to employees below the managerial level.

[68] However, the Supreme Court has noted that "the president of the corporate employer . . . was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy." *Faragher*, 118 S. Ct. at 2284 (discussing Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993)).

[69] See Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 64 (2d Cir. 1992) ("At some point, even under the *Vinson* dichotomy between quid pro quo claims and hostile work environment claims, the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company."); see also Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993):

> [A]n individual qualifies as an "employer" under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing, or conditions of employment. In such a situation, the individual operates as the alter ego of the employer, and the employer is liable for the unlawful employment practices of the individual without regard to whether the employer knew of the individual's conduct. (internal quotation marks and citations omitted)

[70] See Restatement (Second) of Agency § 219(2)(c) (1958). The Court noted that because the plaintiff did not contend that a nondelegable duty was involved, the Court did not have to consider subsection (c). See *Burlington Indus.*, 118 S. Ct. at 2267.

[71] See Faragher v. City of Boca Raton, 111 F.3d 1530, 1535 (11th Cir. 1997), rev'd, 118 S. Ct. 2275 (1998). This branch of the Restatement imposes liability on employers not because of the relationship between the employer and the harassing employee(s) but because of the relationship between the employer and the harassed employee(s). If such a duty is "nondelegable," strict liability is imposed on the employer in the event of its breach. See Restatement (Second) of Agency § 214. According to the Restatement, employers have a nondelegable duty to create and maintain a safe working environment for their employees. See Oppenheimer, supra note 9, at 94-97, 95 n.140, 142 (citing Restatement (Second) of Agency § 492). The Restatement is equivocal as to whether, once this duty is met, any harm that results is to be borne by the employee or the employer. See Restatement (Second) of Agency § 492.

[72] See, e.g., Dees v. Johnson Controls World Servs., Inc., 168 F.3d 417, 421-22 (11th Cir. 1999) (holding that employer can be held vicariously liable if harassment violates its nondelegable duty); Brooks v. National Convenience Stores, Inc., 897 S.W.2d 898, 902 (Tex. Ct. App. 1995) (holding that employers have nondelegable duty of ordinary care to provide safe workplace for employees).

failure to eliminate sexual harassment might violate a nondelegable duty to the harassment victim.[73]

Neither *Faragher* nor *Burlington Industries* discusses a fifth agency doctrine: the fellow-servant rule.[74] Although the fellow-servant rule specifically addresses tortious conduct by one employee against another, it only applies to employee negligence within the scope of employment, not to intentional acts or to acts outside of the scope of employment.[75] Moreover, the Restatement itself mentions that the adoption of workers' compensation statutes likely would alter the liability standard.[76] The near universal adoption of such statutes and the current disuse of the doctrine probably casts doubt on its continuing vitality.

Nor do *Faragher* or *Burlington Industries* address the liability standard for harassment by nonsupervisory coworkers. However, the Court did refer to the standard devised by the lower courts, which it called a "negligence standard."[77] This dictum suggests that the Court agrees with the Restatement's position that employers, at a minimum, are subject to vicarious liability based on negligence for employee torts, even if they occur outside of the scope of employment.[78] Thus, employers probably are required to be non-negligent in discouraging sexual harassment by all employees, adopting appropriate regulations to deal with sexual harassment, hiring employees not likely to harass and training and supervising them so as to discourage harassment, taking steps to eliminate harassment they know or should know about, and preventing harassment.[79]

D. A Divided Liability Regime Based on the Status of the Harasser

The Supreme Court's decision in *Faragher* and *Burlington Industries* to divide the liability regime based on the status of the harasser—whether the harasser is the victim's supervisor or a nonsupervisory coworker—represents a partial return to the rules of several early sex-

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[73] See, e.g., Justin S. Weddle, Note, Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace, 95 Colum. L. Rev. 724 (1995).

[74] See Restatement (Second) of Agency § 473.

[75] See id. § 474.

[76] See id. § 528.

[77] Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2289 (1998).

[78] See Restatement (Second) of Agency § 213.

[79] See id. Interestingly, the numerous circuits that impose a constructive notice standard (knew or should have known and failed to remedy) seemingly have ignored Restatement § 213(d) by not requiring the employer to be non-negligent in the hiring decision. Section 213(d) states: "The principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him." Id.

ual harassment cases[80] and to the position advocated by the EEOC in its 1980 Guidelines.[81]

A regime based solely on the status of the harasser imposes strict vicarious liability on the employer for any harassing acts by the victim's supervisors. For the acts of nonsupervisory employees, the employer is vicariously liable only if negligent in preventing, learning of, or remedying the harassment.[82] Advocates of this regime argue that common-law agency principles mandate a strict liability standard for supervisor harassment because of the vast authority that the employer grants the supervisor.[83] Under this view, "harassment occurs because of an imbalance of power"—workplace supervisors are empowered by the principal to oversee disempowered subordinate employees.[84]

Thus, the employer is held to a standard of strict vicarious liability specifically because the supervisor possesses authority over the victim that the nonsupervisory coworker does not possess. Similarly, because nonsupervisory coworkers do not possess this authority, the employer is held to a more lenient standard for their acts of harassment. It is the supervisor's greater capacity to do harm that generates the stricter standard.

The Supreme Court used the rationale of supervisor authority in *Faragher* and *Burlington Industries* to distinguish harassment by supervisors from harassment by nonsupervisory employees. As the Court noted, "supervisors have special authority enhancing their capacity to harass."[85] This special authority is revealed by an employee's inability to prevent a supervisor's abusive conduct the way the same employee might deal with abuse from a nonsupervisory coworker. "When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose power . . . does not disappear . . . when he chooses to harass."[86]

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[80] See infra notes 88-89 and accompanying text.

[81] Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, 29 C.F.R. § 1604.11 (1997) [hereinafter Title VII Guidelines] (establishing different standards of employer liability for acts by supervisory employees or agents and acts by nonsupervisory employees).

[82] Under a negligence standard, an employer has a duty of care in these areas. See, e.g., Restatement (Second) of Agency §§ 213, 219(2)(b).

[83] See supra notes 45-46.

[84] See Oppenheimer, supra note 9, at 89. Oppenheimer continues: "Even when the harassment is unrelated to job functions, the . . . authority conferred upon the supervisor by the employer provides the supervisor with opportunities denied other employees or strangers." Id. at 89-90.

[85] Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2289 (1998).

[86] Id. at 2291 (quoting Estrich, supra note 16, at 854) (internal quotation marks omitted).

The genesis of the liability regime divided by the status of the harasser adopted in *Faragher* and *Burlington Industries* is in several early sexual harassment cases and the 1980 EEOC Guidelines.[87] By 1979, the four circuits to recognize sexual harassment as a Title VII violation held employers strictly vicariously liable for sexual harassment by supervisors.[88] But the courts each utilized different agency principles and disagreed as to the proper liability regime to impose.[89]

In November 1980, the EEOC promulgated guidelines that ratified the distinction between harassment by supervisors and harassment by nonsupervisory coworkers.[90] For the harassing behavior of supervisory employees and agents, the employer was subject to strict vicarious liability.[91] For harassment by what the EEOC termed "fellow employees" (presumably nonsupervisory employees who were somehow not "agents"), liability was imposed when the employer (or its supervisors or agents) knew or should have known of the conduct, unless it could show that it took immediate and appropriate corrective action.[92] However, confusion regarding the guidelines' application, combined with the complexity and indeterminacy of agency law, led courts to reach conflicting results.[93] Nevertheless, varying liability standards by the status of the harasser was in many ways more

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[87] Title VII Guidelines, supra note 81, § 1604.11.

[88] See Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Garber v. Saxon Bus. Prods., Inc., 552 F.2d 1032 (4th Cir. 1977) (per curiam). All of these cases reversed earlier dismissals by district courts that had held sexual harassment to be outside of the scope of Title VII.

[89] See Oppenheimer, supra note 9, at 112. The circuits imposed strict vicarious liability standards that ranged from liability solely for the actions of upper-level management to automatic liability for the actions of nonsupervisory coworkers. See id.

[90] See Title VII Guidelines, supra note 81, § 1604.11(d).

[91] "[A]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." Id. § 1604.11.

[92] Id. § 1604.11(d). This standard was one of constructive notice liability because it asked whether the employer subjectively knew (actual notice) or reasonably should have known (constructive notice) of the harassing behavior and failed to provide a remedy. This standard looks like a backward-looking vicarious liability based on negligence standard. The employer must act reasonably in discovering and remedying instances of sexual harassment after the fact, but there is no indication that it must act reasonably to prevent sexual harassment in the first place (before receiving notice) as a true negligence regime would mandate. However, in the vocabulary of sexual harassment law, "negligence" liability and "knew or should have known" constructive notice liability are often used interchangeably. See, e.g., Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).

[93] See Oppenheimer, supra note 9, at 119-22. The D.C. Circuit upheld strict vicarious liability for a supervisor in Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), but neither the Eleventh Circuit, in Henson v. Dundee, 682 F.2d 897, 910 (11th Cir. 1982), nor the Fourth Circuit, in Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983), followed suit.

straightforward than the regime the majority of circuits chose to follow after *Meritor*—dividing the liability regime by the type of harassment.

E. A Divided Liability Regime Based on the Type of Harassment

Although *Faragher* and *Burlington Industries* reestablished a divided liability regime based on the status of the harasser, the Court continued to vary liability according to the type of harassment as well. Under the current regime, employer liability for harassment that culminates in a "tangible employment action" is strict, whereas employer liability for supervisor harassment that does not culminate in a tangible employment action is strict but subject to an affirmative defense. Dividing the liability regime by the type of harassment rather than the status of the harasser was a central feature of the regime that immediately preceded the two recent opinions—under which the standard varied depending on whether harassment was classified as "quid pro quo" or "hostile environment." In many ways, the current regime is simply a continuation of the one that preceded it.

In *Meritor*, the Supreme Court not only held for the first time that sexual harassment was a form of sex discrimination in violation of Title VII, it also recognized a distinction that lower courts had begun to make[94] between two kinds of sexual harassment: quid pro quo and hostile environment.[95] Quid pro quo harassment occurred when a supervisor conditioned employment benefits (e.g., retention or discharge, salary change, promotion or demotion) on the granting of sexual favors. Hostile-environment harassment occurred when unwelcome and offensive sexual behavior rendered the workplace sufficiently hostile to interfere with the employment relationship.[96] Although nonsupervisory coworkers could engage only in hostile-environment harassment (because, by definition, they lacked the supervisory authority to make a quid pro quo), supervisors could engage in sexual harassment of either the quid pro quo or the hostile-environment variety.[97]

The *Meritor* Court declined to formulate a liability standard for employers, instead directing that future decisions use "agency princi-

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[94] See *Henson*, 682 F.2d at 899.

[95] See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

[96] See id. at 65-67.

[97] The trier of fact would have the difficult task of determining whether the supervisor's conduct resulted in an expressed or implied quid pro quo or merely created a hostile environment.

ples" to determine employer liability.[98] The Court held both that employers were not always strictly liable for harassment by supervisors and that the employer's lack of knowledge (actual notice) of the harassment did not provide a shield to liability.[99]

In the wake of *Meritor*, the circuits established a consensus liability regime. For quid pro quo harassment, the standard generally was strict vicarious liability.[100] For hostile-environment harassment, whether by supervisors or by nonsupervisory coworkers, employers generally were subject to constructive notice liability.[101] The justification for varying the liability standards based on the type of harassment was the authority that the employer grants supervisors to control employment decisions.[102] Because the employer specifically delegates

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[98] See *Meritor*, 477 U.S. at 72 ("[W]e . . . decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.").

[99] See id. ("[W]e hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors . . . . For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.").

[100] See, e.g., Jansen v. Packaging Corp. of America, 123 F.3d 490, 495 (7th Cir. 1997) (per curiam) (holding employers liable under strict vicarious liability standard for quid pro quo harassment), aff'd sub nom. Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998); Karibian v. Columbia Univ., 14 F.3d 773, 777 (2d Cir. 1994) (same); Nichols v. Frank, 42 F.3d 503, 510, 513-14 (9th Cir. 1994) (same); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 185-86 (6th Cir. 1992) (same (citing Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986))); Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 785 (1st Cir. 1990) (same).

[101] See, e.g., Davis v. City of Sioux City, 115 F.3d 1365, 1368 (8th Cir. 1997) (holding employers liable under constructive notice standard for hostile-environment harassment by supervisors); Faragher v. City of Boca Raton, 111 F.3d 1530, 1538 (11th Cir. 1997) (same), rev'd, 118 S. Ct. 2275 (1998); Andrade v. Mayfair Management, Inc., 88 F.3d 258, 261 (4th Cir. 1996) (same); *Nichols*, 42 F.3d at 508 (same (citing EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989))); Nash v. Electrospace Sys., Inc. 9 F.3d 401, 404 (5th Cir. 1993) (same). The Seventh Circuit was an exception. See *Jansen*, 123 F.3d at 495 (per curiam) ("[T]he standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence . . . ."). Presumably, the Seventh Circuit asked whether the employer acted reasonably in preventing sexual harassment in the first instance, not merely whether it responded reasonably upon receipt of actual or constructive notice. As the plurality opinion noted, "the appropriate inquiry in dealing with this conduct remains whether the company has taken due care to prevent harassment and to respond to complaints of harassment." Id. at 502 (Flaum, J., concurring). Although *Henson v. Dundee* was a pre-*Meritor* case, many courts dividing the liability regime by the status of the harasser relied on it. In *Henson*, the court stated: "Where, as here, the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiff's supervisor or coworker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action." 682 F.2d 897, 905 (11th Cir. 1982). *Henson* thus disallowed the automatic application of strict vicarious liability for a supervisor's harassment and limited the employer's liability for hostile-environment harassment to constructive notice, regardless of the status of the harasser.

[102] The *Henson* court explained quid pro quo harassment in agency terms:

authority to supervisors to make employment decisions, if a supervisor sexually harasses while making such decisions (via a quid pro quo), his conduct is imputed to the employer as the source of that authority.[103]

Part of the confusion generated by *Meritor* arose because of its directive, on the one hand, to apply agency principles and its conclusion, on the other, that strict vicarious liability is not always appropriate for hostile-environment harassment by a supervisor. Thus, agency principles that would automatically lead to the imposition of strict vicarious liability for hostile-environment harassment no longer seemed to be available.[104] It is this conclusion, in part, that led the Supreme Court in *Faragher* to relieve the employer of liability for harassment that does not result in a tangible employment action if the employer can establish the affirmative defense.[105]

> In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the quid pro quo. . . . [T]he supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose. He acts within the scope of his actual or apparent authority to "hire, fire, discipline or promote."

Henson, 682 F.2d at 910 (quoting Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979)).

[103] See *Jansen*, 123 F.3d at 497 (Flaum, J., concurring) ("[B]ecause a supervisor would be unable to engage in quid pro quo harassment without the authority and power furnished by the employer, the supervisor's conduct is properly imputed to the employer."); Bouton v. BMW of North America, Inc., 29 F.3d 103, 106-07 (3d Cir. 1994) (using agency analysis to impose strict liability because "in quid pro quo cases . . . the supervisor has used his authority over the employee's job to extort sexual favors. [Moreover,] [w]ithout the agency relationship, quid pro quo harassment would be impossible, so the employer is responsible."); *Karibian*, 14 F.3d at 777 ("Because the quid pro quo harasser, by definition, wields the employer's authority to alter the terms and conditions of employment—either actually or apparently—the law imposes strict liability on the employer for quid pro quo harassment."); *Kauffman*, 970 F.2d at 185-86 ("Under a 'quid pro quo' theory of sexual harassment, an employer is held strictly liable for the conduct of its supervisory employees having authority over hiring, advancement, dismissal, and discipline . . . ."); Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992) ("The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee."); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) ("In a quid pro quo case, the corporate defendant is strictly liable for the supervisor's harassment. This is logical. When a supervisor requires sexual favors as quid pro quo for job benefits, the supervisor, by definition, acts as the company." (citations omitted)).

[104] Some commentators believe that these competing mandates render *Meritor* internally inconsistent. See, e.g., Oppenheimer, supra note 9, at 74-75.

[105] See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2291 (1998) ("We are not entitled to recognize this [strict vicarious liability] theory under Title VII unless we can square it with *Meritor's* holding that an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination."). For discussion of the affirmative defense, see supra text accompanying note 37; infra Part II.D.

The current divided liability regime based on the type of harassment is not substantively different from the regime under *Meritor*. In *Burlington Industries*, the Court announced that categorizing sexual harassment as quid pro quo or hostile environment did not help the analysis.[106] Although the Court distanced itself from the quid pro quo/hostile-environment terminology, it noted that one way in which the terms remained "helpful" was in "making a rough demarcation between cases in which threats are carried out and where they are not or are absent altogether."[107] Essentially, the Court simply defined quid pro quo harassment to mean harassment which results in a tangible employment action.

The Court thereby resolved the preexisting indeterminacy regarding what constituted quid pro quo harassment (so as to trigger strict vicarious liability).[108] The question certified in *Burlington Industries* was whether a claim of quid pro quo sexual harassment could be stated when the harassment victim had neither submitted to the sexual advances of the harasser nor suffered any tangible effects on the compensation, terms, conditions, or privileges of employment as a consequence of a refusal to submit to those advances.[109] The Court's answer was, in short, no.[110] To trigger strict vicarious liability (without

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[106] See Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2264 (1998) ("The terms quid pro quo and hostile work environment are . . . of limited utility.").

[107] Id.

[108] Several circuits had found threats to be sufficient to constitute a quid pro quo. See, e.g., *Jansen*, 123 F.3d at 495 (per curiam) (stating that "certain views *do* command a majority within our court: in particular, . . . liability for quid pro quo harassment is strict" whether victim rejects or succumbs to harasser's threat); id. at 499 (plurality opinion):

> [A] clear and serious quid pro quo threat alters the "terms and conditions" of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled . . . [because] [m]aking a clear and unambiguous threat of an adverse job consequence is an exercise of the supervisor's delegated authority, just as actually inflicting the consequence invokes that authority.

As the Second Circuit had noted, the tangible job benefit the victim receives in exchange for submitting to a supervisor's quid pro quo threats is continued employment. See *Karibian*, 14 F.3d at 779 ("[A] quid pro quo claim is made out, regardless of whether the employee (a) rejects the advances and suffers the consequences, or (b) submits to the advances in order to avoid those consequences."); see also Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994). *Nichols* involved the submission by a deaf and mute night-shift postal worker to the repeated sexual demands of her boss, the only supervisor able to communicate in sign language. The court held that the Postal Service was strictly liable and the victim's submission did not alter that liability: "[Q]uid pro quo sexual harassment occurs whenever an individual conditions a job, a job benefit or the absence of a job detriment upon an employee's submission to sexual conduct." Id. at 513-14.

[109] See Brief for Petitioner, *Burlington Indus.* (No. 97-569), available in 1998 WL 90827.

[110] See *Burlington Indus.*, 118 S. Ct. at 2265 ("Because [plaintiff's] claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim . . . ."). Some courts had required the supervisor to use the authority entrusted to him to actually

any affirmative defense), the victim must reject the harasser's advances—thereby forcing the harasser to actually follow through on the threat to change the victim's job status—rather than succumb to the harasser's demand.[111]

F. A Divided Liability Regime Based on Notice to the Employer

In *Faragher* and *Burlington Industries*, the Supreme Court recognized the importance of employers' access to information about sexual harassment by their employees. Two regimes, one proposed by Chief Judge Richard Posner and the other by Professor J. Hoult Verkerke, rely on the employer receiving notice about harassment of and by its employees. These regimes base the liability standard on the employer's access to information regarding harassment rather than on the status of the harasser or the type of harassment.

The question underlying both regimes is whether the employer or the victim has superior access to information regarding harassment. When the employer is at least as able as the victim to obtain such information, employer liability is strict; when the victim has superior access to such information, the employer is held to a more lenient standard.

1. Posner's Notice Regime

Burlington Industries reversed an en banc decision of the Seventh Circuit but adopted the division proposed by Posner in his dissent below. Posner had proposed that strict vicarious liability obtain only when a victim rejects the sexual advances of her supervisor and suffers a tangible adverse consequence to her employment (what Posner called a "company act"). Without a company act, employers would be subject only to vicarious liability based on negligence. If the victim

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fire the worker in order for the victim to have a quid pro quo claim. The D.C. Circuit espoused this view in Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995). In *Gary*, a stock clerk was subjected to repeated instances of verbal and physical harassment, culminating in rape. Discussing quid pro quo harassment, the court, unlike most of the other circuits to have considered the matter, made a firm distinction between a victim's refusal and acquiescence, with only the former (followed by a job action) triggering employer liability. Because the victim succumbed to her supervisor's threats, she was unable properly to make a quid pro quo claim. The court noted: "[I]t takes more than saber rattling alone to impose quid pro quo liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." Id. at 1396.

[111] See infra Part I.F.1 (discussing Posner's proposal to draw such a distinction to take advantage of parties' relative access to information).

succumbed to the threat or if the supervisor did not follow through, then the employer would not face strict liability.[112]

According to Posner, company acts, in which the employer ratifies a supervisor's employment decision (by firing the victim, for example), should be distinguished from noncompany acts, in which the supervisor merely makes threats, because knowledge is appropriately imputed to the employer only when there is a tangible change in the employment contract.[113] For Posner, the division is justified because when a supervisor takes a tangible employment action against the victim the employer will have the opportunity to review the action, perhaps thereby receiving notice of the harassment.[114] In the absence of a company act, "there is no way in which a system for vetting such acts would catch him out."[115] Thus, it is the employer's varying access to information regarding the conduct of its supervisors that justifies dividing the liability regime.[116]

Although the Seventh Circuit rejected Posner's division, the Supreme Court adopted it, renaming "company acts" "tangible employment actions."[117] While the Supreme Court did not adopt Posner's standard of vicarious liability based on negligence for supervisor harassment not resulting in tangible employment actions, the Court did use Posner's rationale to justify dividing the regime by type of harassment.[118] Thus, the Court's regime, like Posner's, relies on the employer's access to information regarding harassment by its employees.

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112 See *Jansen*, 123 F.3d at 513, 515 (Posner, C.J., concurring and dissenting) ("Strict liability is inappropriate, however, when the supervisor merely makes threats, even if the threats are effective.").

113 Thus, only tangible job employment actions should subject the employer to strict liability, and liability based on negligence is appropriate for either a supervisor's unfulfilled threats or the victim's acquiescence.

114 "In a well-regulated company a supervisor who wants to fire a subordinate has to obtain the approval of higher-ups, . . . and they will have an opportunity therefore to determine the bona fides of his proposal." *Jansen*, 123 F.3d at 513 (Posner, C.J., concurring and dissenting).

115 Id.

116 Posner's regime, like the current regime, divides the standard of liability by the type of harassment. When the employer has better access to the information (through a company act), liability is strict. Otherwise negligence is the standard. Another way of understanding the proposal is as a uniform regime of vicarious liability based on negligence (or constructive notice) in which the employer is considered negligent per se (or "should have known") only if it ratifies a supervisor's harassment through a company act.

117 See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998); Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2262 (1998).

118 See *Burlington Indus.*, 118 S. Ct. at 2269 ("A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.").

2. *Verkerke's Notice Regime*

Professor Verkerke proposes a regime of "notice liability," so called because, like Posner's, its focus is on the employer's awareness of harassment. The central question is, again, whether the employer has access to information regarding harassment.[119] If the employer has actual or constructive notice, liability is strict; if there is no actual or constructive notice, there is no liability.

Unlike the Supreme Court, Verkerke does not divide the liability regime by whether there has been a tangible employment action.[120] Instead, Verkerke proposes a divided regime of strict liability for what he terms "systemic discrimination," and notice liability for "individual discrimination."[121] The difference between harassment that employers can easily discover and harassment about which only the victim (and the harasser) knows distinguishes systemic discrimination from individual discrimination. Individual discrimination is characterized by one harasser and possibly only one occurrence and one victim. Systemic discrimination, by contrast, might involve multiple acts by multiple harassers.[122]

According to Verkerke, employers should be strictly liable for systemic discrimination because the pervasiveness of the conduct results in no information advantage on the part of the victim; the employer should know about the harassment because it is so widespread. For individual discrimination, however, liability should be based on notice because victims have "information [about harassment] that

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119 See J. Hoult Verkerke, Notice Liability in Employment Discrimination Law, 81 Va. L. Rev. 273, 317-18 (1995) ("With that information, the defendant has a duty to protect the victim against harm. Without it, a notice rule imposes no duty (or a lesser duty) upon the defendant.").

120 In fact, Verkerke argues that past judicial regimes varying liability standards by harassment type are "doctrinally and functionally incoherent" because the types of harassment are functionally equivalent. See id. at 384. It is the equivalence of the types of harassment that justifies, in part, the uniform regime proposed in infra Part II.

121 Verkerke, supra note 119, at 280, 361-69. According to Verkerke, the natural regime choice, uniform strict vicarious liability, is less than ideal because employers will not invest the socially optimal amount in producing information regarding employee harassment. He supports this claim by noting the possibility that employers might not expend resources on detection because doing so could increase their expected liability (if the harassment would otherwise have gone undetected or a claim would otherwise not have been brought) and the notion that employers might wastefully duplicate screening of employees for evidence of tendencies toward harassing behavior. Moreover, strict liability might result in excessive and intrusive expenditures in employee monitoring through the installation of video surveillance cameras and employer oversight of telephone and electronic communications. See id. at 323, 350-61.

122 See id. at 363 ("A repeated pattern of discriminatory conduct and the participation of several managerial employees in discriminatory decisionmaking typically distinguishes systemic disparate treatment cases from individual claims.").

would be comparatively expensive for the employer to obtain."[123] Therefore, the victim must come forward and provide notice to the employer.[124]

Although the Supreme Court did not adopt Verkerke's notice regime, the varying of liability standards by the status of the harasser is based in part on concerns about employer notice. As *Faragher* notes, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to . . . monitor their performance."[125]

3. *Problems with a Regime Based on Notice*

There are three problems with regimes based on notice. The first problem, that without strict liability the business will expand beyond the efficient level of production, and the second, that the victim remains uncompensated (the victim's loss actually fuels the inefficient expansion), are standard arguments against a negligence regime and are discussed in Part II.

There is a third problem, however—one that the Supreme Court addressed in its recent decisions. Notice regimes do not adequately account for costs borne by victims in providing notice.[126] Forcing victims to come forward and complain imposes real costs.[127]

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[123] Id. at 365. Strict liability is inadequate in generating information on harassment more easily obtained by the victim than by the employer. A notice regime encourages victims to come forward with such information whereas a strict liability regime does not. "Victims may know agent-specific or victim-specific information that would be extremely costly for employers to discover." Id. at 362.

[124] The practical result of the proposal is a regime of constructive notice under which the concepts of systemic and individual harassment determine when knowledge is imputed. Systemic discrimination causes constructive notice to be imputed to the employer. For individual discrimination, by contrast, the victim is required to come forward and provide actual notice.

[125] Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2291 (1998). Moreover, "the employer can guard against [supervisors'] misbehavior more easily because their numbers are by definition fewer than the numbers of regular employees." Id. at 2289-90.

[126] The Supreme Court addresses this problem through both parts of the affirmative defense. The defense requires both that the employer reasonably prevent and correct harassing behavior and that the victim unreasonably fail to utilize preventive or corrective measures provided by the employer. See *Faragher*, 118 S. Ct. at 2292-93; Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2270 (1998); see also supra text accompanying note 37. The requirement that the employer reasonably prevent and correct harassing behavior ensures that a low-cost complaint procedure will be in place. The requirement that the victim unreasonably fail to utilize preventive or corrective measures such as the complaint procedure ensures that if it is reasonable for the victim not to utilize such measures (i.e., when reporting costs are comparatively high) the victim can still recover. See infra Part II.D.

[127] See Verkerke, supra note 119, at 345-46 ("The harassment victim may feel both embarrassment concerning the events and fear that a complaint will lead to retaliation against her.").

Notice regimes assume that because victims have better access to certain kinds of information regarding sexual harassment, they can produce that information at little or no cost. As Verkerke notes, the harasser often conceals his motivations from everyone but the victim, thereby making detection difficult. In such situations, "the victim learns of the conduct without making any investment at all and can inform his employer at comparatively low cost."[128]

However, it is exactly in these circumstances when the costs to the victim are highest. She is unlikely to have corroborating witnesses. Her other working relationships may well be disrupted by a complaint.[129] She may well face a difficult and time-consuming procedure that could detract from job performance. She is faced with the daunting prospect of convincing the employer (or ultimately an adjudicator) that her allegations should be credited over the denials of her supervisor (perhaps someone high in the corporate chain). She may face additional costs of filing a claim with the EEOC and litigating to achieve actual resolution. She is not assured of vindication even if she pursues all of these avenues. Yet, because a complaint system shields the employer from liability once the system is in place, any costs of coming forward are borne by the victim rather than the employer.

To force the victim to come forward in the face of the costs of providing notice, notice regimes deny relief for prenotice harm, thereby placing still larger burdens on the victim. The employer only has to compensate the victim for harassment that occurs after the victim gives notice. Essentially, notice liability is designed to increase the costs of harassment to victims to induce them to complain.[130] As a result, victims must bear both the costs of lodging a complaint and the costs of any precomplaint harassment.[131]

Although there will be occasions when the victim should come forward to complain, relief should not automatically be denied whenever the victim fails to utilize a reasonable complaint system. As is

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128 Id. at 366-67.

129 See Faragher v. City of Boca Raton, 111 F.3d 1530, 1547 n.4 (11th Cir. 1997) (Tjoflat, J., concurring in part and dissenting in part) ("Lodging a complaint imposes on the employee certain costs, including . . . disruption of working relationships."), rev'd, 118 S. Ct. 2275 (1998).

130 See Verkerke, supra note 119, at 346 (noting that victim "must suffer at least some [uncompensated] harassment before she has any reason to complain"). Even relief for lost wages is denied. Verkerke suggests that "the prospect of uncompensated harm, in this case wage losses during the period between the occurrence of discrimination and receiving an internal remedy, can provide a valuable incentive to the employee to complain about discrimination." Id. at 374.

131 See id. at 349 ("Conditional notice liability encourages early internal complaints by eliminating the right to sue for harms caused by agents about whom no one has complained.").

discussed in greater detail below, there may be instances in which the victim behaves reasonably in failing to complain because the cost of complaining is high.

Moreover, there are numerous practical problems with notice regimes.[132] Although the incentives for information production informed the Supreme Court's recent decisions, and despite the seeming appeal of disallowing employer liability when the employer is unaware of the harassment, the justifications for notice regimes do not withstand scrutiny. Because divided regimes based on notice fail to resolve adequately the problems of the overexpansion of businesses that are not compelled to compensate harassment victims,[133] the uncompensated harm imposed on victims,[134] and the costs that victims incur both before providing notice and in providing notice, they remain less compelling than the uniform strict liability standard proposed in Part II.

G. Difficulties Policing the Boundaries

There are a number of reasons to doubt the practical administrability of a liability regime divided by both the status of the harasser and the type of harassment. The value of any legal distinction rests in part on the ease with which it can be applied. But the lines dividing supervisors from nonsupervisors, and tangible employment actions from other actions a supervisor might take (or refrain from taking) are not always bright.[135]

The trier of fact in sexual harassment cases already is charged with the difficult task of determining the existence of harassment—whether certain conduct is based on sex and is both subjectively and objectively hostile or abusive.[136] The Court's current regime, dividing

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[132] For Verkerke's regime, it would be next to impossible to make simple distinctions between individual and systemic discrimination. It is unclear how many harassers, victims, or instances of harassment, and what kinds of harassment, would shift harassment from the "individual" to the "systemic" category. For Posner's regime, there would be cases in which a large employer would not know (and would have no reasonable way of learning) whether a tangible employment action was ratifying a supervisor's harassment, particularly when an employment decision involved discretion. This likelihood does not indicate that employers should not be held liable in such instances, merely that the justification for liability (notice) will not be present.

[133] See infra Part II.A-B.

[134] See infra Part II.A-B.

[135] Judge Diane Wood, writing about quid pro quo and hostile-environment harassment, noted that, "[i]n the real world, sexual harassment does not sort itself into tidy categories." Jansen v. Packaging Corp. of America, 123 F.3d 490, 567 (7th Cir. 1997) (Wood, J., concurring and dissenting), aff'd sub nom. Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998).

[136] See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002-03 (1998) (noting that juries need to distinguish between simple teasing and conduct that reasonable person would find severely hostile or abusive); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22

liability by the status of the harasser (supervisor or nonsupervisor) and by the type of harassment (tangible employment action or not) forces the fact finder to make two additional difficult determinations.

Although deciding whether the harasser is the victim's supervisor and whether the harassment caused a tangible change in employment status may appear to be simple tasks (especially as compared with the task under *Meritor* of determining whether or not a quid pro quo occurred),[137] there will be occasions in which the answer is unclear. And the determinations often will be dispositive. If the victim proves that the harasser had some supervisory authority over her, she recovers automatically from her employer (subject to the affirmative defense); if she proves that her new job responsibilities reflect a demotion, she recovers from her employer without further inquiry; if she can prove neither of these things, then she must establish the employer's negligence in order to recover.

Harassers are unlikely to make their employment actions "tangible," particularly if they have knowledge of the liability rules. It will be difficult for juries to determine whether a relocation to a new office or even a delayed promotion is a "tangible job action" taken in response to the rejection of a harasser's advances. Moreover, as the court in *Nichols v. Frank*[138] noted, "[a]s time goes by and harassers learn that they can no longer victimize their prey at will, their actions become less overt."[139] Employment repercussions may increasingly be hidden and subtle rather than "tangible."

More important still is the exercise of power by harassing superiors who do not have "immediate (or successively higher) authority"[140] over the victim. If harassers with knowledge of liability rules turn their attention to victims over whom they are able to exercise employment power, but over whom they do not have direct authority, fact finders will face difficult issues regarding what constitutes a "supervisor."

(1993) (noting that offensive words and conduct not severe enough to create objectively hostile environment do not constitute impermissible discriminatory behavior).

137 Judge Diane Wood expressed reservations at forcing courts to face "the impossible task of parsing a supervisor's every act to see if it belongs in the 'quid pro quo' or the 'hostile environment' category." *Jansen*, 123 F.3d at 566 (Wood, J., concurring and dissenting).

138 42 F.3d 503 (9th Cir. 1994).

139 Id. at 512.

140 Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998) (noting that employer is vicariously liable to victimized employee for "an actionable hostile environment created by a supervisor with immediate (or successively higher) authority"); see also Burlington Indus. v. Ellerth, Inc., 118 S. Ct. 2257, 2261 (1998) (same).

It is unclear that this line-drawing exercise is worth pursuing. Harassment by a supervisor culminating in a tangible job action might strike some as "the most oppressive and invidious type of workplace sexual harassment."[141] But harassment by supervisors is similar in most respects to harassment by nonsupervisors, whether or not a tangible employment action results. Both the harm and the techniques for preventing that harm are essentially indistinguishable. It is thus quite puzzling that the law of employment discrimination treats these categories of sexual harassment so differently.[142]

II
PROPOSAL: A UNIFORM REGIME OF STRICT VICARIOUS LIABILITY

The courts' approach to employer liability for sexual harassment by employees has been indecisive and without sound theoretical justification. Moreover, the Supreme Court's use of agency doctrine has been inconsistent. This Part introduces an approach to vicarious liability for workplace sexual harassment that is analogous to the approach used to analyze common-law torts. This approach explains and justifies why vicarious liability on employers should be strict and argues for a coherent approach to sexual harassment law.

A. Causation and Strict Vicarious Liability

The familiar economic argument for a regime of strict liability can be applied to the sexual harassment context.[143] As with other torts, strict liability for sexual harassment serves two functions: It forces actors (tortfeasors) to take the socially efficient level of care[144] and to engage in the socially efficient activity level.[145] Additionally, strict liability provides compensation to victims for the harm caused by harass-

141 *Nichols*, 42 F.3d at 510 (referring to quid pro quo harassment).

142 See Verkerke, supra note 119, at 275-76 (discussing similarities between quid pro quo and hostile-environment harassment).

143 For the standard treatment of the economic analysis of tort law, see Robert Cooter & Thomas Ulen, Law and Economics 259-333 (2d ed. 1997).

144 By imposing liability on a party (the employer) that causes a harm to a third party (the victim), the injuring party bears the costs it causes. Recognizing that it will bear these costs, the injuring party considers them (internalization) in making its decisions regarding the level of care with which it engages in the activity creating the harm. To the extent that the harm can be prevented by expending resources in monitoring, training, applicant selection, restructuring, and exchanging capital for labor, the employer will be willing to bear these costs as long as it is thereby relieved of more expensive civil judgments. As with a negligence rule, the employer will incur prevention costs until the marginal costs of prevention equal the marginal benefits provided by reductions in the expected value of liability.

145 By triggering liability for the harm it causes, the injury-producing activity becomes more expensive, resulting in a lower activity level than if the injuring party faced no liabil-

ers, a result that can be justified by corrective justice or on distributional grounds of insurance and risk spreading.[146]

Acts of sexual harassment impose social costs. The unwilling victim of sexual harassment is, like any tort victim, forced to suffer the negative consequences of the acts of sexual harassment. It is clear how the harassing employee causes sexual harassment, but what about the employer? To justify a regime of employer liability, a theory explaining how employers "cause" sexual harassment is needed. In what sense does an employer cause the sexual harassment of one employee by another? Put another way, why should harassment committed by an employee be treated as a cost of the employer's business?

The notion of causation that is appropriate is slightly different from the more familiar causal concepts (e.g., cause-in-fact, but-for cause, proximate cause). What is needed is a measure of the extent to which decisions that the employer makes affect the probability that an employee will commit an act of harassment against another employee, thereby generating a social cost. The employer's decisions regarding its employment relationships can either increase or reduce the likelihood of sexual harassment. These decisions provide the causal mechanism for employer liability.

The employer essentially makes two kinds of decisions that affect the likelihood of sexual harassment: (1) hiring employees; and (2) establishing the workplace structure. With regard to the hiring of employees, employers decide both whether to hire a particular employee and the care with which to make that decision. Employers can take more or less care to hire employees who will not engage in sexual harassment. To reduce the possibility of sexual harassment, employers can adopt more intensive screening techniques such as background investigations and reference checks.

For the hiring decision, the question is how to measure the change in the likelihood of sexual harassment that results from the affiliation of a particular employee with a particular employer. An approach to this decision is provided in part by Professor Alan Sykes, who has developed a model using what he terms "enterprise causation."[147] Enterprise causation tracks the relationship between the existence of a business and a social-cost imposing act by an employee of that business. It is defined as the extent to which the employment relationship increases the probability of the occurrence of the harm.

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ity. The employer's business contracts to reflect the fact that it is paying for the harm it imposes.

146 Costs are spread over many consumers of the employer's product rather than borne by a single victim.

147 See Sykes, supra note 24, at 571 (introducing term).

An enterprise fully causes an employee's wrong only "if the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong to zero."[148] This notion of causation considers all resources unemployed as a baseline.[149] As resources are deployed in an enterprise (e.g., someone is hired), the likelihood of generating certain costs (e.g., the probability that the employee will commit a tort) changes. Enterprise causation measures this change.

Full enterprise causation is illustrated by an example in which an employee tends to commit assaults on third parties, and the probability that the employee will commit assaults depends solely upon the fact of his employment.[150] In other words, if the employee is fired the probability that he will commit assaults will fall to zero. In this example, imposing strict vicarious liability is "plainly efficient" because "the enterprise will operate at an efficient level of output only if it bears, directly or indirectly, all liability for the employee's assault."[151] Because the enterprise fully causes the assaults, all of the associated costs are properly (and efficiently) attributed to it. The increased probability of assaults following the hiring of the employee represents the extent to which the enterprise causes the harm.

Although Sykes provides a framework for thinking about causation in the context of the hiring decision, he fails to apply it correctly to Title VII claims. Sykes concludes (correctly) that all harassment by supervisors should subject employers to strict vicarious liability both because the supervisor's authority over the subordinate creates leverage allowing the harassment to occur and because threats of altering an employee's job status can only take place within the corporate hierarchy.[152] Thus, if the harasser is discharged he will lose the leverage he once had and be relatively unable to harass employees under him.

Regarding nonsupervisory coworkers, however, Sykes concludes (incorrectly) that the causal relationship between the employer and the sexual harassment is sufficiently attenuated to render strict vicarious liability inefficient.[153] The apparent inefficiency results because

148 Id. at 572.

149 See id. at 573 & n.24. As Sykes explains, a baseline of unemployed resources is appropriate to maintain proper resource allocation not only among different possible kinds of employment but between employment and unemployment (leisure) as well. See id.

150 See id. at 573-79 (offering example).

151 Id. at 576.

152 See id. at 607 ("The case for strict vicarious liability is strongest for quid pro quo harassment but may also be quite strong for hostile-environment harassment by supervisory personnel.").

153 See id. at 608 (noting that harasser has no leverage over coworker, and therefore is just as likely to harass regardless of employment status).

the likelihood that the victim's nonsupervisory coworkers will engage in harassment is affected only slightly by the fact of their employment. If unemployed, they will continue to harass. His solution in such cases is to impose vicarious liability based on negligence.[154]

The model will not permit such a distinction. First, there is little reason to distinguish supervisors from nonsupervisory coworkers. The employment relationship, given common workplace structures, contributes greatly to the likelihood of harassment by both groups. In the case of harassment by a nonsupervisor, it is the forced physical proximity of harasser and victim in the workplace (potentially combined with insufficient training and monitoring and an inadequate complaint system) that allows the harassment to occur. If the potential harasser is unemployed, he has little opportunity to take advantage of the captive audience of potential victims that a workplace would otherwise provide. Any potential victim outside the workplace could simply leave the scene of the harassment and avoid further encounters with the harasser, a course of action that is not possible when the victim is required to share physical space or maintain a working relationship with the harasser as a result of her employment contract.[155] Moreover, to the extent that an unemployed nonsupervisor will retain some residual ability to harass on the street, he is no different from the unemployed supervisor who will be able to harass on the street just as easily.

Second, sexual harassment that occurs in the workplace may constitute a more invidious social harm than similar conduct outside of the workplace.[156] No discharged harasser, whether a supervisor or not, will be able to continue to engage in workplace harassment. If harassment that occurs in the workplace in fact constitutes specially harmful conduct that results in greater injuries than similar conduct outside of work, then unemployed harassers no longer will be able to cause that distinct harm. Nevertheless, whether workplace harassment constitutes a special harm or not, there is no basis to distinguish between harassment by supervisors and harassment by nonsupervisors.

The employer makes a second type of decision that influences the probability of sexual harassment—the kind of workplace structure to establish. As with the hiring decision, the employer can make decisions with regard to workplace structure that eliminate the possibility

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154 See id.

155 See Verkerke, supra note 119, at 310.

156 Title VII only prohibits sexual harassment that occurs in the workplace (as workplace discrimination), not sexual harassment generally. The rationale for the distinction may be, in part, the special harm of harassment in the workplace. See id. at 309.

of sexual harassment. Elements of workplace structure include the physical space in which the employer does business (e.g., the office or the shop floor), the hierarchical chain of command, workforce training (including sexual harassment education), the availability of a complaint system, and employer monitoring of workplace sexual harassment. Decisions regarding each of these elements affect both the profitability of the business and the likelihood of sexual harassment.

Employers presumably attempt to establish workplace and organizational structures that maximize the profits that they make. These profits represent part of the social benefit of certain workplace structures while the incidence of sexual harassment represents part of the social cost of such structures. If employers are forced to bear the costs of sexual harassment by their employees, they will design and adopt workplace structures that reduce or eliminate the possibility of sexual harassment. At the most extreme, employers could force the probability of sexual harassment nearly to zero by physically separating employees (e.g., through a telecommuting office) or by training and constantly monitoring them. The possibility that employers could eliminate sexual harassment through the design of workplace structures (even if such structures might prove undesirable for other reasons) demonstrates the way in which employers fully cause sexual harassment. Moreover, the imposition of employer liability encourages employers to consider the costs of sexual harassment in arranging the very workplace structures that generate their profits.

The implication of this understanding of causation for Title VII is a uniform regime of strict vicarious liability because the probability that a particular employee will engage in sexual harassment will fall nearly to zero if the harassing employee is discharged or if the workplace structure is reorganized to prevent harassment.[157] An employee's act of sexual harassment, like the employee's assaults in the above example, is just the kind of act that is "fully caused" by the business, so the employer should bear the financial responsibility for the costs of that act. Because the decisions that the employer makes completely control the probability of sexual harassment, there is no justification for varying liability standards depending upon the kind of harassment, the status of the harasser, or the employer's current ability to access information.

[157] This result remains true regardless of the status of the harasser, the type of harassment, or employer access to information.

B. Vicarious Liability Based on Negligence

Although the relationship between an employer's decisions and the probability of sexual harassment provides a rationale both for a uniform regime and for strict vicarious liability, it may not initially be clear how such a regime is superior to a uniform regime of vicarious liability based on negligence.[158] Regarding sexual harassment, vicarious liability based on negligence has the standard advantages and drawbacks of any negligence regime. First, the standard of care taken by the employer to reduce harassment levels theoretically should be just as efficient as the standard resulting from a strict liability regime.[159] Second, it might seem unfair to compel employers to pay for harassment that they could not have prevented by any reasonable means.

Although employers would engage in the efficient level of prevention, the second benefit of a strict liability regime would be lost. Employers would not engage in the efficient activity level when the harm produced was fully caused by the enterprise. Even though, as previously discussed, the employer fully causes the harassment, the harm caused would (improperly) not be reflected as a cost to the employer.[160]

Recognizing the burden that any liability regime imposes on judicial resources, it also is desirable for a regime to encourage the filing of meritorious suits while discouraging the filing of suits without merit. To the extent that the cost of bringing suit is reduced under a regime of strict vicarious liability as opposed to a regime of vicarious

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158 Such a regime was advocated by Judge Coffey in Jansen v. Packaging Corp. of America, 123 F.3d 490, 521 (7th Cir. 1997) (Coffey, J., concurring and dissenting), aff'd sub nom. Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998).

159 Assuming that the employer's expenditures to prevent sexual harassment are defined as "reasonable" up to the level at which the expenditures equal the harm caused by the harassment discounted by its likelihood (Judge Learned Hand's famous "B < PL" calculus from United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)), and any additional expenditures are not reasonable, then the employer will undertake all reasonable activities to avoid a civil judgment that would adequately reflect the harm of the harassment. The employer will not make any expenditures beyond this point because it will not face any liability once all reasonable expenditures are made. A strict liability regime will not increase prevention expenditures beyond this point because under strict liability employers would prefer simply to pay the occasional judgment which is, by definition, less costly than additional "unreasonable" prevention expenditures.

160 Under a negligence regime, the employer's production would expand beyond the efficient level as costs were externalized onto victims. The employer would produce at the level where its marginal benefits equal its marginal private costs which, because they exclude the costs of harassment, would be lower than the marginal social costs of production. Moreover, the benefit of spreading the risk of harassment by providing a form of insurance to potential victims also would be lost as victims would be forced to bear the costs of harassment individually.

liability based on negligence, more suits will result, leading to greater numbers of "false positives," or claims made without merit. However, reducing costs also will lead to a reduction in "false negatives," or claims with merit that are not brought. Thus, although reducing litigation costs by imposing strict liability on employers may result in more overall litigation, the increase in litigation will include claims both with and without merit.[161] Moreover, the increase in the number of lawsuits under strict vicarious liability may or may not result in greater administrative costs. Vicarious liability based on negligence carries its own price tag in the form of more expensive lawsuits to determine the negligence of the employer.[162] Which liability standard is more expensive is, therefore, an empirical question.

C. Sexual Harassment and Labor Market Solutions

There are two twists, however, that make workplace sexual harassment look slightly different than the example of the employee who assaults third parties. First, a victim of sexual harassment has a contract with the harasser's employer. Second, victims of sexual harassment may be able to influence the incidence of harassment by taking precautionary measures such as complaining to the employer (providing notice).

The fact that the victim has an employment contract might suggest that the imposition of liability is unnecessary. Theoretically, employers and harassers and victims should all be able to contract as necessary to place the costs of any risk of sexual harassment with the party most willing to bear the risk. If potential victims of sexual harassment are fully informed of the risk that they will be sexually harassed, they will demand a higher wage from the employer to reflect the costs of assuming that risk. The employer will then invest in precautionary measures as long as the investments are more than compensated by reductions in the wage it has to pay for the potential victims to bear the risk of being harassed.[163] The costs of any remaining harassment will be borne by the employer whose increased wage payments will compensate victims.

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[161] Although it is an untested empirical question, this result may reduce levels of sexual harassment in the workplace.

[162] Sykes assumes, for analytic purposes, that the costs incurred by an increase in the number of lawsuits brought under a strict liability regime is roughly equal to the costs saved by a decrease in the per-suit price of litigation. See Sykes, supra note 24, at 579.

[163] This result is analogous to the imposition of liability on an employer for harm to a third party. The employer will incur prevention costs until the marginal costs of preventing harassment equal the marginal benefits provided by reductions in the wage paid due to the decreased risk of harassment. See id. at 605.

At first glance, it might seem counterintuitive to analyze sexual harassment as part of a bargained-for contract. Certainly social censure both of harassment and of explicit bargaining over the burden it imposes remains to influence contracting heavily. Even without such social pressure, however, the market result is subject to attack from within the framework of its own assumptions. There are four distinct grounds for criticism, each of which argues for the imposition of civil liability.

First, the assumption of perfect knowledge on the part of employees with regard to risks of harassment is without doubt too strong. Certain industries or firms might establish reputations as offering levels of harassment that are lower or higher than average. But to the extent that employees are poorly informed of the likelihood of harassment with a particular employer, any harassment above the average economy-wide or industry-wide level will not be compensated. Moreover, by the time employees gain employer-specific information, they may already have borne some of the costs of the harassment and then face the standard array of job transition costs (search, moving, loss of employer-specific human capital, etc.).

Second, and perhaps more seriously, even if potential victims are well informed, to the extent that the likelihood of being harassed varies across the population, employers might simply refuse to pay an increased wage to compensate potential harassment victims, even assuming they can be identified. Instead, employers may prefer to hire those who are at less risk of harassment or who have a greater tolerance for it. The result may well be socially unacceptable employment segregation by sex—the very result that Title VII was meant to remedy. The likely victims of harassment constitute a distinct class—women—who, without intervention, could well be left with the unhappy choice of either choosing to bear the costs of harassment or not being hired. Thus, without the imposition of liability women may continue to face barriers to employment in particular industries or with particular employers. This process, in which the existence of sexual harassment might dissuade women from entering or remaining in the workforce and encourage employers to hire men over women, relates directly to Title VII's prohibition on discrimination in employment on the basis of sex.

Third, with perfect information the higher wages paid to potential victims of harassment for bearing the risk of harassment would theoretically be offset by lower wages to those wanting to harass. This arrangement would explain segregation not only by sex but by desire to engage in harassing behavior. In other words, firms or industries tending to be predominately male might also tend to consist predomi-

nately of men with an above-average propensity to harass. Just as women might be attracted to certain industries or firms based on their reputed levels of harassment, so too might men. Moreover, the economic "benefit" conferred by permissive employers might be further reinforced by social arrangements in which employers look the other way rather than observe and prohibit workplace harassment. Simultaneously, the informal social arrangements that allow the perpetuation of workplace harassment might themselves be reinforced by the underpayment of harassing employees.

However, if perpetrators of harassment are almost always men, then employers with imperfect information may reduce wages to men as a class (even while largely excluding women) in exchange for the job "perk" of the freedom to harass. This "benefit" provided men generally would only be of use to potential harassers. Men not engaging in harassing behavior would thus be forced to accept a lower wage than they could command in a harassment-free environment or choose not to be employed (somewhat analogous to the unpleasant choice available to women). While this result, forcing men who desire a harassment-free environment to accept both lower pay and the existence of harassment, is hardly the type of discrimination that women face, it does represent an added social cost.

Fourth, even if the victims of harassment were not predominately women and the perpetrators of harassment were not predominately men, there would be sound reasons for imposing liability rather than letting employees sort themselves by tolerance for harassment or risk preference. The satisfaction derived by employees who engage in sexual harassment might not be socially valued as an economic benefit (despite being privately valued). Antiharassment statutes like Title VII may well stand in part for the proposition that employers are prohibited from exchanging the right to harass in the workplace for a reduction in salary. The satisfaction received by harassing employees is neither to be socially valued nor to be implicitly ratified in the employment contract. From this viewpoint, reducing or eliminating sexual harassment does not involve a social loss in terms of lost satisfaction to harassers, only in terms of resources consumed in its prevention.

Each of the preceding arguments recognizes reasons to prefer other policy objectives over market solutions in the sexual harassment context. Either perfect market assumptions are not met (imperfect information) or, even if they could be, the real world results are not socially acceptable. Thus, if a socially acceptable market solution does not result, as the preceding analysis suggests is likely, or if prospective employees lack employer-specific information as to the risk of being

the victim of sexual harassment, then the framework provided by Part II.A is appropriate.[164] The employer should bear the costs of the harms it causes regardless of whether these harms are inflicted upon employees or third parties.[165]

D. The Victim's Role: Contributory Negligence

Faragher and *Burlington Industries* provide the employer with the possibility of an affirmative defense to liability based on unreasonable conduct by the employee.[166] When a supervisor engages in harassment of a subordinate that does not result in a tangible employment action, and the victim is negligent and the employer is not negligent, the employer can escape liability.[167] This defense, including the requirement that the employer behave non-negligently to prevent recovery by a negligent victim, is entirely appropriate. It should be expanded to complement the other kinds of sexual harassment as well. Despite the problems with a liability regime based on employer notice, there will be occasions when the victim's negligence should absolve the employer of liability.

The contributory negligence defense fashioned by the Supreme Court in *Faragher* and *Burlington Industries* is one of "dual contributory negligence."[168] Under strict liability with dual contributory negligence, an injurer is always liable unless both the victim is negligent and the injurer is not negligent.[169] Such a rule has the feature, as do some other contributory and comparative negligence rules, of minimizing the social costs of injuries.[170] However, under the regime of *Faragher* and *Burlington Industries*, the dual contributory negligence defense is only available when a supervisor engages in harassment of a subordinate that does not result in a tangible employment action.

It is useful to distinguish the two ways in which the victim might be contributorily negligent. First, as with any tort victim, there is the level of care the victim takes to avoid harassing behavior. As a practi-

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164 However, it is incomplete. To account for the possibility that potential victims might engage in preventive activities to reduce the likelihood of harassment, see infra Part II.D.

165 See Sykes, supra note 24, at 606 (noting that analysis is identical regardless of whether victim is stranger or individual in contractual relationship with employer).

166 See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998); Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2270 (1998).

167 See *Faragher*, 118 S. Ct. at 2293; *Burlington Indus.*, 118 S. Ct. at 2270.

168 See John Prather Brown, Toward an Economic Theory of Liability, 2 J. Legal Stud. 323, 329 (1973) (comparing various liability rules).

169 Under standard contributory negligence, by contrast, the negligence or non-negligence of the injurer (employer) would not be considered. As soon as the victim was determined to have behaved negligently, the injurer (employer) would be absolved of liability.

170 See Brown, supra note 168, at 340-43 (giving mathematical proofs of minimum social costs under various liability rules).

cal matter, this inquiry will be subsumed by the factfinder's determination whether harassment occurred in the first place. That determination will require consideration of the victim's conduct, whether the victim found the harasser's conduct hostile, whether a reasonable person would have found that conduct hostile, and the extent to which that conduct was based on the victim's sex. Thus, the victim's decision regarding the level of care is considered in determining whether harassment occurred—the factfinder will consider the actions of the victim, and perhaps absolve the employer (or harasser) of any liability, in determining whether harassment occurred.

The victim has a second set of decisions to make, however—whether to report the harassment and the care with which to report the harassment to the employer. Because the employer generally is a legal fiction (a corporation or other entity), the victim must also decide to whom to report.[171] This decision is the one that notice liability considers and the one that the Supreme Court factors into its dual contributory negligence defense. The result of this decision should be considered in determining the liability of the employer for any potentially harassing act after the first.[172] The victim's providing notice should play a role in determining the employer's liability even in a strict liability regime.

Under a strict liability regime, however, unlike under a notice regime, the employer's liability is triggered by the first harassing act of its employee. Much harassing conduct only consists of one or two specific acts. For any subsequent act, a determination as to whether the victim was reasonable in failing to report the harassment must be made to support continuing liability on the employer. This requirement is analogous to contributory negligence in the context of mitigation of damages. The appropriate question is whether the victim took reasonable steps, given the circumstances, to avoid further injury. It is not unlikely that failing to provide notice is in fact reasonable, particularly when the employer has no established complaint procedure (or an unreasonably inadequate one). Alternately, if the employer has not taken reasonable steps to ensure a harassment-free workplace, it might be reasonable for the victim to believe that any complaint would be ineffectual (or result in retaliation). Perhaps it is reasonable to think that self-help measures will suffice or that the harassment will stop on its own. Thus, an analysis of the victim's decision should not assume that the victim must give notice to trigger employer liability.

171 Many companies with established complaint procedures designate the person or persons to whom the victim is supposed to file complaints.

172 This decision should have no bearing on the individual liability of the harasser (if any) who has already been found to have harassed.

It should hold the employer liable unless and until the victim is shown to have behaved objectively unreasonably in failing to provide notice of the harassment.

The proposed liability regime, thus, is one of strict liability with a defense of dual contributory negligence available to the employer. However, unlike the rule of *Faragher* and *Burlington Industries*, the dual contributory negligence defense should be available not only when a supervisor harasses a subordinate but does not cause a tangible employment action; it should also be available when such harassment does result in a tangible employment action. Of course, it will be difficult for the employer to establish that it acted non-negligently in ratifying the supervisor's harassment by approving the job action (discharge, demotion, or reassignment), but it will not be impossible to do so. Additionally, because harassment by nonsupervisory coworkers imposes strict vicarious liability on the employer under the proposed regime, the employer should also have a dual contributory negligence defense in such circumstances.

Whenever the victim takes due care in reporting (or in reasonably deciding not to report), it is efficient for employers to bear the costs of harassment by their employees whether the employer is negligent or not. However, if the victim does not use due care in taking steps to reduce the likelihood of future incidents of harassment (evaluated given the circumstances of the employment relationship), such as reporting incidents of harassment or filing a complaint, and if the employer is non-negligent, then the employer should be absolved of liability.

CONCLUSION

The judiciary's approach to employer liability for sexual harassment in the workplace has proved wanting in terms of both justification and effectiveness. The post-*Meritor* caselaw suffered from a doctrinal incoherence that raised the costs of sexual harassment suits and resulted in confusion as to the state of the law—ultimately undermining Title VII's effectiveness at eliminating workplace discrimination. Now, *Faragher* and *Burlington Industries* have pointed the law in the right direction by resolving convoluted agency doctrines, by imposing strict liability on employers for all sexual harassment by supervisors, and by providing a contributory negligence defense for employers. Nevertheless, the current divided liability regime—creating variable standards based on both the status of the harasser and the type of harassment—still lacks a clear theoretical basis, and circuits are likely to continue to reach conflicting results.

There are persuasive arguments in favor of a uniform regime of strict vicarious liability for all forms of workplace harassment. Requiring employers to pay the costs that their enterprises generate results in a more efficient and equitable allocation of workplace benefits. Congress mandated no liability standards in Title VII, so it is within the power of the Supreme Court to do so unilaterally. The Supreme Court should take the next opportunity to impose a standard of strict vicarious liability for harassment by nonsupervisory coworkers, thereby establishing a coherent and uniform liability regime. Although making such a change would overturn some precedent in the circuits, doing so is likely to be more than justified by the resulting benefits.